UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0871

September Term, 2014

LARRY STEVEN CUMMINGS

v.

STATE OF MARYLAND

Wright,
Hotten,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: June 17, 2015

On April 17, 2014, following a one-day jury trial in the Circuit Court for Washington County, Larry Steven Cummings, appellant, was convicted for distribution of cocaine, distribution of heroin, possession of cocaine, and possession of heroin. On June 13, 2014, the trial court sentenced appellant as a subsequent offender to serve an enhanced penalty of twenty-five years without parole for distribution of heroin and a concurrent twenty-five years for distribution of cocaine. Appellant's possession convictions were merged for purposes of sentencing. In his timely filed appeal, appellant presents six questions for our review:

> [I]. Did the trial court err by failing to conduct the inquiry required by [Md.] Rule 4-215(e)?
>
> [II]. Did the trial court err when it permitted an officer to testify that a certain phone number was registered to [appellant], when such testimony was inadmissible hearsay?
>
> [III]. Did the trial court err when it permitted an officer to testify that the confidential informant, on whose testimony the State's case rested, had proven to be reliable in the past?
>
> [IV]. Did the trial court err when it permitted the State to introduce the drugs and chemist's report into evidence and when it permitted the introduction of hearsay statements during the chemist's testimony?
>
> [V]. Must this Court reverse [appellant's] convictions because the prosecutor made impermissible and prejudicial remarks in closing argument?
>
> [VI]. Must this Court vacate [appellant's] sentences because the State failed to prove that he was a subsequent offender?

For the forgoing reasons, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of May 30, 2013, Agent David Fortson of the Washington County Narcotics Task Force conducted a controlled buy utilizing a paid informant, William Flood, ("Mr. Flood"). While Agent Fortson listened, Mr. Flood arranged via his cell phone to purchase cocaine and heroin from appellant, who used the street name Black. Mr. Flood's person and vehicle were searched and no drugs, money, or other contraband were found. Officers in unmarked police vehicles followed Mr. Flood's vehicle as appellant directed him to a pick-up location where Agent Fortson observed an African-American male enter the car. Appellant then directed Mr. Flood to drive to the City Park. Mr. Flood purchased cocaine and heroin from appellant using $200 in prerecorded money while Agent Fortson listened through an audio monitoring device. Officers again followed Mr. Flood as he drove appellant back to an area near the pick-up location, where appellant exited the vehicle. Agent Fortson had a clear view of appellant as he exited Mr. Flood's vehicle and was able to positively identify him. The officers continued to follow Mr. Flood as he returned to the police station. Mr. Flood gave the drugs he had purchased from appellant, five baggies containing suspected cocaine, and five folded papers containing suspected heroin, to Agent Frank Toston. Mr. Flood and his vehicle were searched again, and no other drugs, money, or contraband were found. Mr. Flood was paid $60 for his participation in the controlled buy.

On June 6, 2013, Mr. Flood identified appellant in a photo array as the person who sold him the drugs. At trial, Agent Fortson identified appellant as the individual he saw get out of Mr. Flood's car after engaging in a drug transaction on the night of May 30, 2013. Also at trial, Mr. Flood identified appellant as the individual he knew as Black, who sold him cocaine and heroin on the night of May 30, 2013. The audio recording of the controlled buy was played for the jury.

In his defense, appellant presented two alibi witnesses, Jade Startzman, appellant's fiancé, and their roommate, Jessica Hart. Both witnesses testified that on May 30, 2013, appellant was at their apartment all night.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

DISCUSSION

I. Maryland Rule 4-215(e) Inquiry

On December 19, 2013, appellant appeared with counsel for a scheduled trial date. After the court ruled on a suppression motion, appellant's counsel, who had been on the case for only two months, represented to the court:

> [APPELLANT'S COUNSEL]: And Your Honor . . . I just wanted to give [appellant] a chance - I'm not sure if he had concerns he wanted to raise. . . . He had expressed to me a desire to seek a continuance and I, I don't know exactly what the basis would be or if it would have anything to do with my representation. So I just wanted to give him a chance to express any concerns at the outset.

> [APPELLANT]: [Appellant's counsel] just came to see me two, two weeks before this day. And I feel like he ain't get enough information.
>
> THE COURT: Okay. So how many times have you met with him? Total?
>
> [APPELLANT]: Twice. . . . And I'm just now hearing the audio yesterday and the audio is going in and out, like you can't – it's going in and out. If you hear somebody talking like for thirty seconds, then it goes out.

The court then questioned appellant's counsel regarding whether he was prepared to try the case. Counsel averred that he was, but that he had some concerns regarding whether he had all of the information about the informant's prior criminal record. Noting that appellant was facing an enhanced sentence of at least twenty-five years without parole, the court opined that more preparation was necessary. After a short recess, the court granted appellant's request for a continuance, advising:

> Matter will be continued. [Appellant's counsel], your client – you said you've been to see him three times; your client says two times. I don't know which it is, but on a serious case, I think it requires more effort. So we're not going to set this case up for ineffective assistance of counsel where somebody might get convicted and it's going to come back. Get with your client. Make sure you're prepared. Do what's necessary for preparation. Okay?
>
> The matter is continued. This is the first time in. So I am going to continue the case for good cause shown. It'd be reset for (pause) Tuesday, February 25[th]. That should give you plenty of time to get prepared for this case. . . .
>
> Maryland Rule 4-215(e) governs discharge of counsel, and provides as follows:
>
> (e) Discharge of counsel – Waiver. If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise

> the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(l) - (4) of this Rule if the docket or file does not reflect prior compliance.

"Any statement that would reasonably apprise a court of defendant's wish to discharge counsel will trigger a Rule 4-215(e) inquiry regardless of whether it came from the defendant or from defense counsel." *State v. Davis*, 415 Md. 22, 32 (2010); *see also State v. Taylor*, 431 Md. 615, 632 (2013) (reiterating that "a defendant must provide a statement 'from which the court could reasonably conclude' that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation" (quoting *State v. Hardy*, 415 Md. 612, 622 (2010))). "[T]he provisions of Rule 4–215 are mandatory." *Gambrill v. State*, 437 Md. 292, 301 (2014) (citing *Snead v. State*, 286 Md. 122, 130 (1979)). Thus, on appeal, a trial court's failure to comply with the provisions of the Rule is reviewed for legal error. *Gambrill*, 437 at 301-07.

Appellant contends that his statement indicating that counsel "just came to see me two, two weeks before this day. And I feel like he ain't get enough information" constituted a request to discharge counsel that triggered the trial court's obligation "to inquire into the reasons for the request and to determine whether the request [was] meritorious[,]" in accordance with the requirements of Maryland Rule 4-215(e).

We are persuaded that the facts in this case are distinguishable from those cases where Maryland Courts have held that a defendant's statements, though they did not constitute an unambiguous declaration of a desire to obtain different counsel, were sufficient to trigger the trial court's obligation under Md. Rule 4-215(e) to inquire further regarding the defendant's relationship with his or her attorney. *See, e.g., Hardy*, 415 Md. at 622-23 ("A defendant makes such a request even when his or her statement constitutes more a declaration of dissatisfaction with counsel than an explicit request to discharge." (citations omitted)); *Gambrill*, 437 Md. at 305. ("Although Gambrill's request to hire a new attorney was coupled with a request for a postponement and may not have been a paradigm of clarity, its inherent ambiguity did not relieve the judge of his obligation to comply with Rule 4-215(e)[.]").

In the instant case, however, appellant did not express any intent or desire to obtain new counsel. He did not indicate that he had any personal problems or conflicts with his attorney. He did not say that he was dissatisfied with his court-appointed public defender, in any way. Appellant explained to the trial court that he had only met his attorney two weeks before trial and he was concerned that his attorney didn't have enough information. In order to remedy his concerns, appellant requested and was granted a continuance to allow his attorney additional time to prepare for trial. At subsequent hearings and at trial, appellant did not raise *any* additional concerns regarding the representation that his attorney was

providing that would lead the trial court to believe that there were ongoing problems in the attorney/client relationship.

We find this Court's opinion in *Wood v. State*, 209 Md. App. 246 (2013), to be helpful in resolving appellant's query. In *Wood*, the defendant claimed that the trial court erred in failing to conduct a Rule 4-215(e) inquiry after he had complained to the trial court that he had "problems" with his public defender and had not received copies of the discovery from that attorney. *Id*. at 286. In rejecting Wood's assertion, this Court found that his complaint before the trial court did not "constitute[ ] a request to discharge counsel[ ]" because "appellant's specific complaint concerned a 'lack of discovery' rather than an attempt to discharge counsel." *Id*. The Court opined that Wood's dissatisfaction with his attorney was not related to his relationship with counsel, but rather his concern that discovery issues affected his lawyer's ability to be an effective advocate. *Id*. at 288. The Court further noted that Wood never again expressed any concerns regarding his representation at subsequent hearings or during trial and sentencing. *Id.*

In the instant case, we are persuaded that appellant's dissatisfaction was rooted in concern regarding his attorney's ability to proceed to trial on that day due to the lack of time counsel had to prepare. The trial court directly addressed appellant's concern by postponing his trial and by expressly cautioning defense counsel that, because of the serious nature of the charged offenses and the length of the potential sentence appellant faced, counsel needed to make additional efforts to prepare. Ultimately, we perceive nothing about appellant's

statements to the trial court that indicated that he had any "'. . . present intent to seek a different legal advisor[.]'" *Wood*, 209 Md. App. at 288 (quoting *Davis*, 415 Md. at 33 (footnote omitted)). Consequently, the trial court did not err in concluding that appellant's request for a continuance was not for the purpose of obtaining new counsel, but rather so that his current counsel could be more effective. We conclude, therefore, that the trial court was not obliged to conduct the additional inquiry required by Md. Rule 4-215(e).

II. Testimony Regarding Appellant's Phone Number

In the "[s]tatement [o]f [p]robable [c]ause" prepared by Agent Fortson in this case, Agent Fortson attested that: "It should be noted that appellant is known by Agent Fortson to go by the street name of 'Black.' The phone number provided by the CNI for 'Black' is also known by Agent Fortson to be associated with appellant." Prior to appellant's trial, defense counsel filed a motion in limine seeking, among other things, to exclude evidence of "the basis of Agent Fortson's . . . familiarity with appellant, particularly if it involved any other investigations[.]" In the motion, counsel asserted that this evidence was inadmissible under Maryland Rule 5-404(b) and due to the potential prejudice accruing to appellant as a result of the admission of evidence tending to show that appellant may have had prior contacts with the police department.

Before beginning jury selection, the parties addressed appellant's motion in limine. With respect to appellant's claims relating to the telephone number, counsel added that his objection extended to evidence, not explicitly referenced in his written motion, that the

number used by "Black" was matched to appellant's phone number through the use of a "police data base." Appellant's counsel argued:

> The . . . the phone again, that's referenced in the, ah, the police reports as it's in a police data base. It's not public record. It's a police data base, therefore, suggesting the product of other investigations. That somehow that . . . that the individual, ah, that my client allegedly came to their attention previously in another investigation. So much so that they then in their data base included this information about this phone number allegedly being associated. They . . . they haven't provided me documentation of that. Certainly not clear and convincing evidence. No public records indicating this phone was in my client's name.
>
> . . . the danger is that it brings up the specter of they were looking at him for other things or he was involved in other investigations. And . . . and I think that's the danger of the undue prejudice that could lure the jury into, ah, a line of improper character reasoning. . . .

The trial court ruled that Agent Fortson could indicate that appellant was associated with the relevant phone number in a database, without specifying that it was a police database. The court reasoned that though references to information about appellant existing in a "police database" could be prejudicial, limiting the Agent's testimony to the fact that appellant's phone number was in "a database" would not be. The court opined, "[t]here's lots of databases that contain people's phone numbers." Appellant's counsel challenged the court's ruling, arguing that

> . . . Ah, again, the ruling regarding the phone number suggests that . . . almost suggests that it . . . well, it's a matter of public record or something. But there's no indication that it is. That again, if the only . . . if the only association with my client of his phone number is this police data base, that might give . . . ah, suggest to the jury that it's . . . it's his number in the phone book or something, or . . . or AT&T records, or something. I . . . I just . . . that's not the case.

> THE COURT: Or the White Pages.com or any number of other places that people . . . sometimes even private phone numbers show up. Yeah, I mean if the jury doesn't hear where the data base is they might assume it's the phone book. I don't see that's prejudicial though.
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> [APPELLANT'S COUNSEL]: But I . . . I would . . . I would, I mean again, if . . . if this number isn't actually in any sort of like financial way or . . . or, you know, matter of public record associated with . . . with my client, then to suggest that somehow it might be would seem to present misleading evidence to the jury. And, again that . . . that any reference to the phone number being associated with [appellant] should be inadmissible. That's what I would request, your Honor.

The trial court denied counsel's request and overruled his objection to the admission of testimony that the police associated the phone number with appellant.

During the State's direct examination of Agent Fortson, the officer testified that, while Mr. Flood was at the police station and Agent Fortson was present, Mr. Flood received a call from Black on telephone number 240-707-9652. After describing what occurred during the drug transaction itself, State asked Agent Fortson whether there was "any other information [he] used to follow up on . . . Black or Larry Cummings from that day, information [he was] able to get from the start of the investigation [.]" Agent Fortson responded:

> On the same day, ah, that I saw him and believed that that was [appellant], I also checked the phone number that, ah, Mr. Flood gave me and the phone number that was confirmed that called Mr. Flood while he was at our office, ah, in front of me. I checked that phone number and . . . and the phone was, ah, registered to [appellant].
>
> [APPELLANT'S COUNSEL]: Objection, your Honor.
>
> THE COURT: Overruled.

Q. Agent Fortson, is that the phone number you testified about at the beginning of my questioning?

A. Yes. It was 240-7079652.

Q. The call that came from Black?

A. Correct.

At that point, appellant's counsel asked to approach the bench. At the bench, counsel articulated the following:

[APPELLANT'S COUNSEL]: Your Honor, Agent Fortson I don't think followed . . . first of all, I don't think he followed even with what you said that it was permissible for him to do. He said looked up in the data base. He said it was registered. That implies more certainty. Ah, again that was my fear that if he was allowed to even say anything along these lines it would be suggestive that somehow like there was phone company records that associated this number.

And now he's just given testimony that indicates . . . that would seem to indicate that in violation of your ruling. And he was there in court and heard it. Your Honor, additionally, again there's no, ah, substant . . . there's no . . . that's hearsay. There's no substantiation of . . . of any records of any . . . you know, that would . . . that would associate [appellant] with that number. That's . . . there hasn't been a sufficient foundation for it to be admissible, ah, you know in terms of like saying it's registered. Ah, he would . . . they would need to have some sort of documents in order to prove that.

THE COURT: Registered is a funny term. I understood on the motion in limine . . . .

[APPELLANT'S COUNSEL]: It has connotations. . . .

THE COURT: It was in a . . . in a data base. Ah, did you know what he means by registered, [State]?

[STATE]: I . . . I don't. I think it's just the term that he's using, that's registered to him. No, I don't.

THE COURT: I don't know how to explore. I mean it wasn't . . . .

[STATE]: Can we ask him what?

THE COURT: Like from the phone company, from Verizon or something registered?

[STATE]: NO. NO. . . . I think it's just . . . just terminology. Sometimes like . . . similar, criminal record/criminal history. They're really different things but they're interchangeable. So, it can be like that, you know. I looked it up. It comes back to him . . . registered to him.

THE COURT: Yeah. Register could mean registered anywhere.

* * *

[STATE]: On the White Pages on line or something.

THE COURT: Registered in . . . in a data base the police had.

[APPELLANT'S COUNSEL]: Registered to me sounds official, your Honor.

THE COURT: Probably more so than just related to. But I don't think it's impermissibly suggestive that this was a telephone record or anything of the sort. He just said it was registered. It's . . . it's . . . I think an obscure enough term that the objection is overruled.

[APPELLANT'S COUNSEL]: I mean for the record, just . . . .

THE COURT: Your objection is noted for the record.

Later, during re-direct examination, Agent Fortson again testified, over appellant counsel's objection that the testimony was misleading, that he "found [appellant's] phone number registered[.]"

Appellant contends that the trial court abused its discretion by allowing the State to elicit testimony from Agent Fortson indicating that the phone number used by "Black" to

contact Mr. Flood was "registered" to appellant. Appellant asserts that Agent Fortson's testimony constituted inadmissible hearsay. Alternately, appellant suggests that Agent Fortson's testimony was "misleading" and thus inadmissible under Maryland Rule 5-403.

We are persuaded that any error in the trial court's admission of Agent Fortson's testimony indicating that the phone number was "registered" to appellant was harmless. *See, e.g., Dionas v. State*, 436 Md. 97, 108 (2013) (reaffirming that an error will be deemed harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict [ ]" (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))). Because we are persuaded that any error in the admission of the testimony was harmless, we need not consider the parties' arguments regarding preservation and the merits of appellant's contentions at any great length.[1] We shall assume, **only for the sake of argument**, that appellant's contentions were

[1] The State contends that appellant's objection that the testimony constituted inadmissible hearsay evidence was untimely because it was not made until well after the State elicited Agent Fortson's testimony. The State further asserts that appellant's contention that the testimony was misleading and unfairly prejudicial was not preserved because appellant's counsel never moved to strike the allegedly misleading statements. Addressing the merits of appellant's arguments, the State suggests that Agent Fortson's testimony was admitted for the purpose of outlining the steps taken in the investigation, not for the purpose of proving appellant's identity, and therefore, it did not constitute hearsay evidence. Finally, the State contends that the trial court correctly determined that the testimony was not misleading and therefore, the court's admission of the testimony did not constitute an abuse of discretion.

preserved and that the admission of Agent Fortson's testimony constituted a legal error or an abuse of discretion.[2]

The evidence that appellant was associated with the phone number was relevant to prove that appellant was the individual who sold drugs to Mr. Flood.[3] Appellant contends that "identity was the main issue in this case." Our review of the record indicates, however, that the evidence that appellant was the individual who sold heroin and cocaine to Mr. Flood on May 30, 2013, was overwhelming.

The evidence presented at trial indicated that Mr. Flood told Agent Fortson that he could buy drugs from Black. While Mr. Flood was at the police station and Agent Fortson was listening, Mr. Flood received a call from Black, who used phone number 240-707-9652. Agent Fortson and other members of a surveillance team, followed Mr. Flood while he

[2] By no means do we intend to suggest that the trial court, in fact, abused its discretion by admitting this testimony. We acknowledge that the trial court was constrained by the necessity of sanitizing the evidence, at the express request of appellant's counsel, so that the jury was not informed that the source linking appellant's name to the particular phone number was a database maintained by the police. The court also carefully weighed the implications of the word "registered" during Agent Fortson's testimony and concluded, not incorrectly, that the term did not implicate any specific official source, such as a phone company record, but instead was used generally to indicate that the phone number was associated with appellant, and therefore, that it was not misleading.

[3] During closing argument, the State summarized: "They called that number. Black answers the phone. Black is [appellant]. And then at the end they do research the number and it . . . that's [appellant's] phone number." The prosecutor's statements during closing argument make it clear that the State relied on Agent Fortson's testimony associating appellant with the phone number to prove appellant's identity as the individual who sold drugs to Mr. Flood on May 30, 2013, not to identify the steps taken during the course of the investigation as the State suggests in their brief.

followed Black's directions to a pick-up location in Hagerstown, where Agent Fortson observed a man, presumably Black, get into Mr. Flood's vehicle. Agent Fortson could hear the conversation between Mr. Flood and Black through an electronic monitoring device Mr. Flood was wearing. The officers continued to follow Mr. Flood's vehicle as Black directed him through Hagerstown to City Park, where the drug transaction occurred, and then back to the area near the pick-up location. As Black was getting out of Mr. Flood's car, Agent Fortson saw him clearly and independently recognized him as appellant. At trial Agent Fortson confirmed that appellant was the man he saw get out of Mr. Flood's car following the drug transaction. On June 6, 2013, Mr. Flood identified appellant in a photo array as the individual he knew as Black, from whom he had purchased heroin and cocaine on May 30, 2013. Mr. Flood also identified appellant at trial as the individual he knew as Black, from whom he purchased heroin and cocaine on May 30, 2013.

The fact that two witnesses, both of whom had prior knowledge of appellant, were able to independently identify appellant as Black constitutes overwhelming evidence of appellant's identity as the individual who sold heroin and cocaine to Mr. Flood during the controlled buy on May 30, 2013.

Appellant contends that the strength of the State's case was substantially undermined because the State's key witness, Mr. Flood, was a paid criminal informant. We note that Mr. Flood's testimony was largely corroborated by the testimony of Agent Fortson who witnessed the encounter between Mr. Flood and appellant both visually and aurally. We further note

that Agent Fortson independently identified appellant, who he recognized by name, as the individual he observed getting out of Mr. Flood's car following the drug transaction. Thus, even if the jury rejected Mr. Flood's identification testimony due to his criminal past, there was no similar rationale to reject Agent Fortson's identification testimony. In any event, this Court is not moved to discount evidence merely because it is provided by a paid informant with a criminal record. To the extent appellant contends that Mr. Flood's credibility was weakened as a result of his prior criminal activities, appellant's counsel was afforded ample opportunities to suggest as much to the jury.

In summary, we conclude that Agent Fortson's testimony linking appellant to the phone number used by "Black" during the drug transaction was inconsequential to the verdict, and therefore, its admission was harmless. *See, e.g., Fields v. State*, 395 Md. 758, 763-64 (2006) (concluding that admission of hearsay evidence was harmless because the purpose for which the evidence was admitted was proven by "[t]he collective effect of the other evidence in this case"). This Court is not inclined to extend the gratuitous process of plain error review in cases where the evidence of the defendant's guilt is overwhelming. *See Morris v. State*, 153 Md. App. 480, 523 (2003) (reserving plain error review to remedy "instances of truly outraged innocence"). We decline to do so in this case.

III. Testimony Regarding Reliability of Informant

In opening statement, the State outlined the nature of its case, indicating the heavy involvement of a paid informant who purchased drugs from appellant at the behest of the

police. In response, appellant's counsel, in his own opening statement, placed the credibility of the informant, Mr. Flood, squarely at issue:

> Keep in mind when you hear the evidence in this case, ah, pay careful attention. Pay careful attention to the witnesses. Pay careful attention to what you learn. The State kind of [al]luded to, ah, the fact that they use unsavory characters in their investigations. You're going to learn some things about Billy Flood, the State's informant, the State's criminal informant. You're going to learn that Billy Flood has two prior convictions, at least, for d… for dealing drugs. You're going to learn that Billy Flood is an admitted long time drug user and a dealer of substances including marijuana, cocaine, heroin and methadone. You're going to learn that Billy Flood has worked both with the Washington County Narcotics Task Force and the . . . the Franklin County Narcotics Task Force in Pennsylvania to try and work off his own charges.
>
> You're going to learn that he had other felony drug charges that he worked down through his work as a criminal informant and the State chose to work with him. You're going to learn that he got paid in this case. He's gotten paid in other cases. He's gotten money, cash, over the years. Sixty Dollars in this case for the work on May thirtieth. Sixty Dollars every time he had to come to court for this case. You're going to learn some things about Billy Flood that are going to make you question whether you should believe what he has to say. And I'm going to predict that at the end when everything is said and done, that you're not going to find Billy Flood a credible source of information.

Agent Fortson was the State's first witness. Agent Fortson explained that, in May 2013, he learned that Mr. Flood would be able to purchase drugs from an individual - theretofore known only to the police as "Black." Agent Fortson testified that Mr. Flood had worked for him previously as a confidential informant. When asked whether Mr. Flood had been reliable in the past, Agent Fortson responded: "He has." Appellant's counsel objected, but his objection was overruled.

Appellant argues that the trial court erred when it allowed Agent Fortson to testify that the confidential informant who had participated in the investigation had been reliable in the past. Appellant contends that "Agent Fortson's testimony amounted to a comment on Mr. Flood's credibility," which was a determination that is entrusted solely to the jury.

It is legal error for a trial court to allow a witness to opine that another witness is either telling the truth or lying. *See, e.g., Bohnert v. State*, 312 Md. 266, 277 (1988) (stating that it is "error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying[ ]"). "Whether a witness on the stand personally believes or disbelieves the testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination." *Id*. (citation omitted).

We note, however, that at appellant's trial, Agent Fortson testified before Mr. Flood testified. Logically, Agent Fortson could not offer an opinion on the truthfulness of testimony Mr. Flood had not yet provided. Moreover, it is clear from the State's questions, "[H]ave you used that informant before? . . . Has that informant been found to be reliable?" and Agent Fortson's response, "[h]e has[,]" that the focus of the inquiry was Mr. Flood's reliability in his previous encounters with Agent Fortson, not his truthfulness at appellant's trial.

Instead, we are persuaded that the State sought Agent Fortson's testimony regarding Mr. Flood's reliability in other cases in order to rehabilitate him. A party is permitted to

present rehabilitation evidence on direct-examination when the opposing party attacks the credibility of a witness during opening statements. *Fullbright v. State*, 168 Md. App. 168, 183-86 (2006); *see also* Md. Rule 5-616(c)(3) (providing that a witness whose credibility has been attacked may be rehabilitated by "[e]vidence through other witnesses of the impeached witness's character for truthfulness . . ."); Md. Rule 5-608(a) (defining the permissible scope of rehabilitation evidence that may be provided by a character witness). Because the State's efforts to rehabilitate Mr. Flood following appellant counsel's attack on his credibility during opening statements was appropriate, we conclude that the trial court did not err by overruling appellant's objection to Agent Fortson's testimony.

IV. Chemist's Report and Testimony

At trial, over appellant counsel's objection, the State introduced into evidence as State's Exhibit 3, the drugs that were seized from Mr. Flood following the controlled buy from appellant on May 30, 2013. Over appellant counsel's objection, the State called as an expert witness, Jeffrey Kercheval, ("Mr. Kercheval"), the Supervisory Forensic Scientist for the Western Maryland Regional Crime Laboratory, who tested the evidence. Mr. Kercheval testified that, on June 19, 2013, the evidence was initially tested by Stacey Wilson, ("Ms. Wilson"), a forensic scientist employed by the crime laboratory. Mr. Kercheval was Ms. Wilson's supervisor and reviewed and approved her initial laboratory report in this case. Ms. Wilson subsequently moved to Montana and the State requested that the evidence be retested. Mr. Kercheval performed his own independent analysis of the evidence on

January 2, 2014. His results were consistent with the results Ms. Wilson had obtained during her testing. Mr. Kercheval also testified generally about the quality control standards employed in the laboratory, and noted there was no indication in Ms. Wilson's report that she had not followed the established protocols or had detected any contamination of the evidence in this case. Over appellant counsel's objection, the State introduced into evidence as State's Exhibit 5, Mr. Kercheval's report confirming that the substances that were purchased during the controlled buy contained heroin and cocaine.

Appellant contends that the trial court abused its discretion by allowing the State to introduce the drugs and Mr. Kercheval's report into evidence, and by allowing Mr. Kercheval to testify about the procedures used and the results obtained by Ms. Wilson. Appellant asserts that the evidence should have been excluded because the State failed to comply with the requirements of Md. Code (2006, 2013 Repl. Vol.), §10-1003 of the Courts and Judicial Proceedings Article ("Cts. & Jud. Proc."). More generally, appellant suggests that the State failed to adequately prove "the ultimate integrity of the physical evidence[,]" and therefore, could not prove the chain of custody. Finally appellant contends that the trial court erred by allowing Mr. Kercheval to testify regarding statements made by Ms. Wilson in her initial report because those statements constituted inadmissible hearsay evidence.

We shall first consider appellant's claim that the State's failure to comply with the technical requirements of Cts. & Jud. Proc. §10-1003, precluded the State from establishing a sufficient chain of custody as a matter of law. We review a trial court's determinations

regarding the interpretation or application of statutes and rules utilizing a *de novo* standard of review. *See, e.g., Schisler v. State*, 394 Md. 519, 535 (2006) ("[W]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." (citations omitted)).

Cts. & Jud. Proc. §10-1003 is part of a statutory scheme that allows the State, under certain circumstances, to use procedural shortcuts to admit the results of chemical analyses, without the necessity of producing either the persons in the chain of custody or the chemist who performed the analysis at trial. For example, Cts. & Jud. Proc. §10-1001 provides a shortcut for proving that a substance is or contains a controlled dangerous substance through the admission of a report signed by the chemist who conducted the testing.[4] Likewise, Cts. & Jud. Proc. §10-1002 creates a shortcut for establishing the chain of custody of a controlled dangerous substance through the admission of a statement signed by "each successive person

[4] Cts. & Jud. Proc. §10-1001 provides, in part:

> [A] report signed by the chemist or analyst who performed the test or tests as to its nature is prima facie evidence that the material delivered to the chemist or analyst was properly tested under procedures approved by the Department of Health and Mental Hygiene, that those procedures are legally reliable, that the material was delivered to the chemist or analyst by the officer or person stated in the report, and that the material was or contained the substance therein stated, without the necessity of the chemist or analyst personally appearing in court. . . .

in the chain of custody[.]"[5] On the other hand, Cts. & Jud. Proc. §10-1003(a), defines the circumstances under which Cts. & Jud. Proc. §§10-1001 and 10-1002 may, and may not, be utilized in a particular case. In order to take advantage of the procedural shortcuts allowed in Cts. & Jud. Proc. §§10-1001 and 10-1002, the State is required to provide a copy of the chemists report to the defendant and/or his attorney at least ten days before trial. Cts. & Jud. Proc. §10-1003(a)(3). Furthermore, upon notice from the defendant, filed at least five days before trial, the State cannot avail itself of the shortcuts provided in Cts. & Jud. Proc. §§10-1001 and 10-1002, and must produce the chemist and other persons in the chain of custody for questioning.[6] Cts. & Jud. Proc. §10-1003(a)(1)-(2).

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[5] Cts. & Jud. Proc. §10-1002(a)(1) defines "chain of custody" as the seizing officer, the packaging officer, and the chemist who actually handled the substance, not just the outer sealed package. Cts. & Jud. Proc. §10-1002(b)(1) provides, in part:

> . . . [A] statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

[6] Cts. & Jud. Proc. §10-1003 provides, in part:

> (a)(1) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to a trial in the proceeding, require the presence of the chemist, analyst, or any person in the chain of custody as a prosecution witness.
>
> (2) The provisions of §§10-1001 and 10-1002 of this part concerning prima facie evidence do not apply to the testimony of that witness.

(continued...)

There are, however, situations where it is not feasible or practical for the State to produce a witness whose presence would otherwise be required to prove the integrity of real evidence. *See, e.g., Thompson v. State*, 80 Md. App. 676, 683 (1989) ("Pellucidly, the State cannot produce an adjudicated lunatic, a comatose patient or, as here, one who is deceased."). Consequently, this Court has rejected the rigidity that undergirded this Court's prior jurisprudence in *Parker v. State*, 72 Md. App. 543 (1987), and *Gillis v. State*, 53 Md. App. 691 (1983), the cases upon which appellant relies, opining that Cts. & Jud. Proc. §10-1003 is not a rule of exclusion, and that the "ultimate holding as to the admissibility of evidence does not depend upon [ ] technical compliance" with Cts. & Jud. Proc. §10-1003. *Best v. State*, 79 Md. App. 241, 249-56 (1989). Instead, when the State, upon a timely demand by a defendant pursuant to Cts. & Jud. Proc. §10-1003(a), is precluded from using the shortcuts in Cts. & Jud. Proc. §§10-1001 and 10-1002, the State must follow the long-established rules and procedures regulating the admission of real evidence that have existed since long before the short-cut statutes. *Best*, 79 Md. App. at 253-54 (citing *Amos v. State*, 42 Md. App. 365,

[6](...continued)

(3) The provisions of §§10-1001 and 10-1002 of this part are applicable in a criminal proceeding only when a copy of the report or statement to be introduced is mailed, delivered, or made available to counsel for the defendant or to the defendant personally when the defendant is not represented by counsel, at least 10 days prior to the introduction of the report or statement at trial.

370 (1979); *Moore v. State*, 73 Md. App. 36, 50-52 (1987); *Nixon v. State*, 204 Md. 275 (1954); and *Breeding v. State*, 220 Md. 193 (1959)).

Based on the foregoing, we are persuaded that after appellant filed a timely request that the State produce all the people in the chain of custody, the State's failure to call chemist Stacey Wilson at appellant's trial did constitute a violation of Cts & Jud. Proc. §10-1003. We conclude, however, that the State's non-compliance with the technical requirements of Cts. & Jud. Proc. §10-1003 does not provide an independent basis for excluding the drugs or Mr. Kercheval's conclusions regarding the drugs. We conclude, therefore, that the trial court did not err by overruling appellant's objections to the admission of the evidence on this basis.

We shall next consider whether the State provided sufficient chain of custody evidence to demonstrate that the drugs were in substantially the same condition at trial as they were when they were seized on May 30, 2013. "When determining whether a proper chain of custody has been established courts examine whether there is a 'reasonable probability that no tampering occurred.'" *Cooper v. State*, 434 Md. 209, 227 (2013) (quoting *Breeding*, 220 Md. at 199).

In *Amos v. State*, this Court provided the relevant standard for the admission of "real evidence" such as drugs:

> To be admissible . . . "real evidence" must be in substantially the same condition that it was in at the time of the crime and must be properly identified. Although there is a natural inference or presumption of continuance in the

> same condition, that inference varies in each case with the nature of the subject matter and the time element.
>
> Whether real evidence is in the same condition as at the time of the crime so as to permit admissibility is not entirely a discretionary matter with the court, although the circumstances surrounding its safekeeping in that condition in the interim need only be proven as a reasonable probability. The proof negating the probability of changed conditions between the crime and the trial, is spoken of as proving the chain of custody, and in most instances is established by accounting for custody of the evidence by responsible parties who can negate a possibility of "tampering" and thus preclude a likelihood that the thing's condition has changed.

42 Md. App. 365, 370 (1979) (internal citations omitted). Any gap in the chain of custody evidence is measured against "the weight of the evidence rather than its admissibility." *Martin v. State*, 78 Md. App. 541, 549 (1989) (citations omitted).

At appellant's trial, Agent Frank Toston testified that following Mr. Flood's return to the task force office, he recovered the drugs that Mr. Flood had purchased from appellant, packaged them, and placed them in the evidence lock-up. Agent Toston testified regarding the appearance, packaging, and amount of drugs that he received from Mr. Flood, and confirmed that the drugs in the bag admitted as State's Exhibit 3 were "substantially the same as … the drugs that [he] received that day." The chain of custody form attached to State's Exhibit 3 indicated that the drugs were taken out for testing by Ms. Wilson on July 19, 2013, and then returned to the evidence locker the same day. The drugs were next taken from the evidence locker on January 2, 2014, for retesting by Mr. Kercheval. Mr. Kercheval testified that the drugs admitted as State's Exhibit 3 were substantially the same as the drugs he tested on January 2, 2014, and appeared to be substantially the same as the drugs that were

described on the chain of custody log and in Ms. Wilson's report. Mr. Kercheval confirmed that his results were the same as the results obtained by Ms. Wilson during her testing. Both sets of results indicated that the substances Mr. Flood purchased from appellant contained heroin and cocaine. After Mr. Kercheval completed his analysis, he returned the evidence to the evidence locker, where it remained until appellant's trial.

In ruling on the admission of the drugs, and Mr. Kercheval's report, the trial court explained that she was admitting the evidence despite Ms. Wilson's absence, stating:

> . . . I think that was adequately explained. She is a laboratory technician on the other side of this continent. I think her analysis obviously wouldn't be admissible cause she's not here to be confronted about it, but Mr. Kercheval re-examined the exact same substance. And I'm finding that there was no lack of reliability in Mr. Kercheval's protocol and the laboratory's protocol. And while it would be better to have [Ms.] Wilson here, the objection in overruled. I think it's . . . would be unrealistic to expect her to travel from Montana to Maryland for any case that she may have opened the bag and examined the substance that was later re-examined by someone who is here, Mr. Kercheval. Objection is overruled.

We further note that the trial court was able to independently view the evidence and consider whether the case number associated with the evidence was consistent on all of the evidence, its packaging, the associated documents, and the chemical analysis reports that were submitted by the State. The court could see if the evidence and its packaging bore the appropriate seals and initials of all those persons in the chain of custody, consistent with the information on the evidence log and the testimony of the State's witnesses. The court could also consider the evidence itself and consider whether it was consistent with Agent Toston's description of the amounts, physical appearance, and packaging of the substances Mr. Flood

gave to him after the controlled buy, the descriptions on the evidence log, and the descriptions in Mr. Kercheval's report.

As the trial court acknowledged in its ruling, though the testimony of Ms. Wilson would have been helpful, it was not necessary to establish the chain of custody. Mr. Kercheval's testimony as to the quality control procedures employed by his laboratory, both generally and as reflected in Ms. Wilson's report, was sufficient to rebut any allegation that the evidence had been contaminated or otherwise altered during the time it was in Ms. Wilson's custody.[7] Based on the evidence presented at appellant's trial, we are persuaded

[7] The Court of Appeals of Georgia, considering a claim nearly identical to the one presented by appellant rejected the notion that the mere possibility of tampering or other impropriety compels the presence of any chemist who tested the drugs in order to establish a sufficient chain of custody. The court opined:

> Here, the evidence showed that the drugs were tested by the Georgia crime lab, returned to the arresting police agency, and then sent back to the crime lab for retesting when the initial chemist who tested the drugs was unavailable to testify as to those results because the chemist was no longer employed by the crime lab. A second chemist retested the drugs prior to trial, and she testified as to the results she obtained. Notably, [the defendant] does not contend that tampering occurred or may have occurred between the time the drugs were returned to the police agency after initial testing and the time the drugs were sent back to the crime lab for retesting. He specifically argues the possibility that tampering occurred when the initial chemist handled the drugs.
>
> But [the defendant] presented no evidence of tampering, only mere speculation that because the initial handling of the drugs at the crime lab was unknown, tampering could have occurred. The state met its burden of showing with reasonable certainty that the evidence was the same as that seized and that no tampering or alteration occurred. Accordingly, the trial court did not err in

(continued...)

that the State provided sufficient proof to support the trial court's determination that there was a reasonable probability that the substances Mr. Flood purchased from appellant were not contaminated or otherwise tampered with prior to trial. We conclude, therefore, that the trial court did not abuse its discretion by allowing the admission of the properly authenticated evidence.

Finally, we shall consider whether the trial court erred or abused its discretion by allowing Mr. Kercheval to testify regarding notations made by Ms. Wilson in her report, which was not admitted at trial. Appellant contends that Ms. Wilson's statements in her report constituted inadmissible hearsay evidence.

The record indicates that the trial court prudently decided that, in Ms. Wilson's absence, her report should not be admitted as substantive evidence. Mr. Kercheval's testimony regarding whether Ms. Wilson followed the established procedures, and whether there was any evidence of contamination were not offered for their truth, however, but rather as the basis for Mr. Kercheval's expert opinions.

In Maryland, it has been long established that an expert is permitted, "to express his [or her] opinion upon facts in the evidence which he [or she] has heard or read, upon the assumption that these facts are true." *Quimby v. Greenhawk,* 166 Md. 335, 338 (1934).

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[7](...continued)
admitting the drugs on this ground.

Ashley v. State, 728 S.E.2d 706, 709 (Ga. App. 2012) (footnotes omitted).

Maryland Rule 5–703(a) codifies this practice, "permitting an expert to base his or her opinion on 'first-hand knowledge, hearsay, or a combination of the two.'" *Cooper*, 434 Md. 230 (quoting 6 Lynn McLain, *Maryland Practice: Maryland Evidence State and Federal* §703:1(a) (2d. 2001)). If the evidence upon which the expert relies is inadmissible hearsay, "Maryland Rule 5–703(b) permits a trial judge, in his or her discretion, to admit evidence as the factual basis for the expert's opinion if the evidence is unprivileged, trustworthy, reasonably relied upon by the expert, and necessary to 'illuminate' the expert's testimony." *Cooper*, 434 Md. at 230 (citing *Brown v. Daniel Realty Co.,* 409 Md. 565, 601 (2009)).

At appellant's trial, the court found that Mr. Kercheval was "qualified to offer… expert opinion evidence on . . . analyzing and identifying controlled dangerous substances as part of his duties with the Western Maryland Crime Lab." In this capacity, Mr. Kercheval was thus qualified to testify regarding the procedures that the laboratory employed, as well as how compliance with those procedures would be documented by those he supervised. As Ms. Wilson's supervisor, Mr. Kercheval was uniquely qualified to understand Ms. Wilson's report and to interpret her notations therein. Appellant does not assert that Ms. Wilson's report was privileged. Nor does appellant provide anything more than speculation to support his assertions that the statements included in Ms. Wilson's report could be unreliable or untruthful. Clearly, Ms. Wilson's report is the type of evidence that would generally be accepted by a court as prima facie evidence of the facts asserted therein. Mr. Kercheval's ability to reference the details of Ms. Wilson's report was certainly helpful to assist the judge

and the jury in evaluating the weight to be afforded to Mr. Kercheval's testimony regarding whether Ms. Wilson had followed the proper procedures while handling the evidence in the lab, thereby minimizing any possibility that contamination of the evidence occurred.

Under the circumstances, we are persuaded that Mr. Kercheval's testimony about representations made by Ms. Wilson in her report were admissible under Md. Rule 5-703, as the basis of his expert testimony. We conclude, therefore, that the trial court did not abuse its discretion by allowing Mr. Kercheval's testimony.

V. Improper Closing Arguments

During the State's direct examination of Agent Fortson, he testified that on June 6, 2013, Mr. Flood identified appellant in a photo array as the individual he knew as Black, from whom he had purchased cocaine and heroin on May 30, 2013. In closing argument, the State commented: "And additionally, he had a picture, a mug shot of [appellant]. He got that and the mug shot of five other individuals, similar complexions, and he presented that to the informant." Appellant's counsel raised no objection to the State's closing argument.

Appellant now contends that the State's comment characterizing his photograph in the photo array as a "mug shot" was improper: first, because it assumed facts not in evidence, and second, because it constituted improper other crimes evidence. Appellant asserts that the State's comment was "obviously improper and grossly prejudicial."

Because appellant's counsel raised no objection to the improper comment at the time it was made, however, we must conclude that appellant's contention was not properly

preserved for appellate review. *See* Md. Rule 8-131(a) ("the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"); *Jones-Harris v. State*, 179 Md. App. 72, 102 (2008) (holding that complaints regarding improper remarks in closing arguments are waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed[ ]"). Consequently, this Court need not consider the matter any further.

Appellant urges this Court to exercise its discretion and undertake plain error review of the State's closing argument. Plain error review is an extraordinary remedy, however, to be undertaken only in instances of "truly outraged innocense[.]" *Herring v. State*, 198 Md. App. 60, 87 (2011) (quoting *Jeffries v. State,* 113 Md. App. 322, 325–26 (1997)). When an individual requests that this Court undertake plain error review there are several factors we consider. Among them are: 1) "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law;" 2) "the egregiousness of the trial court's error;" 3) "the impact of the error on the defendant;" and 4) the degree of lawyerly diligence or dereliction." *Steward v. State*, 218 Md. App. 550, 566 (2014) (citing *Morris v. State*, 153 Md. App. 480, 518-24 (2003)).

"Maryland law is clear that counsel have great latitude in the presentation of closing arguments, and any restriction of remarks is within the trial court's sound discretion." *Wise v. State*, 132 Md. App. 127, 142 (2000). Attorneys are "afforded great leeway in presenting

closing arguments[,]" so long as their arguments are "confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel[.]" *Degren v. State*, 352 Md. 400, 429-30 (1999). Even when an attorney's arguments stray beyond the limits of what is acceptable, "[n]ot every improper remark . . . necessarily mandates reversal, and what exceeds the limits of permissible comment depends on the facts in each case." *Id*. at 430-31 (internal citations omitted). Reversal is warranted only where the State's arguments "actually misled or were likely to have misled the jury to the defendant's prejudice," or where the arguments "trespass[ed] upon a defendant's Constitutional rights." *Wise*, 132 Md. App. at 142. On review, we shall not reverse a trial court's determination that an argument was acceptable, "unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Ware v. State*, 360 Md. 650, 682 (2000) (citation omitted).

Even if the State's reference to a photograph of appellant as a "mug shot" was improper because it referenced facts not in evidence, or potentially constituted other crimes evidence, we still do not find the circumstances of appellant's case to be sufficiently compelling to justify plain error review.

In his brief, appellant fails to do more than summarily conclude that the State's fleeting comment in the midst of closing argument, because it referenced facts not in evidence and potentially constituted improper other crimes evidence, was "obviously improper and grossly prejudicial." Appellant does not so much as cite a single case or rule

prohibiting the admission of such evidence, though this is an area of law that this Court is often called upon to discuss. He does not explain why we should overlook his own attorney's failure to object to such an "obviously improper and grossly prejudicial" remark at the time it was made. Nor does he provide any argument regarding why the trial court's failure to, on its own initiative, interrupt the State's closing argument and provide a curative instruction constituted reversible error, much less plain error.

Based on our review of the record, we are persuaded that the State's comment, though it included the word "mugshot" twice, was an isolated remark that was not emphasized, and, in fact, was wholly peripheral to the argument the State was presenting at that time.[8] In any event, because Mr. Flood's identification of appellant in a photo array did not happen until a week after the controlled buy, and the jury was never told on what date appellant was arrested for the charged offense, it is just as likely that the jurors assumed that the "mugshot" Agent Fortson used in the photo array was from appellant's arrest in the current case, rather than a prior arrest.

Clearly, had appellant's counsel interposed a timely objection to the State's remark, the trial court could have appropriately admonished the jury that the reference was improper and that there was no evidence as to how the photograph had been obtained. Failing to object to the State's comment thus prevented the trial court from taking action to remedy any

[8] The State was reminding the jury that Mr. Flood had identified appellant in a photo array as the individual from whom he purchased cocaine and heroin on May 30, 2013.

perceived prejudice that had accrued to appellant. Under all the circumstances, we decline to exercise our discretion and undertake plain error review of the State's closing argument.

VI. Proof of Subsequent Offender Status

In accordance with Md. Rule 4-245, prior to appellant's trial, State filed a "[s]ubsequent [o]ffender [n]otice" with the court informing appellant that the State intended to seek enhanced penalties under Criminal Law, ("Crim. Law") §5-608[9] and Crim. Law §5-905.[10] In the subsequent offender notice, the State identified the following two prior convictions upon which it was relying to support it's petition for enhanced penalties:

> The [appellant] was convicted on or about July 27, 2000, in Criminal Case #10-K-00-026270 in the Circuit Court for Frederick County, Maryland, of Possession with Intent to Distribute Cocaine (adopted and incorporated herein by reference).
>
> The [appellant] was convicted on or about November 4, 2003, in Criminal Case #21-K-03-032344 in the Circuit Court for Washington County, Maryland, of Distribution of Cocaine (adopted and incorporated herein by reference).

At appellant's sentencing hearing, the State introduced true test copies of the docket entries for each of the cases referenced in the subsequent offender notice as well as the testimony of the police officers who had arrested appellant in 2000 and 2003 offenses.

[9] In pertinent part, Crim. Law §5-608(c) mandates the imposition of a twenty-five year mandatory minimum sentence where an individual has been twice convicted for a qualifying drug offense, and has served at least one term of confinement of at least 180 days in a correctional institution as a result of a conviction.

[10] Pursuant to Crim. Law §5-905, an individual who has been previously convicted of a drug crime may be sentenced to "a term of imprisonment twice that otherwise authorized."

Lieutenant Dwight Summers of the Frederick Police Department testified that, in 2000, he arrested appellant, whom he identified in court, after observing him distributing crack cocaine to another individual. The docket entries for case #10-K-00-026270 (the "2000 case") indicate that on July 27, 2000, "Larry S. Cummings," with a birth date of XX/XX/1981, pled guilty to the offense of possession of cocaine with the intent to distribute in the Circuit Court for Frederick County.

Agent Frank Toston of the Narcotics Task Force for Washington County testified that on July 8, 2003, he arrested appellant, whom he identified in court, for distribution of cocaine. Agent Toston testified that the arrest led to appellant being prosecuted and convicted for distribution of cocaine. The docket entries for case #21-K-03-032344 (the "2003 case") indicated that on October 8, 2003, "Larry Steven Cummings," with a date of birth of XX/XX/1981, pled guilty to the offense of distribution of cocaine.

On the basis of the documentary and testimonial evidence presented by the State, the trial court determined that appellant should be sentenced as a subsequent offender. For his distribution of heroin conviction, the trial court sentenced appellant to serve the mandatory minimum penalty provided in Crim. Law §5-608(c), twenty-five years, without the possibility of parole. For distribution of cocaine, the trial court imposed a concurrent twenty-five-year sentence.

Appellant contends that the trial court erred by finding that the State had proven, beyond a reasonable doubt, that appellant had been twice previously convicted for a

qualifying offense, and had served at least 180 days in a correctional institution. "When the State seeks an enhanced penalty, the State must prove each element of the enhanced penalty statute beyond a reasonable doubt, including the defendant's identity in the previous qualifying convictions." *Bryant v. State*, 436 Md. 653, 670-71 (2014) (quoting *Dove v. State*, 415 Md. 727, 746 (2010)). All of the statutory elements must be "proven by competent evidence[.]" *Id.* at 671.

We are persuaded that the testimony of the arresting officers, in combination with the certified docket entries, was sufficient to establish, beyond a reasonable doubt, that appellant was the individual convicted in each of the cases referenced in the State's subsequent offender notice. It strains credulity to believe that another "Larry S. Cummings," or "Larry Steven Cummings," born on the same day as appellant,[11] was convicted for cocaine distribution in Washington County, where appellant resides, and Frederick County, the county adjacent to the county where appellant resides, concurrent with appellant's arrests for the same offenses, in the same jurisdictions, and by the same officers who subsequently testified at appellant's sentencing hearing that appellant was the same individual they arrested in 2000 and 2003. Based on these many congruencies, we conclude that the trial court's determination that appellant had been twice previously convicted for qualifying drug offenses in 2000 and 2003 was supported by substantial evidence, and therefore, was not clearly erroneous.

[11] Appellant's date of birth was noted at several places in the official court record.

To establish that appellant had served at least one period in a correctional institution of at least 180-days, the State presented evidence that for his 2003 conviction, appellant was sentenced to serve twenty years with all but eight years suspended, to be followed by a period of five years probation. The docket entries for appellant's 2003 conviction did not indicate that appellant's sentence had been subsequently reduced or modified. Under Maryland Law, to be eligible for parole, a prisoner must serve at least a quarter of the executed time imposed. Md. Code (1999, 2008 Repl. Vol.), §7-301(a)(2) of the Correctional Services Article. The trial court could, therefore, reasonably infer that appellant had served at least two years of his eight year sentence, a period of time that was clearly sufficient to satisfy the 180-day requirement of the enhanced penalty statute.

The inference that appellant had served a sufficiently lengthy sentence in a correctional institution was further supported by the docket entries from his 2003 conviction that indicate appellant was still serving probation for his 2003 conviction as late as March 22, 2011. The docket entries specify that, "[u]pon release" from the Department of Corrections, appellant was required to serve a five-year probationary period. Thus, even if March 22, 2011, was the final day of appellant's five-year probationary period, the trial court could reasonably infer that appellant was still incarcerated as of, at least, March 22, 2006. Based on the fact that appellant was sentenced for his 2003 conviction on November 4, 2003, the trial court was assured that appellant was incarcerated for more than two years, and thus, had served more than 180 days in confinement for his 2003 conviction. We conclude, therefore,

that the trial court's finding that appellant had served at least 180-days in a correctional institution was not clearly erroneous. Accordingly, the trial court did not err in sentencing appellant to enhanced penalties for both of his convictions based on his status as a subsequent offender.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.