UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1789

September Term, 2013

TONY STEPHENSON

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: January 13, 2015

On July 31, 2013, Tony Stephenson, appellant, was convicted by a jury in the Circuit Court for Baltimore City of conspiracy to commit robbery with a dangerous or deadly weapon, robbery, conspiracy to commit robbery, second degree assault, conspiracy to commit second degree assault, theft, and conspiracy to commit theft. The trial judge sentenced appellant to twelve years on the conspiracy to commit robbery with a dangerous or deadly weapon charge and imposed a concurrent twelve year term for the robbery conviction. No sentences were imposed for the other convictions. In this timely appeal, Stephenson presents two questions for our review:

> 1. Was the evidence sufficient to sustain the conviction for conspiracy to commit robbery with a dangerous or deadly weapon?
>
> 2. Was the evidence sufficient to sustain the conviction for robbery?

I.
A. Testimony of Henry Edward Croxton, Jr.

Henry Edward Croxton, Jr., (hereinafter "Croxton") at the time of the trial in this case, was 50 years old and lived with his sister in Baltimore City. Since he was a child, he has had a seizure disorder for which he currently takes Dilantin, Haldol, and Cogentin. According to Croxton's testimony, the medication sometimes makes him drowsy but it does not affect his memory or ability to think.

On January 4, 2013, Croxton was the victim of a robbery that occurred in an alley not far from the Urban Liquor Store. Croxton went to the liquor store at about 3:00 p.m. on January 4, 2013, but before arriving at the store, he had been at an establishment located on Northern Parkway in Baltimore City. According to Croxton, when he arrived at the liquor

store, he had over $1,000.00 in his pocket that he won through games of chance on Northern Parkway. He was at the Urban Liquor Store for the next six hours, approximately. He played the Keno machine and bought scratch-off lottery tickets and won more money.

While Croxton was in the liquor store, he pulled out a wad of money and counted his winnings. This drew the attention of some of the patrons in the store, including appellant, whom Croxton had known for six or seven years. While at the liquor store, other persons came up and made comments and later watched him gamble. One of those was a man named "Reggie" and another was named "Chucky." Also, while he was playing, on several occasions he spoke to "Officer Danny," a special police officer. On the day in question, "Officer Danny" lent Croxton $5.00, but the record is unclear as to why Croxton borrowed the money.

At one point, appellant entered the liquor store and asked Croxton for a cigarette. Croxton refused to give him one, which made appellant mad. Appellant said: "People get killed over two dollars."

At approximately 9:00 p.m. on January 4, 2013, Croxton left the liquor store to go home. He walked through an alley to get there. But while in the alley, he was robbed and assaulted.

According to Croxton, before he was robbed, he looked down the alley and saw three men approaching. Appellant was in the lead followed by a person with a baseball bat, who, in turn, was followed by a third person. The threesome were all "stooping down" and wore

masks. Appellant approached Croxton and put a gun to his head and said: "You're killed over three dollars." Croxton emptied his pockets and his money fell to the ground. The man with the baseball bat swung the bat and hit Croxton in the left leg. This caused Croxton to fall and to hit his head and to eventually lose consciousness. Despite the fact that Mr. Stephenson was wearing a mask, Croxton recognized him by his voice, his "beady eyes" and his beard. The gun that appellant used was a black automatic.

After the robbery, Croxton went to his home and told his sister to call the police, but she did not do so until two days later. When he was interviewed by the police, he was shown a photographic line-up and selected appellant's picture as one of his assailants. He went to the hospital for his injuries a week or two after the robbery. On cross-examination, Croxton admitted that he falsely told the police that a lady took him to the hospital on the night of the robbery.

B. Testimony of Baltimore City Police Department Special Police Officer Danny Sweitzer

Much of Officer Danny Sweitzer's testimony corroborated that of Croxton. Officer Sweitzer, on the day of the robbery, was employed as a special police officer at the shopping center in which the Urban Liquor Store is located. Officer Sweitzer had known Croxton for approximately two years before the date Croxton was robbed. He described Croxton as a "mentally disabled individual."

On January 4, 2013, he saw Croxton at about 3:00 p.m. and lent him $5.00. He also saw Croxton go into the Urban Liquor Store and start to play a "scratch off" lottery game and

later play other games of chance. Croxton started winning money so Officer Sweitzer checked on him at 4:00 p.m. and 5:00 p.m. By 5:00 p.m., Croxton had won "a wad of money," which Croxton was openly displaying. Officer Sweitzer told Croxton to put the money away because "people [were] watching him." He again checked on Croxton at 5:15 p.m. and 8:45 p.m. Among the persons watching Croxton gamble were appellant and two men named "Corey" and "Charles." At one point, Croxton left the liquor store to smoke a cigarette whereupon he was joined by appellant. When appellant asked Croxton for a cigarette, Croxton's response was: "[no], it's two dollars like you charged me." Appellant replied, "[a]w, it's going to be like that now." Appellant walked away acting "a little upset." At 8:55 p.m., Officer Sweitzer saw appellant and men he knew as "Corey" and "Charles" leave the liquor store. Croxton left the store at approximately 9:00 p.m.

Officer Sweitzer next saw Croxton two days later. Croxton was "limping" and "upset." When he asked him about his limp, Croxton told him what had happened in the alley whereupon Officer Sweitzer called his supervisor. The supervisor, however, did not call the police immediately but did so approximately two days later.

C. Testimony of Baltimore Police Sergeant Kurt Henry

Sgt. Henry testified that he interviewed Croxton on January 10, 2014, six days after the incident occurred. He corroborated Croxton's testimony that Croxton had selected appellant's picture out of a photographic array and identified appellant as one of the men who had robbed him.

II.
MOTION FOR JUDGMENT OF ACQUITTAL

At the conclusion of the State's case, appellant's trial counsel made a motion for judgment of acquittal. Defense counsel stated:

> I am moving for judgment of acquittal as to all of the charges. Specifically, I would like to argue the charges involving the firearm. I would just argue that at this point, the State has provided insufficient evidence to sufficiently describe a regulated firearm. There's been some testimony back and forth. I think the ultimate testimony was that Mr. Croxton just [f]elt something to the back of his head.

The trial judge denied the motion after pointing out that Croxton "also testified that it was an automatic handgun." Appellant elected to put on no evidence. Defense counsel then renewed the motion for judgment of acquittal, but put forth no additional grounds. The trial judge denied that motion.

III.
ANALYSIS

A. First Issue Presented

Appellant contends that the evidence was insufficient to convict him of conspiracy to commit robbery with a dangerous and deadly weapon. According to appellant, the State failed to prove that he entered into a criminal agreement with one or more people and also failed to prove that appellant entered into that agreement with the specific intent to commit (or cause the commission of) a robbery perpetrated by the use of a dangerous weapon. The State responds, preliminarily, that the aforementioned contentions were not grounds raised in the trial court and therefore cannot be raised for the first time on appeal.

Maryland Rule 4-324(a) reads, in material part, as follows:

> (a) **Generally**. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial. at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted.*

(Emphasis added).

Generally, "[i]n a criminal action, when a jury is the trier of fact, appellate review of sufficiency of evidence is available only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking." *Anthony v. State*, 117 Md. App. 119, 126 (1997). Grounds that are not raised in support of a motion for judgment of acquittal may not be raised on appeal. *See Graham v. State*, 325 Md. 398, 416 (1992).

Plainly, pursuant to the dictates of Md. Rule 4-324(a), appellant did not preserve for appellate review the two arguments his counsel now advances. Recognizing this fact, at least implicitly, appellant argues "[t]o the extent . . . that this Court deems the specific issue of evidentiary sufficiency underlying the conspiracy conviction unpreserved, it is urged to review the sufficiency of the evidence under the rubric of ineffective assistance of counsel." For that proposition, appellant cites *Testerman v. State*, 170 Md. App. 324 (2006). In *Testerman*, we said:

> In addressing appellant's ineffective assistance claim, the first question is whether we may address this issue on direct appeal. In that regard, we note that generally a post-conviction proceeding is the "most appropriate" way to raise a claim of ineffective assistance of counsel, *Mosley v. State*, 378 Md.

> 548, 558-59, 836 A.2d 678 (2003), because "ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. 717, 726, 770 A.2d 202 (2001). But, we may nonetheless do so, "where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *Id*.; *see Mosley*, 378 Md. at 566, 836 A.2d 678; *Lettley v. State*, 358 Md. 26, 32, 746 A.2d 392 (2000).
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> The "critical facts are not in dispute" here: Appellant changed seats with his front seat passenger after complying with a request by a police officer to stop his vehicle. And, since this issue was fully aired at trial, "the record is sufficiently developed to permit a fair evaluation of [appellant's] claim." Hence, we conclude that "there is no need for a collateral fact-finding proceeding, and review [of appellant's claim]" by this Court would "be appropriate and desirable."

Id. at 335-36.

In his brief, appellant does not explain exactly how he contends that his trial lawyer was ineffective. Nevertheless, because the sole issue briefed is whether there was sufficient evidence to sustain appellant's convictions, we assume that appellant contends that his lawyer was ineffective because counsel did not make a motion for judgment of acquittal raising the same issues as are raised in this appeal.

The record is clear that trial counsel was not ineffective in failing to make a motion for judgment of acquittal on the grounds now advanced by appellant. If such a motion had been made, the trial judge would have been required to deny the motion. We explain.

When considering a motion for judgment of acquittal based on evidentiary sufficiency, the trial judge, as well as a reviewing court, must determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could . . .

[find] the essential elements of the crime beyond a reasonable doubt." *Carroll v. State*, 202 Md. App. 487, 504 (2011) (citing *Smith v. State*, 415 Md. 174, 184 (2010)).

Appellant makes the following argument:

> Viewing the evidence in the light most favorable to the State in this case, the State failed to prove that Mr. Stephenson conspired specifically to commit robbery by way of a dangerous weapon. The gap in the State's evidence was proof that Mr. Stephenson acceded to commit a robbery that included use of a weapon, when the State never showed that Mr. Stephenson had knowledge of the weapon's existence. *See Howard v. State*, 66 Md. App. 273 (1986). As a result, the State failed to provide sufficient evidence in support of the conspiracy conviction, necessitating vacation of that conviction and its associated sentence.

The above argument overlooks the fact that, according to Croxton's testimony, it was appellant who held a gun to his [Croxton's] head. Quite obviously, if appellant held the gun, it can be inferred, legitimately, that he knew it was to be used in a robbery.[1]

As already mentioned, appellant also contends that the State failed to prove that he entered into a criminal agreement with others. As in most conspiracy cases, there was no direct evidence of an agreement between appellant and the two other persons who

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[1] Appellant says in a footnote that "[i]t is worth mentioning that the dangerous weapon at issue could not be the handgun about which Mr. Croxton testified. The jury expressed its finding that Mr. Stephenson did not possess a handgun, as evidenced by its jury note to the court and its acquittal on the substantive charge of robbery with a deadly weapon." The short answer to this contention is that what the jury inquired about or what the jury decided in regard to whether appellant held a handgun is immaterial when, as here, the question is whether appellant's trial counsel was ineffective because he did not contend below that a judgment of acquittal should be granted because the State did not produce sufficient evidence to present a jury issue as to whether appellant used a handgun in the robbery.

participated in the armed robbery. But, a jury could easily infer that there was such an agreement based on Croxton's testimony. The three robbers acted in unison. They all came down the alley together. The three assailants were, according to Croxton, all "stooping down" as they approached him. All three individuals were wearing masks that covered half of their faces. Appellant approached the victim and placed a gun to his head and said, "You're killed over three dollars." When Croxton heard appellant make that statement, he emptied his pockets. A second individual then struck Croxton in his left leg with a baseball bat. After Croxton was struck, the third participant in the robbery approached him while he was on the ground. They took Croxton's money and fled the area. From the above testimony, a rational jury could infer that the three assailants worked in concert. Therefore, there was sufficient evidence presented to prove that the three conspired to commit a robbery with a dangerous weapon.

B. Second Issue Presented

Appellant contends that there was insufficient evidence presented to the jury to convict him of robbery. That contention was not raised below but, presumably, appellant contends that his trial counsel should have made a motion for judgment of acquittal making the same argument that he now advances. Once again, if such an argument had been made at trial, the judge would have erred if she had granted it. Therefore, trial counsel for appellant was not ineffective in failing to make such an argument. Appellant disagrees, but his sole basis for disagreement is founded on *Kucharczyk v. State*, 235 Md. 334 (1964). That

case stands for the proposition 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. Appellant argues:

> [T]hat the holding in *Kucharczyk* controls his case and, as a result, his conviction for robbery must be vacated. It is appellant's contention that Mr. Croxton's testimony cannot be deemed reliable in any sense of the word. Between Mr. Croxton's disability, the medications he takes to manage that disability, the contradictions in his testimony, and the confusing and ambiguous nature of his testimony, Mr. Croxton's account cannot stand as the sole basis for Mr. Stephenson's conviction. Because Mr. Croxton was the only State's witness to describe the substantive acts underlying the conviction, the State presented inadequate credible evidence upon which it could base that conviction.

In *Turner v. State*, 192 Md. App. 45 (2010), we pointed out that

> *Kucharczyk* has been narrowly interpreted. *See Bailey v. State*, 16 Md. App. 83, 94 (1972) ("Some appreciation of the limited utility of the so-called *Kucharczyk* doctrine may be gathered from the fact that it was never applied pre-*Kucharczyk* in a criminal appeal and it has never been applied post-*Kucharczyk* in a criminal appeal."); *see also Vogel v. State*, 76 Md. App. 56, 59 (1988) ("*Kucharczyk* does not remotely stand for the proposition for which it is so regularly cited – that marginal or even impeachable testimony is entitled to no weight."), *aff'd*, 315 Md. 458 (1989).
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> Writing for the Court in *Bailey*, 16 Md. App. 83, Judge Moylan addressed the contours of *Kucharczyk*. He stated, *id.* at 96 (internal quotations and citations omitted):
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> > 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 appears initially to have contradicted himself but later explains or resolves the apparent contradiction. 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.

Similarly, in *Wilson v. State*, 261 Md. 551, 556-58 (1971), the Court of Appeals held that a witness's testimony, which wholly contradicted the statement the witness gave to the police, was not barred by *Kucharczyk*. The Court explained: "The jury was well aware of the prior inconsistent statement of the witness . . . and was faced with judging her credibility in the light of such inconsistency. That, of course, is a task for the jury rather than the appellate tribunal." *Id*. at 558. Almost thirty years after *Wilson*, 261 Md. 551, in *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000), the Court of Appeals again rejected the extension of *Kucharczyk*.

More recently, in *Brown v. State*, 182 Md. App. 138, 183 (2008), this Court highlighted that the lone witness in *Kucharczyk* gave "*internally* inconsistent" testimony. (Emphasis in original.) The *Brown* Court said, *id*.:

> The *[Bailey]* Court noted that, "[d]espite the limited utility of the doctrine, the 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." *Id*. at 95. Of import here, in reciting a variety of situations in which citation to *Kucharczyk* was inapposite, we began with the example that "*Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court . . . ." *Id.* (eight supporting citations omitted).

Turner, 192 Md. App. At 81-83.

Turning to the case at hand, we hold that *Kucharczyk* is inapposite. It is true that officer Sweitzer described Croxton as a "mentally disabled individual." But that characterization, standing alone, would not be enough for a trial judge, considering a motion

for judgment of acquittal, to disregard Croxton's testimony. As the trial judge instructed the jury, it was up to them to evaluate the credibility of the witnesses that testified.

In regard to the medications that Croxton took, no evidence was presented to contradict Croxton's testimony that the medications did not affect his thinking capacity or his memory. Moreover, Croxton's testimony that appellant participated in the robbery, how the robbery occurred, and what happened during the robbery was consistent. The only "contradictions" that appellant points to in his brief are three: 1) Croxton lied to the police when he told them that a woman drove him to the hospital on January 4, 2013, when in fact he didn't go to the hospital until at least a week after the robbery; 2) he testified that he went to the police two days after the incident, but Sergeant Henry testified that Croxton went to the police station six days afterward; and 3) at one point in his testimony, Croxton said he had $600.00 on him immediately before he was robbed but at another point he said he had "a thousand" on him. Those three "contradictions" were minor ones and were clearly not of a magnitude that would allow us to say, as a matter of law, that it was improper for the jury to use Croxton's testimony in order to convict appellant of robbery.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.