UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2881

September Term, 2015

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JACQUE ALPHONSO BROWN

v.

STATE OF MARYLAND

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Meredith,
Arthur,
Beachley,

JJ.

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Opinion by Beachley, J.

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Filed: March 10, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a bench trial, the Circuit Court for Baltimore County convicted appellant Jacque Brown of possession with intent to distribute heroin and possession of heroin. On the possession with intent to distribute charge, the court sentenced appellant to a term of twenty-five years' imprisonment without parole; the simple possession charge was merged and no separate sentence was imposed. Appellant presents four questions on appeal:

1. Did the hearing court err in denying, in part, Mr. Brown's motion to suppress?

2. Was the evidence sufficient to convict Mr. Brown?

3. Did the lower court err in admitting evidence with no chain of custody?

4. Did Mr. Brown knowingly and voluntarily waive his right to a jury trial?

We perceive no error and shall therefore affirm the circuit court's judgment.

## DISCUSSION

### I. Motion to Suppress

We begin by articulating the applicable standard of review:

> When we review a [circuit] court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly [deduced] therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the [circuit] court's fact-finding at the suppression hearing, unless the [circuit] court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *[de novo]* and must "make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case."

*Grant v. State*, 449 Md. 1, 31 (2016) (alterations in original) (citations omitted).

Viewing the evidence in a light most favorable to the State in this case, the following facts pertinent to the suppression hearing emerge. On April 9, 2014, at approximately 2:23 p.m., Officer Daum of the Baltimore County Police Department responded to a call from an apartment complex at 9905 Mill Center Drive and met appellant, the victim of an attempted carjacking. Appellant informed Officer Daum that two men approached him as he was exiting his vehicle. One of the men put a gun to appellant's head and demanded his keys. A struggle ensued and a round was discharged from the gun. Fortunately, the gun misfired. Appellant then fled while his assailants left the scene in a gray Cadillac.

Detective Quigley arrived at the scene shortly thereafter. After briefly scanning the area, Detective Quigley asked appellant to have a seat in Detective Quigley's car. Appellant complied and told the detective about the attempted carjacking. Detective Quigley neither frisked nor restrained appellant in any manner.

After the conversation with appellant in his car, Detective Quigley asked another officer to transport appellant to the police station for the purpose of obtaining appellant's statement. Although appellant told Officer Daum that he did not want to give a statement, Detective Quigley unequivocally testified at the suppression hearing that appellant never told him that he did not want to go to the police station. Both Officer Daum and Detective Quigley testified that they consistently treated appellant as a victim of a crime and that it is customary police practice to interview victims at the police station. Neither officer told appellant that he was required to go to the police station. Likewise, neither officer told appellant that he was free to leave.

Appellant was transported to the police station by Officer Tarczy. Appellant was not restrained in any manner during the trip to the precinct.[1] According to Officer Tarczy, appellant gave no indication to her that he did not want to go to the police station. As with any victim, Officer Tarczy led appellant into the police station through the front door and took appellant to a conference room rather than to an interview room typically used to interview suspects. Officer Tarczy was either at the door or physically inside the conference room while officers interviewed appellant. At one point during the interview, Officer Tarczy recalled that appellant used the bathroom; no male officer escorted appellant to the bathroom because, according to Officer Tarczy, appellant was not a suspect.

Officer Dix interviewed appellant at the police station. Appellant initially told Officer Dix that he did not want to provide a statement or press charges. According to Officer Dix, this was the only time during the interview that appellant indicated that he did not want to give a statement. Officer Dix did not find it unusual for a victim of a crime to be reticent about giving a statement, noting that many victims are cognizant of potential "repercussions." Nevertheless, appellant agreed to provide a written statement. Appellant finished writing his statement at 4:13 p.m.

During appellant's conversation with Officer Dix in the precinct's conference room, appellant acknowledged that he "had dealt drugs in the past." Officer Dix relayed this

[1] In accordance with police procedure for all victim witnesses, appellant was patted down before entering Officer Tarczy's vehicle.

information to Detective Quigley, who was still at the crime scene. Detective Quigley, in turn, contacted Lieutenant Landsman, who instructed Detective Quigley to secure a canine to scan appellant's vehicle.[2] Detective Quigley called for the canine at 3:42 p.m.

At 3:49 p.m., Officer Zon and his dog, Hero, arrived at the scene of the attempted carjacking. Hero scanned the exterior of appellant's car and alerted for the presence of drugs at the driver's door handle and at the passenger door. While the exact time that Hero alerted is unclear, Officer Zon and Hero left the scene at 4:13 p.m. Officers searched appellant's vehicle, but did not find any drugs.

Appellant remained at the police station until he was placed under arrest. The actual time of arrest is unclear, although it occurred sometime between 4:13 p.m. when appellant completed his written statement and 7:13 p.m. when he was "processed." A strip search of appellant yielded a baggie containing 6.3 grams of heroin, recovered from appellant's buttocks.

Appellant moved to suppress the heroin recovered as a result of the strip search at the police station, which the trial court denied. The suppression court found that, while appellant was voluntarily at the police station giving a statement, the police acquired

[2] After Lieutenant Landsman learned that appellant had been arrested in 2013 for drug offenses and that appellant actually lived in the apartment building where the carjacking occurred, Lieutenant Landsman authorized a warrantless search of appellant's apartment. The drugs found during that warrantless search and pursuant to a subsequent search warrant were suppressed by the trial court. The trial court did not rely on any evidence recovered from the searches of appellant's apartment to justify appellant being held at the police station.

probable cause to arrest appellant as a result of the positive alert by the drug canine. The court concluded that the heroin recovered during the strip search was properly recovered as incident to a lawful arrest.

On appeal, appellant contends that the circuit court erred by denying his motion to suppress the heroin found as a result of the strip search. He makes four arguments on this point: 1) that his continued detention at the police station constituted a *de facto* arrest; 2) that his detention was unsupported by reasonable articulable suspicion; 3) that his arrest after no drugs were found in the car was unsupported by probable cause; and 4) that his strip search was unconstitutional. We hold that appellant was not under *de facto* arrest at the police station prior to the canine alert. Because we hold that appellant went to the police station voluntarily, we reject appellant's argument that he was detained without reasonable articulable suspicion. We further hold that appellant has waived his other arguments concerning the motion to suppress, as they were not raised below.

### A. Appellant Was Not Under *De Facto Arrest*

Appellant first asserts that his detention at the police station after Detective Quigley called for the canine at 3:42 p.m. constituted a *de facto* arrest without probable cause. That position is consistent with appellant's argument to the suppression court:

> [THE COURT]: What do you say about this black letter law that [the State] is pointing me to that says that they have probable cause to arrest as soon as that K-9 alerts?
>
> [DEFENSE COUNSEL]: Well, but the problem with that is that we have the police testimony that he expressed, 40 or 50 minutes before his -- before the K-9 hit, we have police testimony that he expressed -- that he said I don't want to be there, I don't want to press charges, and I don't want, I don't want

> to give a statement, and he says he very clearly told them that he wanted to leave. Of course he did.

Notably, appellant did not challenge the State's assertion that the police had probable cause to arrest appellant based upon the canine alert. While not clearly articulated in his brief, appellant argues that, because he was improperly detained after 3:42 p.m. "as a suspect in a drug investigation," the heroin later discovered in the strip search must be suppressed. We disagree.

The Court of Appeals has described a *de facto* arrest as occurring when "the circumstances surrounding a detention are such that a reasonable person would not feel free to leave." *Reid v. State*, 428 Md. 289, 299-300 (2012) (footnote omitted). There, the Court held that Reid was subject to *de facto* arrest where police used a Taser to fire two metal darts into Reid's back as he ran from the police. *Id.* at 293-94. In holding that a reasonable person would not feel free to leave, the *Reid* Court relied upon the Supreme Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979). *Id.* at 300. In that case the Supreme Court determined that appellant was under *de facto* arrest when he was taken from his neighbor's house as a suspect in a homicide investigation; transported to a police station in a police car and placed in an interrogation room; was never told he was free to go; and would have been physically restrained if he had attempted to leave. *Dunaway*, 442 U.S. at 212. *See also Bailey v. State*, 412 Md. 349, 374 (2010) (holding that appellant was placed under *de facto* arrest when an officer grabbed defendant's hands, placed them on his head, and searched him); *Dixon v. State*, 133 Md. App. 654, 673 (2000) (holding that

appellant was under arrest when officers blocked his vehicle into a parking space with their police cruisers and handcuffed him).

In reviewing the record in this case in the light most favorable to the State, we conclude that, contrary to appellant's contention, he was not under *de facto* arrest as of 3:42 p.m. The trial court found that appellant initially accompanied the officers to the police station voluntarily. Various officers testified that appellant was taken to the police station to give a statement as a victim, not as a suspect as in *Dunaway*. Although officers patted him down, this was standard procedure for victims being transported for an interview. Appellant entered the police station through the front door and was seated in a conference room as opposed to an interrogation room. Officer Dix questioned appellant about the carjacking and had him produce a written statement describing the incident. Unlike in *Reid*, *Bailey*, and *Dixon*, appellant was never physically restrained. Though the police were also conducting a drug investigation involving appellant, he had no knowledge of this parallel investigation. Accordingly, the search of appellant's apartment and car that was taking place while he was at the police station cannot factor into whether appellant felt he was free to leave the station. We conclude that the suppression court was not clearly erroneous in finding that appellant voluntarily went to the police station for the purpose of giving a statement concerning the carjacking.

While acknowledging in his brief that he initially went to the police station voluntarily, appellant contends that he was illegally detained after 3:42 p.m. when Detective Quigley called for a canine. Inferentially, based on the facts presented, at 3:42

p.m. appellant was still working on his written statement at the police station. Hero alerted for the presence of drugs in appellant's car at some point between 3:49 p.m. (the time Hero arrived on the scene) and 4:13 p.m. (the time Hero cleared the scene). There is no question under Maryland law that Hero's alert furnished probable cause to arrest appellant as the driver of the vehicle. *State v. Harding*, 196 Md. App. 384, 390 (2010); *State v. Ofori*, 170 Md. App. 211, 228-29 (2006). That appellant had been transported to the police station and thus was no longer in close proximity to his car does not extinguish probable cause in this case – appellant was at his car when the police arrived, he was the last known occupant of the vehicle, and he was the victim of the attempted carjacking of the same vehicle approximately one and one-half hours before the canine alert. In addition, there is no evidence that anyone other than appellant used the car.

Viewing the evidence in a light most favorable to the State, we conclude that appellant voluntarily remained at the police station until he completed his written statement at 4:13 p.m. Prior to completing his written statement, probable cause to arrest appellant developed as a result of the positive alert for drugs. Accordingly, we reject appellant's contention that he was illegally detained at the police station after 3:42 p.m.

**B. Reasonable Articulable Suspicion Is Irrelevant**

Because we conclude that appellant was at the police station voluntarily until probable cause to arrest arose from the canine alert, appellant's argument that he was held at the police station without reasonable articulable suspicion likewise fails.

### C. Appellant's Other Arguments Are Waived

Appellant also asserts that: 1) his arrest (which occurred sometime between 4:13 p.m. and 7:13 p.m.) was unsupported by probable cause "because that probable cause had dissipated after officers searched the car and found no drugs;" and 2) that the strip search was unconstitutional. We hold that, because these arguments were not raised below, they are waived.

Maryland Rule 4-252 provides that a claim relating to an unlawful search or seizure "shall be raised by motion" prior to trial. The motion must "state the grounds upon which it is made." Md. Rule 4-252(e). "[I]f not so raised, it is waived, absent a showing of good cause." *Carroll v. State*, 202 Md. App. 487, 510 (2011). The Court of Appeals has noted that the purpose of this rule is "to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it." *Denicolis v. State*, 378 Md. 646, 660 (2003).

Maryland courts have further elaborated upon the specificity with which a suppression argument must be made pre-trial to avoid waiver. For example, in *Ray v. State*, 435 Md. 1 (2013), the Court of Appeals held that appellant waived his right to appeal the denial of a motion to suppress evidence on the grounds that the evidence was seized as part of an unlawful arrest. In a written supplement to a pre-trial omnibus motion, appellant had argued that the evidence should be suppressed because the police "had no reasonable articulable suspicion that a traffic violation had occurred and therefore no legal basis to

stop the vehicle," and "[a]fter the citations were written, the passengers were illegally detained." *Id.* at 5-6. At the suppression hearing, appellant argued a similar "two-part illegal stop/unlawful second 'detention' of the passengers' theory." *Id.* at 16. The Court held that appellant's unlawful arrest argument was waived because he "did not raise the issue of probable cause to arrest in his written motion or at the hearing, and he did not otherwise allude to that theory for suppression of the evidence." *Id.* at 17. The Court also noted that, although the prosecution had mentioned that probable cause to arrest existed, appellant "did not dispute the prosecutor's words." *Id.*

Similarly, in *Miller v. State*, 380 Md. 1 (2004), the Court of Appeals held that appellant's argument that evidence should be suppressed based on an unlawful arrest was waived. In that case, appellant had filed a pre-trial motion which asserted in part that "evidence seized from his person 'at or about the time of the arrest' be suppressed because such evidence 'was seized unlawfully, absent probable cause[.]'" *Id.* at 49. Nonetheless, the Court ruled that the argument was waived because "[appellant's] omnibus motion gave no details supporting his bald contention," and appellant did not "pursue the matter at the hearing on the motion." *Id. See also Jackson v. State*, 52 Md. App. 327, 331-32 (1982) (citing *White v. State*, 23 Md. App. 151, 155-56 (1974)) (holding that if a defendant files a motion to suppress but fails to pursue it, waiver may result.)

In this case, appellant's sole argument to the suppression court was that he was illegally detained for forty to fifty minutes *prior to* the canine alert at 3:49 p.m. Appellant conceded at the suppression hearing that the canine alert gave police probable cause to

arrest him. Appellant made no argument at the suppression hearing that probable cause to arrest "dissipated" when no contraband was found in his vehicle subsequent to the canine alert.[3] The suppression court was not presented with any of the case law set forth in appellant's brief which purports to support his dissipation theory and therefore the court had no opportunity to consider this issue. We hold that the issue is waived.

Appellant's argument that the strip search was unconstitutional is likewise waived. Although he did raise this point in a supplemental memorandum to his motion to suppress, as in *Miller* he failed to pursue this argument at the suppression hearing, denying the State the opportunity to respond to it and the suppression court the opportunity to address it.

Because appellant waived these arguments, and was not under *de facto* arrest at the police station prior to the canine alert, we hold the trial court did not err in denying appellant's motion to suppress the heroin seized from his person after the arrest.

## II. Chain of Custody[4]

Appellant next contends that the trial court improperly admitted the 6.3 grams of heroin into evidence without establishing a proper chain of custody. We disagree.

At appellant's trial, Detective Mark Fisher testified that he conducted a strip search of appellant at the police precinct. During that search, Detective Fisher found a plastic bag containing a brown powder substance between appellant's buttocks. Detective Fisher

[3] We note that, as in this case, no drugs were found in the vehicle in *Harding*, 196 Md. App. at 395.

[4] Although this is the third issue presented in appellant's brief, we find it useful to address this issue before discussing the sufficiency of evidence claim.

testified that he packaged the plastic bag "per department procedure" which entailed putting it in a "K-pack" and submitting it for chemical analysis. The plastic bag was labeled 5621-005, "5621" representing Detective Fisher's identification number and "005" representing the item number. The parties stipulated that Item 5261-005 was inside the K-pack and that it was in substantially the same condition as when Detective Fisher packaged it. The parties further stipulated that Item 5621-005 was analyzed by a forensic chemist and determined to be heroin with a net weight of 6.3 grams.[5]

Appellant objected to the admission of the heroin. During cross-examination of Detective Fisher, appellant's counsel noted that the chain of custody form ("Form 98") submitted in this case listed appellant's apartment as the location of the seizure of heroin, not the police precinct. Appellant's counsel also noted Form 98 indicated that Item 5621-005 was attributed to both appellant and "Choyer[6] Daniels," appellant's co-defendant who lived with him at his apartment. Finally, appellant's counsel submitted Detective Fisher's statement of probable cause in which he wrote that baggies containing white chunk substance with brown powder labeled "Item 5" were recovered from appellant's apartment. Appellant objected to the admission of the heroin, asserting that the records demonstrated that the heroin was recovered from appellant's apartment. Because the trial court had

[5] Appellant's trial counsel stipulated that Item 5621-005 was tested and was 6.3 grams of heroin, but noted he was not stipulating that the chain of custody was properly maintained.

[6] At times, the trial transcript refers to "Troyer" Daniels. This is a typographical error.

suppressed all evidence recovered from the apartment, appellant argued that the heroin was inadmissible.

On redirect examination, Detective Fisher explained that, because there was only one search and seizure warrant in this case, he filled out only one Form 98 and listed "the place of the search warrant" as the location where evidence was recovered. Although he acknowledged that nothing prevented him from completing a separate Form 98 for the seizure of evidence from appellant's buttocks, Detective Fisher testified that he was trained to complete only one form, except in the case of multiple search warrants. Detective Fisher also testified that he remembered stating in his police report that appellant had been strip-searched at the police precinct, and that he had an independent recollection of locating Item 5261-005 in appellant's buttocks. Finally, on recross examination, Detective Fisher maintained that the item he referred to as "Item 5" in his statement of probable cause was Item 5 listed on the search warrant inventory; he unequivocally testified that Item 5 on that inventory – baggies containing white chunk substance with brown powder – was different from Item 5261-005, the plastic bag retrieved from appellant's buttocks.

The trial court overruled appellant's objection to the admission of Item 5261-005. In ruling on the motion, the trial court stated it was "thoroughly satisfied with the explanation of the officer as to the, I guess for a lack of a better word, accounting discrepancy." The court noted it was satisfied as to the chain of custody "because [Detective Fisher]'s testifying based upon not just the records but on his personal knowledge and recollection as to where he made the recovery."

On appeal, appellant maintains that the heroin should not have been admitted into evidence because the State failed to establish a proper chain of custody, and as a result did not satisfy the authentication requirements of Maryland Rule 5-901(a). *See Martin v. State*, 78 Md. App. 541, 548 (1989) (quoting *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982)) ("The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence."). "Chain of custody evidence is necessary to demonstrate the 'ultimate integrity of the physical evidence.'" *Easter v. State*, 223 Md. App. 65, 75 (2015) (quoting *Best v. State*, 79 Md. App. 241, 256 (1989)). Chain of custody is usually established through the testimony of witnesses responsible for properly storing the evidence who can ensure that it was not tampered with and that its condition did not change. *Id.* What is necessary to ensure that tampering did not occur will vary based on the facts of each case; however "[t]he existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Id.*

"Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court." *Id.* at 74. (citations omitted). This Court "reviews a trial court's evidentiary rulings for abuse of discretion." *Id.* at 74-75 (citations omitted). A trial court abuses its discretion "when no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *Id.* at 75 (citations omitted).

When ambiguities in the chain of custody exist, the trial court may still admit the evidence if it is convinced of its authenticity. For example, in *Colesanti v. State*, 60 Md. App. 185 (1984), Colesanti and his companion were arrested after selling PCP to an undercover police officer. At his trial, Colesanti and another witness testified that during the booking process at the police station, the aluminum packet Colesanti sold to the officer had become intermingled with other exhibits, including two identical aluminum packets which did not contain drugs. *Id.* at 189-90. As a result, Colesanti argued that the packet containing PCP was inadmissible because the State could not sufficiently establish its chain of custody. *Id.* at 190. The trial court disagreed, finding that the arresting officer's testimony that there was no intermingling of evidence was sufficient to satisfy the chain of custody requirement. *Id.* at 191. On appeal, we held that the trial court did not abuse its discretion in admitting the evidence because "[o]n this state of the evidence the trial judge was entitled to believe [the arresting officer] and to reject the apparently contrary testimony of Colesanti and his witness." *Id.* at 192.

Similarly, in this case the trial court was presented with clear testimony from Detective Fisher that the 6.3 grams of heroin admitted at trial was the same heroin seized from appellant during the strip search at the police precinct. Although appellant generated an issue concerning chain of custody, the trial court was satisfied with Detective Fisher's

explanations for the discrepancies. In our view, the trial court did not abuse its discretion in admitting the 6.3 grams of heroin into evidence.[7]

## III. Sufficiency of Evidence

Appellant also argues that there is insufficient evidence to support his conviction for possession with intent to distribute heroin. We disagree.

"The standard of appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003). "We give due regard to the [trial court's] findings of fact, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id.* at 534 (internal quotations and citations omitted). "We do not reweigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial[.]'" *Id.* (quoting *White v. State*, 363 Md. 150, 162 (2001)).

The gravamen of appellant's sufficiency claim is that the 6.3 grams of heroin found in a single package on appellant's person is insufficient to establish his intent to distribute

[7] In his brief, appellant makes two additional arguments in challenging the chain of custody. He first notes that chain of custody Form 98 lists the submitting officer as "Starling" rather than Detective Fisher. Second, he challenges Detective Fisher's veracity by pointing out that Detective Fisher indicated in his Statement of Probable Cause that two baggies seized from appellant's apartment field tested positive for heroin, while the chemist's report indicates that the contents of those baggies tested negative for CDS. Because appellant did not raise either of these arguments below, they are waived.

heroin. To establish intent to distribute, "[t]he State [is] required to prove possession of the controlled dangerous substance in sufficient quantities to indicate, under all of the circumstances, an intent to distribute." *Colin v. State*, 101 Md. App., 395, 407-08 (1994). We have noted, however, that "no specific quantity of drugs has been delineated that distinguishes between a quantity from which one can infer [an intent to distribute] and a quantity from which one cannot make such an inference." *Purnell v. State*, 171 Md. App. 582, 612 (2006). We have also held that "[t]he element of intent is generally proved by circumstantial evidence." *Collins v. State*, 89 Md. App. 273, 278 (1991).

In this case, Detective Scott Young was accepted at trial as an expert witness in the packaging, distribution, manufacture and street level sale of narcotics. Detective Young testified that the heroin recovered from appellant had a street value of $600 to $750. He also noted that there was no paraphernalia found on appellant's person or in his car to indicate personal use. In arguing that the evidence is insufficient to establish his intent to distribute heroin, appellant points to cases where the street value of the drugs was higher than in this case. *See, e.g.*, *Colin v. State*, 101 Md. App. at 399 (1994) (cocaine with a street value of $25,600 sufficient to establish an intent to distribute); *Hippler v. State*, 83 Md. App. 325, 338-39 (1990) (possession of $1,600 of liquid PCP sufficient to establish an intent to distribute). Appellant fails to mention, however, that we have found sufficient evidence in cases where the value of the drugs was less than the value here. *See Purnell*, 171 Md. App. at 617 (drugs with a combined value of $240 deemed sufficient to establish intent to distribute); *Johnson v. State*, 142 Md. App. 172, 205 (2002) (possession of cocaine

with a value of $150 sufficient to establish intent to distribute). Appellant also argues that, because the heroin in this case was all in one package, it was not packaged for distribution and therefore "was not inconsistent with personal use." While evidence of packaging is a relevant consideration in determining an intent to distribute, it is but one factor for the trier of fact to consider in its evaluation of the evidence. As noted in *Purnell*, we are "mindful that under Maryland Rule 8-131(c), we defer to the factual findings of the trial judge in a nonjury case, unless they are clearly erroneous, giving due regard to the opportunity of the trial judge to observe the demeanor of the witnesses and to assess their credibility[.]" 171 Md. App. at 616 (citation omitted). Considering all of the circumstances, the evidence in this case was sufficient for a rational trier of fact to conclude that appellant was guilty of possession with intent to distribute heroin.

## IV. Waiver of Jury Trial

Appellant's final contention is that he did not effectively waive his right to a jury trial under Md. Rule 4-246(b). Appellant acknowledges that this issue is not properly preserved for appellate review because he did not object to the waiver procedure at trial. *See Nalls v. State*, 437 Md. 674, 693 (2014). He invites us, however, to exercise our discretion under Md. Rule 8-131(a) to review issues not raised and decided by the trial court. We decline that invitation.

Maryland Rule 8-131(a) provides that, with the exception of jurisdiction of the trial court, "[o]rdinarily, 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." The Court of

Appeals has held that "the word 'ordinarily' has the limited purpose of granting to the appellate court the prerogative to address the merits of an unpreserved issue, in the appropriate case." *Robinson v. State*, 410 Md. 91, 103-04 (2009). This prerogative, however, "is to be rarely exercised and only when doing so furthers, rather than undermines, the purpose of the rule." *Id.* at 104. "The primary purpose of [Md. Rule] 8-131(a) is to ensure fairness for all parties and to promote the orderly administration of law." *Jones v. State*, 379 Md. 704, 713-14 (2004).

Appellant argues that we should exercise our discretion to "avoid the expense and delay of a post-conviction proceeding challenging the effective assistance of counsel and the trial court's failure to follow Md. Rule 4-246(b)." While the Court of Appeals has exercised its discretion under Md. Rule 8-131(a) to review unpreserved issues relating to jury trial waivers, *see Nalls*, 437 Md. at 693 and *Valonis & Tyler v. State*, 431 Md. 551 (2013), the Court has made clear that it exercised its discretion in those cases to address a "recurring problem- namely, the failure of trial judges to follow [Md. Rule] 4-246(b)." *Nalls*, 437 Md. at 693. In *Nalls*, the Court also noted that "[g]oing forward . . . the appellate courts will continue to review the issue of a trial judge's compliance with [Md. Rule] 4-246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review." *Id.* In subsequent cases, we have declined to exercise the discretion permitted by Md. Rule 8-131(a) to review unpreserved issues in jury trial waiver cases. *See Clark v. State*, 218 Md. App. 230, 246 (2014); *Meredith v. State*, 217 Md. App.

669, 674-75 (2014). We shall not exercise our discretion to consider this admittedly unpreserved issue in this case.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**