UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2785

September Term, 2015

JOSE BARRERA

v.

STATE OF MARYLAND

Arthur,
Beachley,
Shaw Geter,

JJ.

Opinion by Beachley, J.

Filed: April 4, 2017

A jury in the Circuit Court for Prince George's County convicted appellant Jose Barrera of conspiracy to commit robbery and theft under $1,000. The court sentenced appellant to fifteen years' imprisonment, all but eight years suspended, with five years' supervised probation for the conspiracy conviction, and a concurrent term of eighteen months for the theft conviction. Appellant presents four issues on appeal:

1. Whether the trial judge erred in finding that there was sufficient evidence for the jury to consider conspiracy.

2. Whether the jury verdicts of not guilty of robbery under an aiding and abetting theory and guilty of conspiracy to commit robbery were legally inconsistent.

3. Whether the trial court committed reversible error when it failed to respond to a question from the deliberating jury on an issue central to the case, in a way that clarified the confusion evidenced by the query.

4. Whether the trial court committed reversible error when it limited appellant's ability to comment on cross-racial identification during closing argument.

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

FACTUAL BACKGROUND

On December 20, 2014, Christian Stevens and Samantha Dulsaeng drove to Hyattsville, Maryland, to sell a pair of Air Jordan 11 sneakers. Stevens had purchased the shoes from Foot Locker using an employee discount and had agreed via Facebook to sell them to a person who identified himself as "Day-Day Highly Paid" ("Day-Day"). Stevens and Dulsaeng arrived at the agreed upon location, the 1600 block of Allison Street, at approximately 11:00 a.m. Stevens messaged Day-Day, and soon after Day-Day approached the vehicle. Stevens and Day-Day discussed the shoe sale for fifteen to twenty

minutes, at which point Day-Day walked away from Stevens's vehicle toward the houses on the other side of the street. Stevens remained at his vehicle.

Approximately seven to ten minutes later, Day-Day returned to the vehicle with a second individual, whom Stevens later identified as appellant. Stevens noted that appellant was wearing a cold weather face mask that covered his face from the nose down. Stevens showed the two men one of the shoes and asked for the money. The men then led Stevens down the street to a location where he was to receive the money. After passing four to five houses, the men turned up a driveway. Stevens once again "took out another one of the shoes to display to [Day-Day]'s mother," but refused to allow Day-Day to leave the immediate area with the shoe. At that point, appellant grabbed the bag containing the box and the other shoe and said "[g]ive me the bag." Day-Day simultaneously grabbed the shoe Stevens was holding in his hand. Stevens was able to briefly grab the bag back from appellant. Day-Day, however, pulled out a handgun and pointed it at Stevens, who then released the bag to appellant. Appellant and Day-Day walked away from the scene with appellant's shoes, laughing. Stevens returned to his vehicle to call 911.

Later that day, Eric Pickens, a friend of Stevens, saw an advertisement for a pair of Air Jordan 11 shoes on Facebook. Pickens determined that these were the same shoes stolen from Stevens, and arranged to meet the seller that same night in Hyattsville to purchase the shoes. When Pickens arrived at the agreed upon location, he asked to examine the shoes and inquired whether they had been previously worn. The seller dropped the shoes and fled the area. Pickens took the shoes and returned them to Stevens. In a written

statement to the police, Pickens noted that the purported seller of the shoes was named Day-Day.

On the night of the robbery, Detective Jamison Spicer showed Stevens a photo array to aid in identifying his assailants. In "less than a minute, maybe two," Stevens identified a photograph of Daikel Hosley-Stewart as Day-Day. On December 27, 2014, Detective Zedrick Deleon showed Stevens a second photo array. According to Deleon, it took Stevens three minutes to identify a photograph of appellant as his second assailant.[1]

A jury convicted appellant of conspiracy to commit robbery and theft under $1,000. Appellant was acquitted of armed robbery, robbery, use of a firearm in a crime of violence, first-degree assault, second-degree assault, and wearing, carrying, and transporting a handgun upon his person. As noted above, appellant was sentenced to an executed term of eight years' imprisonment on the conspiracy conviction and an eighteen month concurrent sentence for the theft. This timely appeal ensued.

DISCUSSION

I. Sufficiency of Evidence

Appellant first argues that the trial court erred in denying his motion for judgment of acquittal. He contends that "[t]he evidence was not sufficient to support conspiracy to commit robbery and the trial judge relied on the wrong elements when making his decision." We disagree.

[1] During cross-examination, Stevens testified that it took him a "little longer" to identify appellant than Day-Day, and estimated that it took "around 15 minutes."

As a preliminary matter, it is not clear that, in ruling on appellant's motion for judgment of acquittal, the trial court relied upon the wrong elements for conspiracy to commit robbery. The trial court merely stated that based on the evidence presented by the State, "the elements have been presented to the jury and . . . there is sufficient evidence for them to make a finding." The trial court did not even attempt to specifically articulate the elements of conspiracy in its ruling. Moreover, appellant's argument ignores the well-settled principle that judges are presumed to know the law and apply it properly. *Medley v. State*, 386 Md. 3, 7 (2005) (noting that "absent a misstatement of law, a [t]rial [judge is] presumed to know the law and apply it properly.") (internal citations and quotations omitted).

Further, even if the trial court did rely upon the wrong elements, this would have no impact on our review of the sufficiency of evidence. "[W]hen an appellate court is called upon to determine whether sufficient evidence exists to sustain a criminal conviction, it is not the function or duty of the appellate court to undertake a review of the record that would amount to . . . a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994). Rather, "the duty of the appellate court is only to determine '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.'" *Id.* at 479 (emphasis in original) (quoting *Jackson v. State*, 443 U.S. 307, 318-19 (1979)). To be legally sufficient, "evidence (if believed) must either show directly, or support a rational inference of, the fact to be proved." *Tasco v. State*, 223 Md. 503, 510 (1960). Our review of a trial court's

denial of a motion for judgment of acquittal "becomes a determination of the sufficiency of the evidence." *Gray v. State*, 4 Md. App. 175, 179 (1968). The trial court's analysis of the elements of conspiracy is therefore not relevant to our review.

"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." *Carroll v. State*, 428 Md. 679, 696 (2012) (internal citations and quotations omitted). Conspiracy is an unlawful agreement which "need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Id.* at 696-97 (internal citations and quotations omitted). We have noted previously that "[i]n conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime." *Jones v. State*, 132 Md. App. 657, 660 (2000). As a result, "[i]t is commonplace that we may infer the existence of a conspiracy from circumstantial evidence." *Id.*

Maryland courts have inferred the existence of a conspiracy when co-defendants engage in coordinated action. In *Jones*, we explained:

> If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

132 Md. App. at 660. We acknowledged that coordinated action does not necessitate the existence of a conspiracy, noting that "[t]heoretically, one might decide on the spur of the moment to aid and abet another in a crime without ever having been solicited to do so and

without any even implicit understanding between the parties." *Id.* at 661. Nonetheless, we have held that evidence of coordinated action "gives rise at least to a permitted inference" of a conspiracy. *Id.*

In the instant case, appellant's and Day-Day's coordinated actions give rise to a permissible inference of a conspiracy to rob Stevens. After Day-Day's initial meeting with Stevens, appellant and Day-Day returned to Stevens's vehicle together. They both led Stevens away from the vehicle. Stevens testified that, contemporaneously with appellant grabbing the bag, Day-Day "snatched" the other shoe. After Stevens was able to retrieve the bag from appellant, Day-Day produced the gun which allowed appellant to immediately take the bag back from Stevens. The pair left the scene together. Moreover, that appellant wore a mask concealing part of his face would permit a jury to infer an intent to rob. As appellant notes in his brief, there are innocent explanations for these behaviors that do not include an agreement to rob Stevens. However, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Riley v. State*, 227 Md. App. 249, 255 (2016). Given the permissible inference a rational finder of fact could make from appellant's and Day-Day's coordinated action, and the other circumstances related to the crime, the trial court correctly denied appellant's motion for judgment of acquittal.

II. Inconsistent Verdicts

Appellant next contends the trial court erred in accepting the jury's guilty verdict on conspiracy to commit robbery in light of his acquittal for robbery. He argues the two verdicts are legally inconsistent and require reversal.

"We review de novo the question of whether verdicts are legally inconsistent." *Teixeira v. State*, 213 Md. App. 664, 668 (2013). In doing so, "we review the elements of the offense at issue in light of the jury instructions." *Id.* In *McNeal v. State*, 426 Md. 455, 458 (2012), the Court of Appeals noted the distinction between legally inconsistent verdicts and factually inconsistent verdicts. "A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law." *Id.* Verdicts are legally inconsistent when "a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge[.]" *Id.* Factually inconsistent verdicts, on the other hand, "are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge." *Id.* The Court held that legally inconsistent jury verdicts are prohibited in Maryland, but factually inconsistent verdicts are not. *Id.*

Maryland courts have attempted to clarify the admittedly thin line between legally and factually inconsistent verdicts. For example, in *McNeal* the defendant was convicted of possessing a regulated firearm after receiving a prior conviction for a disqualifying crime, but acquitted of wearing, carrying, or transporting a handgun. *Id.* at 460. The Court held that the verdicts were factually inconsistent and therefore permissible, reasoning that

the possession charge "contain[ed] legal elements that are distinct from the elements in a wearing, carrying, or transporting a handgun charge[,]" and "[t]here [was] no lesser included offense or predicate crime involved in McNeal's inconsistent verdicts." *Id*. at 472

Similarly, in *Teixeira*, *supra*, the defendant was convicted, *inter alia*, of armed carjacking and armed robbery. He was acquitted, however, of use of a handgun in the commission of a crime of violence and wearing, carrying and transporting a handgun. *Id.* at 668. We held that those verdicts were factually inconsistent because armed carjacking and armed robbery each require the State to prove use of a dangerous weapon, while the handgun charges require the use or carrying of a firearm. *Id.* at 680-81. In holding that the verdicts were factually inconsistent, we stated:

> What we are left with are verdicts that are factually inconsistent, for reasons known but to the jury. The venire could have decided that, as to the wearing or carrying charge, Teixeira did not do so "with the purpose of injuring or killing another." This element is not a predicate either to the armed robbery or armed carjacking charges. As to the handgun use charge, the jurors could well have decided that Teixeira had not employed a handgun that met the definition of "firearm," but instead another dangerous weapon or even an instrument that was not "capable of being concealed on or about the person and which is designed to fire a bullet by the explosion of gunpowder." *See* Crim. Law § 4-204(a)(1)(i). Use of a handgun that meets the statutory criteria is a sufficient, but not necessary predicate for a conviction of either armed carjacking or armed robbery.

Id. at 681-82 (footnotes omitted). We concluded that "[a]ny manner by which the jury strays from the prosecution's theory of the case, as presented in the indictment, leads us not to legal inconsistency but to factual anomalies." *Id.* at 683.

In this case, appellant's conviction for conspiracy to commit robbery and his acquittal of robbery are not legally inconsistent. With regard to the conspiracy count, the jury was instructed as follows:

> Defendant is charged with the crime of conspiracy to commit robbery. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the Defendant of conspiracy, the State must prove that the Defendant agreed with at least one other person to commit the crime of robbery and that the Defendant entered into the agreement with the intent that the crime of robbery be committed.

As to the robbery count the court gave the following instruction regarding accomplice liability:

> The Defendant may be guilty of armed robbery, robbery, use of a handgun in a crime of violence, first-degree assault, second-degree assault, theft less than a thousand dollars as an accomplice even though the Defendant did not personally commit the acts that constitutes the crime.
>
> In order to convict the Defendant of . . . robbery . . . the State must prove that the . . . robbery . . . occurred and the Defendant with the intent to make the crime happen knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to the primary actor in the crime that he was ready, willing and able to lend support if needed.

As in *McNeal* and *Teixeira*, these charges contain elements that are distinct from one another. Conspiracy is essentially an agreement with another person with the intent to commit a crime. The elements of robbery under a theory of accomplice liability include: 1) that a robbery occurred; 2) the defendant knowingly aided, counseled, commanded or encouraged the commission of the crime, or communicated to a participant in the crime that he was ready, willing, and able to lend support if needed; 3) with intent that the robbery occur. Neither count is a lesser included offense nor predicate crime of the other.

Appellant contends, however, that in this case the elements of aiding and abetting the robbery became necessary elements of the conspiracy charge. He notes that the State's theory for establishing a conspiracy was that he aided in the robbery, and as a result a jury could not have found a conspiracy without also finding that he aided and abetted. But as we noted in *Teixeira*, the State's theory of the case is irrelevant; our focus is on the elements of the crimes divorced from the facts and evidence presented at trial. Just as the jury in *Teixeira* was permitted to find the defendant guilty of armed carjacking and armed robbery while acquitting him of the handgun offenses, the jury in this case could reasonably find that appellant's actions met the elements of conspiracy, but were insufficient to establish that he aided or abetted the robbery. Because these verdicts are factually rather than legally inconsistent, the trial court did not err in accepting them.

III. Response to Jury Question

Appellant next argues that the trial court erred by failing to adequately respond to a question raised by the jury during its deliberation. He contends the court only responded to the first part of a two part question and abused its discretion by insufficiently clarifying an issue central to the case. We disagree.

After retiring to deliberate, the court received the following note from the jury:

> Question number one: Can we agree on not guilty on Count 2 [robbery] and guilty on Count 8 [conspiracy to commit robbery]? Is this appropriate or are they one in the same?

In response to this question, the State requested that the court point the jury to two jury instructions, including an instruction which provided that each count should be considered

separately. Appellant asserted that the court should direct the jury to all of the jury instructions; he objected to the court referring the jury to a specific instruction. The court determined that "if there is a clear answer to give someone . . . we should go ahead and do it," and referred the jury to the instruction that all counts should be considered separately. Appellant objected to the court "directing [the jury] to a specific instruction." Ultimately, as mentioned above, the jury returned a verdict of not guilty on the robbery count, but guilty of conspiracy.

As a preliminary matter, we note the inconsistency between what appellant argued below and what he now argues on appeal. At trial, appellant asked that the trial court simply refer to the jury instructions as a whole and objected to the singling out of a specific instruction. On appeal, he argues that the trial court should have directly answered whether the crimes "are one in the same." This Court will usually not address an issue unless it is raised or decided by the trial court. Md. Rule 8-131(a). The purpose of the Rule is to prevent "sandbagging" and allow the trial court to correct any potential errors. Not only did appellant fail to request the trial court to answer the specific question, but at trial he requested that the jury should be referred to *all* of the instructions. Accordingly, appellant's argument on appeal is not preserved. *See generally, Perry v. State*, 344 Md. 204, 241-42 (1996).

Even if appellant's argument were preserved, we would find no error. Md. Rule 4-325 provides that the trial court "may supplement [jury instructions] at a later time when appropriate." "Whether to give a jury supplemental instructions in a criminal case is within

the discretion of the trial judge." *Lovell v. State*, 347 Md. 623, 657 (1997). This discretion is not without limit. Maryland courts have held that "a trial court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *State v. Baby*, 404 Md. 220, 263 (2008) (citing *Lovell*, 347 Md. 623 (1997)). In *Baby*, after being instructed on the definition of rape, the jury submitted a note which asked "If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?" *Id.* at 262. The jury later asked "If at any time the woman says stop is that rape?" *Id.* The trial court declined to respond to either question and referred the jury back to the instructions and definition of rape given. *Id.* The Court of Appeals held that the trial court abused its discretion because the issue of consent was central to the charge of first degree rape, and the definition of rape provided "makes no reference to the issue of post-penetration withdrawal of consent which was central to the jury's questions." *Id.* at 263-64.

In contrast, in *Mulley v. State*, 228 Md. App. 364, 375 (2016), this Court found that a trial court did not abuse its discretion by answering the jury's question with a written copy of its instructions. In that case, the trial court instructed the jury on the charge of wearing, carrying, or transporting a handgun. *Id.* at 371. The next day, the jury asked the court five questions, including "does State have to prove each element of 'wear, carry or transport?'" *Id.* at 373. The court responded by providing written excerpts from the jury

instructions it had previously read aloud. *Id* at 375. In holding that this was not an abuse of discretion, we noted that:

> Unlike the situation in *Baby*, the jury in this case did not communicate to the court an unambiguous question of law that the trial judge refused to clarify. In the instant case, a correct answer to the jury's question . . . was contained within the court's supplemental instruction.

Id. at 381. *See also Lee v. State*, 186 Md. App. 631, 665-66 (2009), *rev'd on other grounds*, 418 Md. 136 (2011) (holding that "the court's response to the jury, that the answer to the jury's question was contained in the jury instructions already provided, did address the jury's question.")

Here, as in *Mulley* and *Lee*, the answer to the jury's question was contained in the jury instructions originally given and which the court referred to in responding to the jury's note. Maryland Criminal Pattern Jury Instruction 3:06 (2012) provides in part that the jury "must consider each charge separately and return a separate verdict for each charge." This sufficiently answered the jury's question as to whether it could reach different verdicts on different counts. Accordingly, the trial court did not abuse its discretion by referring to a specific instruction previously given to the jury.

Finally, even if the trial court had abused its discretion, this error would have been harmless. The Court of Appeals articulated the standard for harmless error in *Dorsey v. State*, 276 Md. 638, 659 (1976):

> [W]hen an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed "harmless" and a reversal is mandated.

In this case, as appellant correctly notes in his brief, the correct answer to the jury's question was clearly that "conspiracy and robbery are not one in the same" and, as a result, appellant could be convicted of one and acquitted of the other. Putting aside the adequacy of the trial court's response to the question, the jury obviously understood that robbery and conspiracy to commit robbery are separate crimes – it convicted appellant of conspiracy and acquitted him of robbery. Any error in the trial court's response to the jury question is harmless beyond a reasonable doubt.

IV. Cross-Racial Identification

Appellant's final contention is that "the trial court committed reversible error when it limited the Appellant's ability to comment on cross-racial identification during closing argument." We disagree.

At trial, Stevens testified that the man who took the bag with the shoe box, whom he later identified as appellant, was "Mexican slash Hispanic." During appellant's cross-examination of Stevens, the following colloquy occurred:

> [DEFENSE COUNSEL]: Are you capable of identifying someone from Cuba versus Mexico?
> [PROSECUTOR]: Objection
> [STEVENS]: No. There is no way to do that.
> [THE COURT]: He may answer.
> [STEVENS]: There is no way to do that.
> [DEFENSE COUNSEL]: They were of a different race?
> [STEVENS]: From what I assume, no one knows what race anybody is.
> [DEFENSE COUNSEL]: Sure I agree with that.

After the close of evidence, appellant requested a supplemental jury instruction related to cross-racial identification.[2] The trial court denied appellant's request, but did note that "[appellant] is certainly free to argue, in accordance with the instructions as to the difficulty of a single eye witness." When appellant inquired how far he could delve into the subject during his closing argument, the trial court stated the following:

> [THE COURT]: I don't think we have – this gets us in the realm of having experts come in and testify. There is an assumption in this instruction, fairly watered down in the experiences of many, it is more difficult to identify members of a different race than a member of one's own race. We have no evidence or expert opinion to guide us as to whether or not that is a true statement.
>
> And as I said, we have an acknowledgment from the witness based upon your question that it is difficult to simply tell someone's race by looking at them. So obviously that's on the record. You can make whatever you want.
> [DEFENSE COUNSEL]: Sure.
> [THE COURT]: But I don't think you can make the leap that it is many experience [sic] that the identification of someone's race is more difficult if they are of a different race.

"It is well-settled in this State that the opportunity for summation by defense counsel prior to verdict . . . is a basic constitutional right." *Holmes v. State*, 333 Md. 652, 658-59 (1994). "[D]uring closing argument, counsel may 'state and discuss the evidence and all the reasonable and legitimate inferences which may be drawn from the facts in evidence'[.]" *Smith v. State*, 388 Md. 468, 488 (2005) (quoting *Henry v. State*, 324 Md. 204, 230 (1991)). "Closing argument, however, is not without limitation, in that the court

[2] Stevens testified that he is not Hispanic. Defense counsel argued he was "of European descent, a white guy."

should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven." *Id.* (citing *Wilhelm v. State*, 272 Md. 404, 414-15 (1974), *abrogated on other grounds as recognized by Simpson v. State*, 442 Md. 446, 458 n.5 (2015)). "What exceeds the limits of permissible argument by counsel depends on the facts of each case." *Id.* It is within the trial court's discretion to make this determination. *Wilhelm*, 272 Md. at 429.

In *Smith*, the Court of Appeals held that the trial court abused its discretion by preventing defense counsel from commenting on the difficulties of cross-racial identification during closing argument. *Smith*, 388 Md. at 489. In that case, a white victim identified the defendants, two African-America males, as her assailants. At trial, the victim testified that she was "'extremely good with faces,' looked for distinctive features, and was 'obsessed with people's posture,' as the basis for identifying the defendants." *Id.* at 488. She also opined that she was more qualified to identify a person based on her study of art and experience with painting people. *Id.*

After reviewing the research that had been conducted on the difficulties of cross-racial identification up to that point, the Court concluded that "we cannot state with certainty that difficulty in cross-racial identification is an established matter of common knowledge."[3] *Id.* Nonetheless, the Court still found that the trial court abused its discretion by denying the defendants the ability to comment on cross-racial identification during

[3] Appellant produced no evidence at trial that the *Smith* Court's observation in this regard has been questioned by new research.

closing argument. It did so based upon the unique circumstances in that case, specifically that the victim had attempted to bolster her own ability to identify faces. *Id*. 489. The Court concluded the defendants were "entitled to challenge [the victim's] 'educated' identification of the defendants by arguing to the jury that her identification should not be accorded the weight that she credited to her own ability to identify them." *Id.* at 488.

The circumstances of the instant case are distinguishable from *Smith*. Unlike the identifying victim in *Smith*, in this case Stevens made no attempt to bolster the reliability of his identification based on special expertise. By stating that "no one knows what race anybody is," Stevens acknowledged his own limitations in making accurate identifications.[4] Moreover, there was evidence that Stevens could not immediately identify appellant in the photo array. Appellant therefore had ample opportunity to persuade the jury that Stevens incorrectly identified appellant as a participant in the crimes. Accordingly, we hold the trial court did not abuse its discretion by limiting appellant's closing argument.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] We note that when trial counsel asked Stevens "Are you capable of identifying someone from Cuba versus Mexico?," he appeared to be focusing on an individual's nationality rather than race. The only question pertaining to race was, "They (appellant and Day-Day) were of a different race?"