Circuit Court for Baltimore City
Case Nos. 115236041, 115236042,
115236043, and 115236044

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 22; September Term, 2017

MARLO LOMAX
v.
STATE OF MARYLAND

No. 208; September Term, 2017

GARY WARD
v.
STATE OF MARYLAND

Wright,
Graeff,
Arthur,
JJ.

Opinion by Arthur, J.

Filed: January 26, 2018

Appellants, Marlo Lomax and Gary Ward, were charged with a variety of offenses arising out of the shooting of Ebron Richmond and Unique Muhammad in Baltimore City. Lomax and Ward were tried together.

A jury found Lomax guilty of the attempted first-degree murder of Richmond, conspiracy to murder Richmond, use of a handgun in the commission of a crime of violence against Richmond, first-degree assault against Muhammad, and use of a handgun in the commission of a crime of violence against Muhammad. The jury found Ward guilty of conspiracy to murder Richmond, first-degree assault against Muhammad, use of a handgun in the commission of a crime of violence against Muhammad, and possession of a firearm after being convicted of a felony.

The court sentenced Lomax and Ward to aggregate, unsuspended sentences of 60 years and 55 years respectively. They appealed. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. The Shooting

At around 9:22 p.m. on July 21, 2015, Richmond was waiting for Muhammad at a bus stop in the 5200 block of York Road in Baltimore. As Muhammad was approaching the bus stop, two men, one dressed in black and the other in gray, came from across the street and opened fire.

Muhammad was shot once, in her leg. Richmond was shot five times – once in the face, once in his hand as he attempted to shield his face, once in the back of the head, and twice in his arm. As a result of the shooting, he lost a finger and suffered damage to his vision and his cognitive faculties.

After Richmond was shot, he attempted to flee, but abandoned his attempt after a few feet, believing that it was futile. Despite his wounds, Richmond remained conscious and observed the assailants get in a "silver . . . or champagne colored four-door car" and drive off. He later testified that he had had "some words" with the defendants about Muhammad, "the girl [he] was with," and believed that this was the motivation for the shooting.

B. The Identifications

On the evening of the shooting, while Richmond was in the hospital, Detective Hawk showed him some still photos that the detective had pulled from the video-surveillance footage of businesses in the vicinity of the crime. The photos were of two men, one in a black hoodie, the other in gray. Richmond identified them as the shooters, but was unable to give the detective their names.

On July 28, 2015, seven days after the shooting, Detective Hawk and Detective Grubb visited Richmond in the hospital. Outside the presence of Detective Hawk, Detective Grubb showed Richmond a photo array, using a double-blind procedure: Detective Grubb himself had not created the array, did not know the identity of the suspect, and did not know the position of the suspect's photo in the array. Richmond identified Lomax as one of the shooters. Upon seeing Lomax's photo, Richmond stated: "That son of a bitch. That was the shooter."

Finally, on August 12, 2015, Detective Hawk and his partner, Detective Nickles, went to Richmond's home to show him another photo array, again employing a double-blind procedure. This time, Richmond identified Ward as one of the shooters. Below

Ward's photo, he wrote: "He came across the street with a silver gun. He took a shot an[d] then his gun [j]ammed. I know he shoot her."

Both men were subsequently arrested and charged.

C. The Trial

On direct examination, Richmond unequivocally testified that Lomax shot him in the face from approximately 10 feet away and that Ward also "took a shot" at him. As the State showed Richmond the video-surveillance footage, he identified Lomax as the man wearing a black shirt and Ward as the man wearing the gray hoodie. He testified that he had picked out both of the defendants from the photo arrays, and he identified both of them in the courtroom. He reiterated his earlier statement that Lomax was the "son of a bitch" who shot him, and he testified that he had clearly seen Ward's face and that Ward had shot at him and Muhammad.

In cross-examination, however, defense counsel exposed a number of flaws and deficiencies in Richmond's testimony. Richmond was unable to remember many of the statements he made to Detective Hawk at the hospital on the night of the shooting, nor did he remember being shown a photo array while at the hospital. In addition, Richmond could not recall initially telling the police that Lomax had a black revolver, as opposed to the silver gun that he described at trial. In Richmond's initial account, he claimed that he had grabbed Muhammad in an attempt to shield her from the attack, but that account was inconsistent with his trial testimony that she was five feet away from him when the shooting began. He believed that he had been in the hospital for more than two months after the shooting, but later conceded that he had been discharged after eight days. He

also believed that he had been shown one photo array when he was home, but later conceded (based on the date) that he had seen it when he was in the hospital. He had told the police that he managed to take a photograph of the shooters with his phone as they walked away, but was unable to find the phone when he awoke in the hospital. The defense stressed that these inconsistencies in Richmond's testimony made his identifications of the defendants unreliable.

The State called an FBI agent to analyze the cell phone data from Lomax's phone. The agent testified that Lomax's phone was in the vicinity of 5200 York Road before the shooting occurred. From approximately 9:00 p.m. to 9:30 p.m., the same cell phone was "either shut off or not in an area where there's service." However, at 9:48 p.m., Lomax's phone was either on again, or it had regained cell phone service. At that point, the phone was in the area of the shooting.

For reasons that are unexplained in the record, Muhammad did not testify at trial. The State did introduce photographs of her injuries, as well as her medical records.

Ultimately, the jury found Lomax guilty of the attempted first-degree murder of Richmond, first-degree assault on Muhammad, and several lesser charges. The jury acquitted Ward of attempted murder, but convicted him of conspiracy to murder Richmond, first-degree assault on Muhammad, and other lesser offenses.

We shall discuss additional facts as they become relevant to the issues on appeal.

QUESTIONS PRESENTED

In this consolidated appeal, Lomax and Ward present four issues, which we have rephrased as follows:

1. Did the circuit court err in finding that there was no prima facie showing that the State was using its peremptory strikes unconstitutionally?

2. Did the circuit court err in allowing statements made during the State's closing argument?

3. Did the circuit court err in denying Ward's motion to suppress a photo array in which Ward was identified as a shooter?

4. Was the evidence sufficient to sustain Ward's convictions?

We conclude that Lomax has waived his challenge to the State's use of peremptory strikes. On the other issues, we find no error. Therefore, we affirm.

DISCUSSION

I. *BATSON* CHALLENGE

During voir dire, the State used six of its first seven peremptory challenges to remove African-American women from the jury. Lomax objected on the grounds that these strikes were unconstitutionally based on race and gender, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The circuit court overruled the objection, finding that Lomax had not established a prima facie case of discrimination. Later, when the clerk asked Lomax whether the panel was acceptable, he did not renew his *Batson* objection, but instead answered in the affirmative.

As Lomax concedes, "a defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors 'is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Gilchrist v. State*, 340 Md. 606, 617 (1995) (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)). "When a party complains about

the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury." *Id.* at 618. It would appear, therefore, that Lomax has waived his *Batson* challenge.

Lomax counters that his counsel substantially complied with the obligation to preserve an objection. Alternatively, he argues that if counsel waived the *Batson* issue, he received ineffective assistance of counsel. We find neither argument persuasive.

1. Substantial Compliance

Lomax has cited no case holding that a criminal defendant can "substantially comply" with the obligation to preserve a *Batson* objection by objecting to the State's use of peremptory strikes during jury selection, but accepting the jury panel after it has been selected. He borrows the concept of "substantial compliance" from the rules pertaining to objections to jury instructions.

Under Rule 4-325(e), "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Nonetheless, "when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule." *Sims v. State*, 319 Md. 540, 549 (1990).

Instances of substantial compliance "represent the rare exceptions" to the general rule that a defendant waives an objection to a jury instruction unless counsel states an objection after the court has given the instruction. *Id.* For example, in *Gore v. State*, 309 Md. 203, 206, 209 (1989), the Court of Appeals found substantial compliance when defense counsel did not reiterate an objection after the court, on its own motion, devised and delivered an erroneous instruction in response to counsel's comments in closing argument and told counsel, "'You can object all you want, but I'm going to do it.'"

Lomax argues that it would have been futile for him to renew the *Batson* challenge after the jury had been selected and, hence, that we should extend the exception for substantial compliance from the area of jury instructions to the area of jury selection. Under his argument, however, the "rare exception[]" would swallow the rule. If a trial court's decisive rejection of a *Batson* challenge were all that it would take to excuse defense counsel's subsequent expression of satisfaction with the jury, it is difficult to imagine how a defendant could ever waive such a challenge.

In any event, substantial compliance is ill-suited in this context. Its application to jury instructions makes sense if counsel fails to reiterate a totally futile objection, such as an objection that the court has already told a lawyer not to bother making. But here, defense counsel did not simply fail to reiterate an arguably futile objection; he affirmatively stated that he found the jury acceptable.

Even in the context of jury instructions, the doctrine of substantial compliance does not apply when defense counsel expressly states that he or she has no objection. *Johnson v. State*, 310 Md. 681, 689 (1987) (holding that defense counsel made an

"express acquiescence" in the instructions when he stated that he had "no exceptions"); *Choate v. State*, 214 Md. App. 118, 129-30 (2013) (finding no substantial compliance where defense counsel agreed with the instruction and told the court that he was satisfied with the instructions); *Braboy v. State*, 130 Md. App. 220, 226-27 (2000) (finding no substantial compliance where defense counsel told the court that the defense has no exceptions). Therefore, even if the doctrine of substantial compliance applied to *Batson* challenges, Lomax could not rely on it, because his counsel expressly stated that the jury, as empaneled, was acceptable.

2. Ineffective Assistance of Counsel

As an alternative ground for reversal, Lomax argues that if his counsel waived the *Batson* challenge, he did not receive effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668 (1984). In our assessment, his argument is premature.

As a general rule, a criminal defendant should raise a claim of ineffective assistance of counsel in a post-conviction proceeding, and not on direct appeal. *See, e.g.*, *Mosley v. State*, 378 Md. 548, 562 (2003). Appellate courts prefer not to evaluate ineffective assistance of counsel claims in direct appeals, "because the trial record rarely reveals why counsel acted or omitted to act[.]" *Id.* at 560. The trial record typically lacks that important information "because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct in issue." *Smith v. State*, 394 Md. 184, 200 (2006). By contrast, in a post-conviction proceeding, the court can take evidence and have "counsel testify and describe

his or her reasons for acting or failing to act[.]" *Johnson v. State*, 292 Md. 405, 435 (1982), *abrogated in part on other grounds*, *Hoey v. State*, 311 Md. 473, 494-95 (1988).

On this record, we are unable to evaluate the reasonableness of counsel's conduct. Lomax's counsel may have well been satisfied with the jury despite the exclusion of the six jurors. She may have thought that the jurors she got were better than the ones that the State struck. It may have been that the *Batson* challenge had an *in terrorem* effect on the State, deterring the State from striking jurors whom it might otherwise have tried to strike.

In short, we have no basis to evaluate whether counsel's acceptance of the jury reflects a careless omission or a conscious, strategic decision. Similarly, we have no basis to evaluate whether counsel's strategy, if any, was reasonable or flawed. Nor do we have a basis to evaluate whether Lomax knew of and either consented to or objected to some strategic decision by counsel. The resolution of this issue must await a post-conviction proceeding.

II. CLOSING ARGUMENT

During trial, an FBI agent, who is an expert in analyzing records from cell phone towers, testified that at the time of the shooting Lomax's phone was "*either* shut off *or* not in an area where there's service." (Emphasis added.) In the rebuttal phase of its closing argument, the State stressed the first part of the agent's disjunctive formulation, but omitted the second, arguing that Lomax had "shut[] his phone off." The State also argued that, according to the agent, "the reason why he wasn't getting any phone calls during the time of the attempted murder was because his phone had been off." Lomax's

counsel objected, asserting, "That's not what the agent said." The court overruled the objection, commenting, "This is argument."

Lomax argues that his conviction should be vacated because, he says, the State engaged in improper argument when it made what he calls an "affirmative and definitive representation" that Lomax's phone was turned off. We disagree.

"A trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991)). Trial courts have broad discretion in determining the propriety of closing arguments. *See Shelton v. State*, 207 Md. App. 363, 386 (2012).

"[A]ttorneys are afforded great leeway in presenting closing arguments[.]" *Degren v. State*, 352 Md. 400, 429 (1999). "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Id.* at 429-30 (quoting *Jones v. State*, 310 Md. 569, 580 (1987), *vacated and remanded on other grounds*, 486 U.S. 1050, *sentence vacated and remanded on other grounds*, 314 Md. 111 (1988)). "As long as 'counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). Reversal is required only "'where it appears that the

remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Degren v. State*, 352 Md. at 431 (quoting *Jones v. State*, 310 Md. at 580).

In this case, the State argued that the jury should draw one possible inference from the agent's testimony – that Lomax had turned his phone off, probably to keep it from disclosing his location, just before he shot Richmond and Muhammad. The inference was both reasonably drawn from the testimony and fairly deducible from the evidence. This is especially so given the unlikelihood that Lomax had briefly gone somewhere in Baltimore City that lacked cell phone service, but had returned to the vicinity of the crime (and regained service) only a few minutes after the crime had occurred. The court, therefore, did not abuse its discretion in overruling Lomax's objection.

Furthermore, on this record, we see no likelihood that the State misled or was likely to have misled the jury. In objecting, Lomax's attorney alerted the jurors to his disagreement with the State's characterization of the testimony by asserting, "That's not what the agent said." In overruling the objection, the trial judge informed the jurors that the State's comments were argument, which, he had previously instructed them, are not evidence, are intended only to help them understand the evidence and apply the law, and are subordinate to their own memory of the evidence. For this additional reason, the court did not abuse its discretion in overruling Lomax's objection.

III. MOTION TO SUPPRESS

Before trial, Ward moved to suppress evidence of the double-blind photo array in which Richmond identified him as one of the shooters. The circuit court denied Ward's motion, and he challenges that ruling in his appeal.

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id*. (quoting *Jones v. State*, 310 Md. at 577). "If the procedure is not impermissibly suggestive, then the inquiry ends." *Id.* "If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.'" *Id*. (quoting *Jones v. State*, 310 Md. at 577). "If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable." *Id.*

The State points out that Ward does not address the first step of this two-step inquiry, because his brief "does not identify any conduct by the police in presenting the photographic array that was suggestive, let alone unduly suggestive." The State contends that Ward's failure to argue why the array was impermissibly suggestive is "fatal to [Ward's] claim." We agree.

Rule 8-504(a)(6) requires "[a]rgument in support of the party's position on each issue." "[I]t is not incumbent upon this Court, merely because a point is mentioned as

being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any ground, or grounds, to sustain the objectionable feature suggested." *State Rds. Comm'n v. Halle*, 228 Md. 24, 32 (1962); *accord Larmore v. Larmore*, 241 Md. 586, 590 (1966). "[W]e have repeatedly declined to address arguments that are not properly briefed," *Blue v. Arrington*, 221 Md. App. 308, 321 (2015), and we need not do so now.

To the extent that we can discern any reason to suspect that the photo array might arguably have been impermissibly suggestive, it comes not from any argument in Ward's brief, but from his factual description of his counsel's unsuccessful arguments at trial. In brief, several weeks before Detective Nickles showed Richmond the photo array in which he identified Ward, Detective Hawk had gone to the hospital to show Richmond still images taken from video-surveillance footage from businesses in the vicinity of the shooting.[1] Before the suppression court, Ward argued that the still photos had influenced Richmond's subsequent identification of him. Yet Richmond, who had suffered some sort of brain injury as a result being shot in the head, testified that he had no recollection of being shown the still photos.

"To do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make." *Conyers v. State*, 115 Md. App. 114, 121 (1997). If

[1] We have not found the still images in the record before us, but presumably they show that Ward and Lomax were at or near the scene of the shooting at the time when it occurred.

Richmond had no recollection of receiving any clues, it is hard to imagine how his identification of Ward, three weeks later, was somehow tainted by any such clues.

At oral argument, Ward's counsel claimed that, when Detective Hawk showed Richmond the still photos from the surveillance footage at the hospital on the night of the shooting, the detective said that the men depicted in the stills were his assailants. That assertion has no support in the record before us. Ward's challenge to the photo array has just as little support.

IV. SUFFICIENCY OF THE EVIDENCE

Ward argues that the pretrial identification by Richmond is so unreliable that it is insufficient to sustain his conviction of any of charges. Ward goes on to argue that, in relation to his "charges associated with Unique Muhhamed [sic]," any subsequent identification after a "tainted identification" is the "fruit of a poisonous tree." Finally, Ward seems to argue that there was insufficient evidence to find an unlawful agreement between him and Lomax, such that a jury could find that a conspiracy existed. We disagree with Ward in all respects.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486, (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the

credibility of witnesses.'" *Id.* (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385(2012) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)).

A court, on appellate review of evidentiary sufficiency, will not "retry the case," or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

1. Lack of Preservation

Rule 4-324(a) allows a criminal defendant to move for a judgment of acquittal at the conclusion of the State's case-in-chief and again at the close of all the evidence. However, the rule also requires the defendant to "state with particularity all reasons why the motion should be granted." Rule 4-324(a). "Grounds that are not raised in support of a motion for judgment of acquittal at trial may not be raised on appeal." *Jones v. State*, 213 Md. App. 208, 215 (2013) (citing *Graham v. State*, 325 Md. 398, 417 (1992)), *aff'd*, 440 Md. 450 (2014). In other words, "'[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, [but] then urge a different reason for the insufficiency on appeal[.]'" *Starr v. State*, 405 Md. 293, 303 (2008) (quoting *McIntyre v. State*, 168 Md. App. 504, 527-28 (2006)).

At trial, Ward moved for judgment of acquittal only on the grounds that there was no evidence of motive or premeditation and deliberation, and not on the grounds he now presents on appeal. Thus, his argument is not preserved for our review.

2. The Merits

Were we to ignore these deficiencies and address Ward's argument on the merits, it would fare no better.

A. Richmond's Identification of Ward

Ward does not seriously dispute the well-established proposition that a victim's identification of an assailant is sufficient evidence to sustain a conviction. *See Branch v. State*, 305 Md. 177, 183 (1986). Instead, he relies on *Kucharczyk v. State*, 235 Md. 334 (1964), a case whose setting has been described as "*sui generis*,"[2] to argue that Richmond's testimony was so unreliable that it lacked the probative value necessary to support a finding of guilt beyond a reasonable doubt.

In *Kucharczyk*, the conviction rested solely on the testimony of the 16-year-old victim, who had a full-scale I.Q. of 56. *Id.* at 336. The victim testified at trial that the alleged crime – a sexual assault – both did and did not occur. *Id.* at 336-37. The victim also testified that he had never previously been to the scene of the assault and that the defendant had taken him there, but also that that he had been there on two prior occasions and that he had taken the defendant there.

In reversing the conviction, the Court of Appeals decided that "the testimony of the prosecuting witness, who was the only person that testified as to any overt act on the part of the [defendant], was so contradictory that it lacked probative force and was thus insufficient to support a finding beyond a reasonable doubt[.]" *Id.* at 337. Borrowing

[2] *Bailey v. State*, 16 Md. App. 83, 93 (1972).

from a civil case, the Court reasoned that "'if any witness's testimony is itself so contradictory that it has no probative force, a jury cannot be invited to speculate about it or to select one or another contradictory statement as the basis of a verdict.'" *Id.* at 338 (quoting *Kaufman, by Deutch v. Baltimore Transit Co*., 197 Md. 141, 145 (1951)). Borrowing from another civil case, the Court added that, "'When a witness says in one breath that a thing is so, and in the next breath that it is not so, his testimony is too inconclusive, contradictory, and uncertain[] to be the basis of a legal conclusion.'" *Id.* at 338 (quoting *Slacum v. Jolley*, 153 Md. 343, 351 (1927)).

The holding from *Kucharczyk*, however, is "extremely limited in scope." *Smith v. State*, 302 Md. 175, 182 (1985). *Kucharczyk*'s limited application was perhaps best summarized by Judge Moylan:

> [T]he life of *Kucharczyk* has been amazing for the number of occasions on which and the number of situations in which it has been invoked in vain. *Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court or, indeed, in some other trial. Nor does *Kucharczyk* apply where a witness's trial testimony contradicts itself as to minor or peripheral details but not as to the core issues of the very occurrence of the corpus delicti or of the criminal agency of the defendant. Nor does *Kucharczyk* apply where the testimony of a witness is "equivocal, doubtful and enigmatical" as to surrounding detail. Nor does *Kucharczyk* apply where a witness is forgetful as to even major details or testifies as to what may seem improbable conduct. Nor does *Kucharczyk* apply where a witness is initially hesitant about giving inculpatory testimony but subsequently does inculpate a defendant. Nor does *Kucharczyk* apply where a witness appears initially to have contradicted himself but later explains or resolves the apparent contradi[c]tion. Nor does *Kucharczyk* apply where a State's witness is contradicted by other State's witnesses. Nor does *Kucharczyk* apply where a State's witness is contradicted by defense witnesses. Nor does *Kucharczyk* apply where a witness does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version.

Bailey v. State, 16 Md. App. 83, 95-97 (1972) (quoting *Thompson v. State*, 5 Md. App. 191, 196-197 (1968)) (citations omitted).

Instead of extending *Kucharczyk* as a means of contending with the frequent contradictions in trial testimony, both this Court and the Court of Appeals have recognized that "'[i]t is the quintessential approach of the Anglo-American trial system to rely fundamentally upon cross-examination, upon the introduction of prior inconsistent statements, upon impeachment devices generally, upon sequestration, upon oral argument to ferret out and to highlight such contradictions if and when they exist.'" *Vogel v. State*, 315 Md. 458, 471 n.6 (1989) (quoting *Bailey v. State*, 16 Md. App. at 93); *see also Pittman v. Atlantic Realty Co*., 359 Md. 513, 546-47 (2000). Hence, in 1972 Judge Moylan observed that "the so-called *Kucharczyk* doctrine . . . was never applied pre-*Kucharczyk* in a criminal appeal and it has never been applied post-*Kucharczyk* in a criminal appeal." *Bailey v. State*, 16 Md. App. at 94. Twenty-eight years later, in 2000, Judge Rodowsky observed that, "[f]rom the time that Judge Moylan wrote *Bailey* to date, no opinion of this Court or of the Court of Special Appeals has encountered a set of facts that justified applying the *Kucharczyk* approach." *Pittman v. Atlantic Realty Co.*, 359 Md. at 546. In 2008 Judge Hollander observed that "we are unaware of any such opinion in the intervening years between *Pittman* and this case." *Brown v. State*, 182 Md. App. 138, 184 (2008). Nor are we aware of any such opinion in the more than nine years that have passed since *Brown*.

This is not one of the "extreme and peculiar" cases in which *Kucharczyk* applies. *Bailey v. State*, 16 Md. App. at 94. Unlike the complaining witness in *Kucharczyk*, Richmond did not contradict himself on the issue of whether a crime had occurred. To the contrary, Richmond consistently identified Lomax and Ward as his assailants, and as the trial court put it, he has not "wavered from that position." The contradictions concern "peripheral details," *Bailey v. State*, 16 Md. App. at 96, such as the color of a gun, how far Muhammad was from Richmond at the time of the shooting, how long he spent in the hospital, and where he was when the detectives showed him one of the photo arrays.

Even under *Kucharczyk*, it was the jury's prerogative to decide whether to believe or not to believe Richmond's testimony in light of those contradictions. Notwithstanding those contradictions, therefore, the court did not err in submitting the case to the jury.

B. Ward's Culpability for the Assault on Muhammad

In support of his argument that the evidence was insufficient to support his conviction for the charges involving Muhammad, Ward advances a one-sentence argument that contains no legal authority. In full, it reads: "For the reasons listed above, appellant argues that any identifications that resulted from the 'fruit of the poisonous tree' which was a tainted identification should also be reversed." We interpret this sentence to mean that the trial court was required to disregard Richmond's in-court identification of Ward as one of Muhammad's assailants, because that identification was in some way "tainted," perhaps by an impermissibly suggestive photo array.

Because Ward's brief contains no argument that the photo arrays actually were impermissibly suggestive, and because the record does not support the argument to that

effect that he made at trial, we have no basis to conclude that the trial court was required to disregard the identification in deciding whether to submit the case to the jury. The court did not err in allowing the jury to decide the charges pertaining to the offense against Muhammad.

C. Ward's Culpability for Conspiracy to Murder Richmond

Lastly, Ward argues that there was insufficient evidence to establish an unlawful agreement between Ward and Lomax. We disagree.

"In Maryland, conspiracy remains a common law crime." *Mitchell v. State*, 363 Md. 130, 145 (2001). The Court of Appeals has described the offense as follows:

> "A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown."

Id. (quoting *Townes v. State*, 314 Md. 71, 75 (1988)).

The Court continued:

> Although a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred, the requirement that there must be a meeting of the minds—a unity of purpose and design—means that the parties to a conspiracy, at the very least, must (1) have given sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy—the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act. Absent that minimum level of understanding, there cannot be the required unity of purpose and design.

Id. at 145-46 (citations omitted).

Here, the jury was entitled to infer that Ward and Lomax had reached an unlawful agreement, because Richmond's testimony established that the two men were acting together for the purpose of shooting and killing him. After testifying that he "had some words" with the defendants, Richmond testified that they advanced on him, firing guns, and then got into a car together and fled. Each step forward, each round fired, and each stride to the getaway car serve as evidence to sustain the conspiracy conviction against Ward.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.