Circuit Court for Montgomery County
Case No. 138435C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1596

September Term, 2022

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NOE DANIEL SURIEL

V.

STATE OF MARYLAND

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Arthur,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

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Opinion by Raker, J.

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Filed: April 18, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Noe Daniel Suriel, was convicted in the Circuit Court for Montgomery County of negligent manslaughter and driving a vehicle in a race or speed contest. Appellant presents the following questions for our review, which we have reordered for clarity

1. "Is Section 21-1116 of the Transportation Article unconstitutionally vague?

2. Did the trial court abuse discretion by refusing to ask during *voir dire* whether any juror had strong feelings about high-performance vehicles?

3. Did the court below abuse discretion by ruling prior to trial that certain expert testimony would be admissible?

4. Did the trial court abuse discretion by excluding evidence offered during the cross-examination of important eyewitnesses?

5. Did the court below err and abuse discretion by denying defense counsel's request for a jury instruction on the absence of flight?

6. Is the evidence legally insufficient to sustain the convictions?

7. Should this Court vacate the separate sentence imposed for engaging in a race or speed contest?"

We shall find that the first question is unpreserved for our review. We shall find no error as regards the second through sixth questions. As to question seven, the State concedes error, and we agree. As a result, we shall vacate the sentence for driving a vehicle in a race or speed contest.

I.

Appellant was indicted by the Grand Jury for Montgomery County of negligent manslaughter and driving a vehicle in a race or speed contest. He proceeded to trial before a jury and was found guilty of both counts. The trial court sentenced appellant to a term of incarceration of 5 years for negligent manslaughter and a concurrent term of incarceration of 1 year for driving a vehicle on a highway in a race or speed contest.

On September 6, 2019, appellant was involved in a fatal, multi-car crash. Appellant was driving northbound on Georgia Avenue, a three-lane road in Montgomery County in a Dodge Challenger. Camilo Ahumada was driving northbound on Georgia Avenue in an Infiniti Q50. Rene Hernandez, the victim, was driving southbound on Georgia Avenue in a Honda. At the intersection between Georgia Avenue and the Intercounty Connector, Mr. Hernandez made a left turn from Georgia Avenue towards the entrance to the Intercounty Connector, requiring him to turn across the northbound lanes of traffic. He collided with appellant who was in the intersection and was struck then by Mr. Ahumada as Mr. Ahumada drove through the intersection. Mr. Hernandez was killed.

The State called nine witnesses at trial and appellant testified in his defense. Multiple eyewitnesses testified as to the behavior of appellant and Mr. Ahumada immediately prior to the crash. There are three intersections with traffic lights on Georgia Avenue immediately preceding the intersection at the Intercounty Connector that are pertinent to this case: the intersection at Connecticut Avenue, the intersection at Bel Pre Road, and the intersection at Norbeck Road.

Mr. Randy Thompson testified that he was driving on Georgia Avenue at the same time as appellant. He observed a four-door sedan and a Dodge Challenger maneuvering around a bus at the intersection at Connecticut Avenue and then pulling ahead of traffic. The two vehicles were going fast enough that Mr. Thompson was not sure they would be able to stop if there was a red light. Both cars did stop, however, for a red light at Bel Pre Road. When the light turned green, Mr. Thompson saw both cars accelerate quickly and pull ahead of traffic. Both cars stopped at a red light at Norbeck Road and then again "took off" when the light turned green. He believed the cars were traveling between 65 and 70 miles per hour. Mr. Thompson observed both cars hitting Mr. Hernandez's car at the intersection of Georgia Avenue and the Intercounty Connector. Appellant was identified as the driver of the Dodge Challenger.

Several other eyewitnesses described similarly the approach of the two cars to the Intercounty Connector. Witnesses described the speed of the cars as "zooming past us at a high rate of speed," "flying through traffic," "punch[ing] it," and "upwards to 70 or 80, you know, closer to 90 miles an hour."

Camilo Ahumada testified that he was driving an Infiniti Q50 sedan on Connecticut Avenue with his girlfriend Ms. Murillo in the front seat. The Dodge Challenger pulled up beside him. Both drivers turned onto Georgia Avenue. At the intersection of Georgia Avenue and Bel Pre Road, both cars stopped at a red light. Both the driver of the Dodge and Mr. Ahumada revved their engines. Mr. Ahumada understood this as "trying to instigate something, trying to start something." When the light turned green, both cars accelerated "pretty hard pretty fast," both stopping at Norbeck Road. Both drivers revved

their engines again. Between Norbeck Road and the Intercounty Connector, the Dodge managed to get 3 to 4 car lengths ahead of Mr. Ahumada who was speeding to catch up with it. Suddenly, Mr. Ahumada saw headlights in the middle of the street and tried to brake but was unable to and his vehicle struck Mr. Hernandez's car. Mr. Ahumada pled guilty to manslaughter and was awaiting sentencing at the time of appellant's trial.

Ms. Murillo testified at trial. She testified that, while she was a passenger in Mr. Ahumada's car, a black Dodge vehicle turned onto Georgia Avenue next to them. The Dodge accelerated and pulled in front of them between Connecticut Avenue and Bel Pre Road. After the light at Bel Pre Road, both the driver of the Dodge and Mr. Ahumada accelerated "a lot faster" than the rest of the traffic. Both drivers sped away from the intersection after the light at Norbeck Road. Shortly thereafter, she saw headlights turning towards the Intercounty Connector interchange just before the crash. Ms. Murillo took a video during the "race" while she was a passenger in the car.

Detective Briscoe, a member of the Montgomery County Police Collision Reconstruction unit, was received by the trial court as an expert in the field of collision reconstruction. She testified that she recovered the event data recorder from Mr. Ahumada's car. The event data recorder indicated that, five seconds before the accident, while Mr. Ahumada was speeding to catch up with appellant, Mr. Ahumada was driving at 106 miles per hour. Just before impact, Mr. Ahumada's speed decreased to 78 miles per hour. Detective Briscoe used the video Ms. Murillo took to conclude that, over the course of the video, Mr. Ahumada was driving at an average speed of 97 miles per hour. She concluded that Mr. Hernandez's car was traveling at 21 miles per hour.

Based upon a statement appellant made to her that he was traveling no more than 55 miles per hour prior to the collision, Detective Briscoe conducted a time-distance analysis with the goal of determining "if the drivers had been going the speed limit, would the crash still have happened?" She concluded, using time-distance analysis, that, had appellant and Mr. Ahumada been driving the speed limit, Mr. Hernandez would have had plenty of time to clear the intersection based on when he started his turn and how far away appellant and Mr. Ahumada were when the collision happened.

Appellant testified in his own defense. He testified that he was driving along Georgia Avenue but that he had not interacted with any other cars. He testified that, after driving through the intersection at Bel Pre Road, he "punched it," not because he was in any sort of race but because he was enjoying his car. He testified that he returned to a normal speed. He changed lanes several times because another car was tailgating him. As he approached the intersection of Georgia Avenue and the Intercounty Connector, he was driving no more than 55 miles per hour. Just as he was approaching the intersection, Mr. Hernandez turned left in front of him. He swerved to avoid Mr. Hernandez's car but Mr. Hernandez hit the back side of his car.

In rebuttal, the State recalled Detective Briscoe who testified that, if appellant's version of events were true, and appellant was driving only 55 miles per hour, he would have been driving significantly more slowly than Mr. Ahumada, who was driving at over 100 miles per hour. Thus, appellant would have needed significantly more time to cover the distance between the preceding red light at Norbeck Road and the location of the crash. Appellant would have had to leave that intersection substantially earlier than Mr. Ahumada

(conflicting with the testimony of every witness who observed the two cars leaving the intersection at the same time).

At the close of trial, the jury found appellant guilty on all counts. He was sentenced as described above. This timely appeal followed.

II.

Appellant argues that Md. Code Ann., Transp. Art. § 21-1116(a) (2017)[1], driving a vehicle in a race or speed contest, is unconstitutionally vague, both on its face and as applied. The statute provides as follows:

> "Except as provided in §21-1211 of this title, on any highway or on any private property that is used by the public in general, a person may not drive a vehicle in a race or speed contest, whether or not on a wager or for a prize or reward."

At the close of all the evidence, in his motion for judgment of acquittal, appellant moved to dismiss the case on grounds that § 21-1116(a) was "constitutionally vague as applied to the facts of this case." Appellant renews that argument on appeal. He argues that the statute fails to define the criminal offense with sufficient definiteness to enable ordinary people to understand what conduct is prohibited. He argues that there are no standards for interpreting this statute and, in the absence of standards, "a person of ordinary intelligence and experience in Mr. Suriel's circumstances would not have understood that Section 21-1116 prohibited his conduct."

[1] All subsequent statutory references herein, unless otherwise noted, shall be to Md. Code Ann., Transp. Art.

The State argues that appellant's contention that the statute is unconstitutionally vague is waived because appellant failed to raise it below in a pretrial motion as required by Md. Rule 4-252. Substantively, the State maintains that appellant fails to offer adequate argument in support of his claim, other than the bald assertion that it is vague. And third, the State argues the claim is meritless because, the statute is couched in plain English and because the phrase "race or speed contest" possesses a common and generally accepted meaning. A statute is not unconstitutionally vague if its meaning is clear from plain English. *State v. Philips*, 210 Md. App. 239, 266 (2013) ("A statute does not fail for vagueness . . . if the meaning of the words in controversy can be fairly ascertained by reference to . . . the words themselves, if they possess a common and generally accepted meaning."). The State argues that the meaning of this statute is plain. It sets out clearly the locations to which it applies: highways and private property used by the public. It sets out the conduct that is proscribed: engaging in a race or speed contest.

We agree with the State that appellant's contentions regarding the alleged vagueness of § 21-1116(a) are waived. Md. Rule 4-252 addresses mandatory motions in circuit court. Rule 4-252(b) requires that motions alleging defects in the prosecution (encompassing allegation of constitutional or statutory vagueness) be filed "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished." We held in *Marshall v. State*, 213 Md. App. 532, 549-554 (2013), that appellant must raise a claim that the statute under which he is charged is void for vagueness in a pretrial motion pursuant to Md.

Rule 4-252. Otherwise, the allegation is waived and not preserved for appellate review. *Id.* The claim must be made in writing unless the court directs otherwise. *Id*. Here, appellant failed to raise any motion claiming § 21-1116(a) was void for vagueness, in writing or otherwise, at any time prior to trial. Indeed, appellant did not raise this argument until the last day of trial. By that time, it was waived. The issue is not preserved for our review.

III.

Appellant claims that the trial court erred in declining to ask the prospective jurors adequately about "strong feelings" about the nature of the charges. During *voir dire*, the court asked several questions as to whether the venire panel could be impartial given the nature of the charges in the case. The court informed the panel that the State alleged that appellant and others "were engaged in a speed contest operating their motor vehicles at excessive speeds," and asked whether anything about the nature of this charge would prevent any of the prospective jurors from being impartial. The court followed up and asked if any prospective juror had strong feelings about the charges of manslaughter by automobile or engaging in a speed contest. The court asked whether any prospective juror had been in a car accident or had a family member die in a car accident. Appellant requested the court ask whether any prospective juror had "strong feelings about individuals who operate high-performance vehicles." The court declined to ask the question.

Appellant argues that, because the question was designed to reveal a potential bias, the court was required to ask it. Appellant argues that his questions were directed at a specific cause for disqualification and reasonably likely to reveal issues that might have an undue influence over the jury. He argues that there may have been jurors who believed that anyone driving a high-performance vehicle, *i.e.*, a muscle car, was more likely to speed. We note at the outset that that was not the question he requested. If he had requested a question as to whether anyone driving a high-performance vehicle was more likely to speed or to engage in a speed contest, we would have a different question before us.

The State notes that the scope of *voir dire* in Maryland is limited, and that the court is required only to ask questions that are reasonably likely to reveal specific cause for disqualification. The State argues that a juror's views on high-performance vehicles are, at best, fodder for the intelligent use of peremptory challenges. They are not directly related to the crime, the witnesses, or the defendant and they are not a subject that the judge is required to delve into on *voir dire.*

We review the trial court's decision declining to ask a voir dire question for abuse of discretion. *Washington v. State*, 425 Md. 306, 314 (2012). Maryland embraces "limited *voir dire*." *Pearson v. State*, 437 Md. 350, 356 (2014). A trial court is not required to ask *voir dire* questions that are not directed at specific causes for disqualification or that are merely "fishing for information to assist in the exercise of peremptory challenges." *Id.* at 357. Further, the question requested must be reasonably likely to reveal a specific cause for disqualification. *Id.* The pressing question in this case is whether "strong feelings"

about individuals who operate high-performance vehicles would be cause for disqualification.

Two categories of inquiry may reveal cause for a juror's disqualification: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313. There is no contention in this case that the question about high-performance vehicles would have revealed a defect in any juror's statutory qualifications for jury service. Rather, appellant argues that it might have revealed a juror's state of mind on a collateral matter that might have undue influence over the prospective juror.

The Supreme Court of Maryland has held that the collateral matters that might have an undue influence are "biases directly related to the crime, the witnesses, or the defendant." *Pearson*, 437 Md. at 357. Beginning with biases related to the witnesses or the defendant, the relevant biases are biases that might make a potential juror likely to give more credibility to a specific witness based on that witness's occupation, status, category, or affiliation. *Thomas v. State*, 454 Md. 495, 512 (2017). Possession of a high-performance vehicle does not fall into any of these categories. Even insofar as "driver of a high-performance vehicle" is a category or affiliation on which a juror, theoretically, could base credibility assessments, it is far more analogous to the categories we have found do not merit *voir dire* questions than it is to those that do. *Compare Colkley v. State*, 251 Md. App. 243, 301-03 (2012) (holding that the trial court was not required to ask a strong

feelings question about drugs or drug use where appellant was not charged with drug crimes but was involved in a drug-distribution organization), *with Muldrow v. State*, 259 Md. App. 588 (2023) (2023) (holding that a trial court must ask, if requested, questions about biases relating to a defendant's alleged homosexuality and noting that courts have required questions about biases regarding race, ethnicity, cultural heritage, religious affiliation, and status as a police officer).

As for biases related directly to the crime, appellant analogizes to *State v. Thomas*, 369 Md. 202 (2002) in which the Maryland Supreme Court held that the trial court abused its discretion by refusing to ask whether potential jurors had strong feelings about violations of narcotics laws in a case where the defendant was charged with drug crimes. The court held that "[a] question aimed at uncovering a venire person's bias because of the nature of the crime with which the defendant is charged is directly relevant to, and focuses on, an issue particular to the defendant's case and, so, should be uncovered." *Id.* at 214. Appellant argues that jurors' potential biases regarding high-performance vehicles are issues particular to the defendant's case and should be uncovered.

There is a critical difference between *Thomas* and the instant case, however. The strong feelings question requested in *Thomas* addressed potential biases regarding the nature of the crime charged. But in this case, the trial court asked precisely the type of strong feelings questions required by *Thomas* when the court asked about the crimes with which appellant was charged as well as several other questions about jurors' experiences with car accidents designed to reveal potential biases related to the crime. *Thomas* is, therefore, inapposite.

We drew this distinction in *Colkley*, 251 Md. App. at 301-03. There we held that, while a strong feelings question about drugs might be required in a case in which the defendant was charged with drug crimes, it was not required in cases where the defendant was not charged with drug crimes, even if the evidence would show appellant had committed the crimes with which he was charged as part of his work for a drug distribution organization. *Id.* Here appellant was not charged with driving a high-performance vehicle. The question about high-performance vehicles did not relate directly to the crime any more than the drugs in *Colkey* did. The question may have revealed useful information to appellant's counsel to exercise a peremptory challenge, but it was not calculated to reveal a prejudice or bias that would constitute cause for disqualification.

The court did not abuse its discretion in declining to ask defense counsel's proposed additional *voir dire* question.

IV.

Appellant challenges the basis for one of Detective Briscoe's conclusions. As part of her work, Detective Briscoe conducted two time-distance analyses. First Detective Briscoe conducted a time-distance analysis on Mr. Ahumada's car to determine whether, if appellant and Mr. Ahumada had been driving at the speed limit, the crash would have occurred. Detective Briscoe determined, based on data from Mr. Ahumada's car's event data recorder, that 5 seconds prior to the crash, he was approximately 700 feet away from the site of the crash. If he had proceeded from that spot towards the intersection at the speed limit of 50 miles per hour, he would still have been over 300 feet and four and a half

seconds away from the place where the crash occurred at the time when the crash occurred. Detective Briscoe calculated that, in order to clear the intersection, Mr. Hernandez needed approximately one more second. Thus, Mr. Hernandez would have cleared the intersection three and a half seconds before Mr. Ahumada reached it, if Mr. Ahumada had been driving the speed limit, and the cars would not have collided.

Detective Briscoe conducted a second time-distance analysis to determine how far away Mr. Ahumada was when Mr. Hernandez decided to enter the intersection, to rebut any argument that Mr. Hernandez was at fault for choosing to make an unsafe left-hand turn. Detective Briscoe acknowledged that she had conflicting witness reports whether Mr. Hernandez had stopped before making his left-hand turn, and whether he had accelerated as he made the turn. To account for this, she ran her calculations using four hypothetical scenarios designed to represent various witness accounts: Mr. Hernandez drove through the intersection at a constant 21 miles per hour, Mr. Hernandez rolled through the intersection at 10 miles per hour and then accelerated to 21 miles per hour, Mr. Hernandez stopped at the intersection and then accelerated using his Honda's maximum acceleration to 21 miles per hour, and Mr. Hernandez stopped at the intersection and accelerated at a steady speed to 21 miles per hour.

She concluded that, regardless of which of these scenarios she chose, Mr. Hernandez had entered the intersection between 2.4 and 4.8 seconds prior to the crash when the speeding cars were 307 to 672 feet away. She concluded Mr. Hernandez's decision to turn when he did would have left him plenty of time to clear that intersection under normal circumstances.

Appellant contests the second of these time-distance analyses. Appellant moved, prior to trial, to exclude Detective Briscoe's conclusions based on possible scenarios. He objected to these conclusions again at trial. He argues that these possible scenarios amount to little more than conjecture or guesswork. The speed at which Mr. Hernandez entered the intersection was never proved at trial. Thus, appellant argues that the assumptions used by Detective Briscoe were entirely unsupported and any conclusions based on those unsupported assumptions should be excluded.

The State notes, first, that Detective Briscoe made her four assumptions in part to account for variation in witness reports of what happened and based at least two of those assumptions on appellant and Mr. Ahumada's accounts of Mr. Hernandez's actions. The State argues that an expert is permitted to testify in the form of a hypothetical. Detective Briscoe presented four hypotheticals, explained the evidence they were based on, and then showed the jury mathematical calculations based on each of her four hypotheticals.

We consider the circuit court's decisions on the admissibility of expert testimony on an abuse of discretion standard. *Devincentz v. State*, 460 Md. 518, 550 (2018); *Rochkind v. Stevenson*, 471 Md. 1, 22 (2020). We reverse only when the decision to admit the expert testimony "appears to have been made on untenable grounds" or is "violative of fact and logic." *Id.* We do not find an abuse of discretion simply because we would have decided otherwise. *Id.* Rather, the circuit court's decision must be "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id.*

It is well-established law in Maryland that experts may testify in the form of hypotheticals:

> "The factual basis for an expert's opinion can come from facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions. . . . This applies to disputed facts as well. . . . Under such circumstances, the proper way to submit a hypothetical question is to ask the witness to presume the truth of certain facts as if they were not the subject of dispute. These may still be contested in actuality but the inquiry is proper as long as there is evidentiary support for the facts which the expert is told to assume the veracity of and evaluate in rendering his opinion. Of course, any assumption made must be grounded on a fair summation of the material facts in evidence and those material facts must be sufficient in scope for the witness to formulate a rational opinion. In such a situation the jury is aware of the premise upon which the opinion is based and can determine whether that assumption was valid. If it is not, the opinion of the expert is disregarded."

*Frankel v. Deane*, 480 Md. 682, 700-701 (2022) (internal citations omitted). Here, Detective Briscoe explained to the jury that her calculations were hypothetical. They were based on her previous conclusion (to which there had been no objection) that Mr. Hernandez was driving at 21 miles per hour at the time of impact. They covered the full gamut of possibilities for how Mr. Hernandez could have been driving in the seconds leading up to the accident. They accounted for and represented the description given by appellant that Mr. Hernandez "jetted" through the intersection (*i.e.*, he did not slow down or stop) and by Mr. Ahumada that Mr. Hernandez "rolled" through the intersection *(i.e.*, that he did not stop but entered the intersection at a slower pace) as well as several other possibilities. Detective Briscoe did not opine on which hypothetical was most likely or

attempt to form a definitive conclusion about which hypothetical had happened. Instead, she presented the different possibilities and demonstrated mathematical calculations showing what each possibility would mean.

The court did not abuse its discretion in concluding that these hypotheticals were grounded in a fair summation of the material facts in evidence. The jury was aware of the assumptions Detective Briscoe was making and could determine, based on the testimony of the eyewitnesses it heard from, which, if any, of her hypotheticals to credit. We find no error in the court's decision to admit the expert testimony.

V.

Appellant claims that the trial court abused its discretion by limiting improperly the scope of cross-examination during the testimony of Mr. Ahumada and Ms. Murillo. Appellant points to three pieces of evidence that the court excluded and argues that the court erred in all three instances. First, during his testimony on direct examination, Mr. Ahumada stated that he pled guilty to manslaughter in relation to this car crash "to take responsibility for what happened that night." Appellant sought to rebut this testimony by showing that Mr. Ahumada had purchased another car of the same make and model as his old one after the accident. The court permitted appellant to question the witness about purchasing a new car of the same make and model, but not to introduce a picture of Mr. Ahumada's new car.

Second, on the cross-examination of Mr. Ahumada, appellant attempted to introduce a video of Mr. Ahumada driving at a high speed on Georgia Avenue a few weeks before

the incident at issue in this trial. Appellant argued at trial that the video "shows him essentially [doing] the same thing at the same intersection a few weeks before." The court excluded the evidence. On direct examination of Ms. Murillo, Ms. Murillo testified that, normally, Mr. Ahumada does not speed. Appellant sought to introduce the same video of Mr. Ahumada driving fast on Georgia Avenue during the cross-examination of Ms. Murillo, this time ostensibly for impeachment purposes, but the court once again excluded the evidence. Appellant asserts that the trial court abused its discretion in excluding this evidence.

Finally, appellant argues that the trial court erred in excluding several sets of text messages between Mr. Ahumada and Ms. Murillo. During cross-examination of Mr. Ahumada, appellant offered a set of text messages, marked as Exhibit 9, in which Mr. Ahumada describes a near-miss accident near Bel Pre Road. The State objected to the text messages on grounds that they were hearsay, and the court sustained the objection. However, appellant was permitted to use the text messages to refresh the witness's recollection. Appellant was then permitted to cross-examine the witness about the previous "near-accident" incident. Later on in the cross-examination, appellant offered more text messages between Mr. Ahumada and Ms. Murillo in which Mr. Ahumada discussed speeding on previous occasions. The State objected and the court ruled that any text messages about the night of the crash would be admissible but text messages referring to prior speeding would not be admissible.

Appellant, once again, offered text messages in which Mr. Ahumada discussed prior speeding during the cross-examination of Ms. Murillo, after she testified that Mr. Ahumada

did not speed usually. As with the video, this time, appellant alleged that the text messages were for impeachment purposes. The court found that the evidence was not proper impeachment evidence because it was an assertion made, not by Ms. Murillo but by Mr. Ahumada and because it was improper extrinsic evidence used to impeach the witness on a collateral matter.

Appellant argues that the court erred in excluding all of this evidence, *i.e*, the picture of the car, the video of alleged prior speeding, and the text messages that reference prior speeding, because the evidence "could have established: (1) Mr. Ahumada's 'need for speed,' (2) that his action in driving at an excessive speed was 'independent of anything that Mr. Suriel did on this occasion,' and (3) that Mr. Ahumada did not need a signal from another driver to prompt him to speed," and was, therefore, probative. Appellant argues that the court further erred in excluding each piece of evidence when its purpose was for impeachment (the photograph to impeach Mr. Ahumada and the video and text messages to impeach Ms. Murillo) because it was appropriate extrinsic impeachment evidence under Md. Rule 5-616(b).

The State maintains that the picture of Mr. Ahumada's new car was irrelevant. The State argues that whether Mr. Ahumada purchased a new car of the same make and model as his old one made no fact at issue more or less likely. Insofar as that fact was relevant, it was established by Mr. Ahumada's acknowledgment of the fact on cross-examination, and the picture added no additional probative value.

The State notes that the trial court excluded the video the first time it was offered as improper character evidence. As to the use of the video for impeachment purposes, the

State notes that the trial court found that the video did not show speeding and was not relevant to impeach testimony that Mr. Ahumada does not usually speed. The State notes that appellant has made no argument that the trial court's factual finding was clearly erroneous. The State argues that we cannot find an abuse of discretion in the trial court's ruling that a video that does not show speeding was not relevant to impeach the witness's claims about speeding.

As to the text messages, the State argues that the text messages were hearsay, offered to prove the truth of the matter asserted within them, *i.e*., that Mr. Ahumada had been speeding. Insofar as they were offered to prove a need for speed or that Mr. Ahumada speeds without provocation, they were character evidence. Finally, the State argues that, for impeachment purposes, appellant has provided no basis beyond a bald assertion that the text messages were appropriate impeachment evidence under Md. Rule 5-616(b).

The Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights protect a defendant's right to cross-examine witnesses. *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018). That right is not, however, unrestricted. *Stanley v. State*, 248 Md. App. 539, 551 (2020). Cross-examination is not permitted on matters that are irrelevant or immaterial to the trial issues. *Rowe v. State*, 62 Md. App. 486, 495 (1985). The question of whether a matter is sufficiently probative is left to the sound judgment of the trial court. *Id.* We review the circuit court's decisions to exclude the above-referenced pieces of evidence for an abuse of discretion. *Id.*

As for the picture of Mr. Ahumada's new car, we hold that the evidence appellant sought to introduce was not admissible, and the trial court did not err in excluding it.

Insofar as appellant makes any argument that the picture was relevant, appellant argues that it was relevant to rebut the claim by Mr. Ahumada that he pled guilty "to take responsibility for what happened that night." As the State argues, there is little or no connection between an individual's decision to buy a new car of the same make and model and his feelings about his decision to drive over twice the legal limit or his desire to take responsibility for what happened that night. Even assuming *arguendo* that the evidence about Mr. Ahumada's new car was relevant to rebut his claim that he pled guilty to take responsibility for his decision to drive in the way he did, appellant achieved his goal because defense counsel cross-examined Mr. Ahumada on the fact that he had purchased the same make and model of car. At best, the photo of the new car was cumulative evidence and it was within the trial court's discretion to admit or reject the evidence.

As for the video of Mr. Ahumada's prior driving and the text messages about his prior speeding, when used during cross-examination of Mr. Ahumada, the court did not abuse its discretion in excluding the evidence. Md. Rule 5-404(b) prohibits the use of "Evidence of other crimes, wrongs, or other acts . . . to prove the character of a person in order to show action in the conformity therewith." Appellant argues that Mr. Ahumada had a "need for speed" and that he was just driving fast independent of appellant. On the cross-examination of Mr. Ahumada, Appellant's proffered use for the video was that it "shows him essentially [doing] the same thing at the same intersection a few weeks before." The proffered use for the text messages was to show that Mr. Ahumada's prior speeding shows that, in general, he decides to speed on his own. In short, the only proffered probative value of either piece of evidence was to demonstrate that Mr. Ahumada had a

propensity for driving too fast without provocation and acted in conformity with that propensity on the night of the crash. Even assuming that driving fast is a character trait that could be probative, the only proffered probative value was inadmissible character evidence. The trial court did not abuse its discretion in excluding the evidence.

When appellant offered the video, once again, during the cross-examination of Ms. Murillo, he argued that it was admissible for impeachment purposes. The court made a factual finding that the video did not show Mr. Ahumada speeding. Such factual findings are reviewed under a "clearly erroneous standard." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 620 (2011). Appellant does not argue that there was any clear error in the court's factual finding. We assume, for the purpose of our analysis, that the video did not show Mr. Ahumada speeding. Upon that assumption, the evidence did not impeach the witness's testimony that Mr. Ahumada does not usually speed. The trial court did not abuse its discretion in finding that the video lacked probative value for impeachment purposes.

Finally, as regards the use of the text messages for impeachment purposes, the text messages were extrinsic evidence of the statements of an individual who was not on the stand used to impeach the witness. Their use, therefore, falls within the ambit of Md. Rule 5-616(b)(2). Rule 5-616(b)(2) provides that "Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters."

Here, the matter upon which appellant sought to impeach the witness was whether Mr. Ahumada had sped in the past. Mr. Ahumada's past speeding was not at issue in the trial. As discussed above, the question of whether Mr. Ahumada had sped in the past was

not probative for any permissible purpose. Impeachment on matters that would not, themselves, have been relevant if offered independent of the impeachment falls near to the heart of the of the general prohibition of impeachment on collateral matters. *Smith v. State*, 273 Md. 152, 162 (1974) ("It is only in the context of relevancy that the rule accomplishes its underlying objectives. The test [for collateral evidence], therefore, . . . is whether the fact as to which the error is predicated is relevant independently of the contradiction"). We find no abuse of discretion in the court's decision to preclude impeachment using extrinsic evidence on a point of minimal weight.

VI.

At the close of trial, appellant requested a jury instruction informing the jury that it could consider his decision not to flee the scene as evidence "of consciousness of innocence." Appellant requested the following instruction:

> "A person's flight immediately after the commission of a crime is not enough by itself to establish guilt but it is a factor that may be considered by you as evidence of guilt and such flight may be considered as evidence of consciousness of guilt.
> Likewise, a person who remains at the scene of the commission of a crime is a factor you may consider as evidence of innocence and evidence that a person remained at the scene of the commission of a crime may be considered as evidence of consciousness of innocence."

The court declined to give the instruction, reasoning that "the absence of flight is adequately covered by the other [reasonable doubt and presumption of innocence] instructions I've given."

Appellant maintains that his requested jury instruction is a correct statement of the law and argues that a jury is permitted to consider evidence of the lack of flight as evidence of innocence or consciousness of innocence. Because appellant stayed at the scene after the crash and did not flee, and the instruction was applicable law to the facts of the case, the court erred and abused its discretion in declining to give the instruction.

The State argues that the court was not required to give the "absence of flight" instruction because it was an instruction on the facts and desired inferences, not the law. The State points out that appellant cannot provide one citation supporting his argument, and that every other jurisdiction that has considered this issue has declined to give a lack of flight jury instruction. The crux of the State's argument is that because lack of flight does not necessarily raise an inference of innocence, it is inappropriate to instruct the jury that it may draw that inference.

Md. Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." The Rule requires the court to give a requested instruction when (1) the instruction states correctly the law, (2) the instruction applies to the facts of the case, and (3) the content of the instruction must not have been fairly covered by another instruction. *Patterson v. State*, 356 Md. 677, 684 (1999). Where the requested instruction regards facts or inferences to be drawn from the evidence, the instruction is not required. *Id*. at 684. We review the trial court's decision not to grant such an instruction for an abuse of discretion. *Id*. at 682.

The Maryland Supreme Court in *Patterson* cautioned against requiring trial judges to give instructions regarding permissible factual inferences, noting as follows:

> "[W]hen the inference is communicated to the jury as part of the judge's binding jury instructions, it creates the danger that the jury may give the inference undue weight. At the very least, a trial judge's jury instruction may have the effect of overemphasizing just one of the many proper inferences that a jury may draw."

*Id.* at 684. The Court found no abuse of discretion in the trial court's refusal to give an instruction regarding permissible inferences from missing evidence.

The same logic applies here. As multiple states that have considered this issue have noted, a jury may reasonably draw any number of inferences from a defendant's decision not to flee the scene of a deadly car accident on foot before the police arrive. *See e.g., Commonwealth v. Hanford*, 937 A.2d 1094, 1097 (Pa. Super. Ct. 2007) ("[U]nlike an attempt to flee, the fact that a suspect did not try to avoid the police is open to multiple interpretations, many of which have little to do with consciousness of guilt."); *People v. Cowan*, 236 P.3d 1074, 1129-30 (Cal. 2010) ("[T]he inferences arising from evidence of the absence of flight are ambiguous because 'there are plausible reasons why a guilty person might also refrain from flight, such as fear of recapture or confidence that flight will be unnecessary because there is no strong proof of guilt.'"); *State v. Walton*, 769 P.2d 1017, 1030 (Ariz. 1989) ("Absence of flight under other circumstances may seem far better calculated to avoid detection. Absence of flight does not necessarily reflect the state of mind. Would that detection of criminals were so simple."); *United States v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971) ("Experimental observations do not give substantial assurance that

either failure to flee or failure to resist arrest makes it more likely than not that the person arrested is innocent of the offense with which he is charged.").

Further, as one Pennsylvania court noted, *Commonwealth v. Hanford,* 937 A.2d 1094 (Pa. Super Ct. 2007), the lack of flight issue is already fairly covered by the presumption of innocence instruction. The court explained as follows:

> "Furthermore, the 'absence of flight' instruction is unnecessary because, from the outset, an individual is presumed innocent until proven guilty and the jury is so instructed. Because the defendant is already 'clothed with a presumption of innocence,' the jury need not be additionally charged on an inference of innocence where a suspect does not flee. Accordingly, we find no merit in Appellant's claim."

*Id.* at 1097-98 (internal citations omitted).

Because appellant's requested instruction was not a correct statement of the law, and, the instructions given by the court covered the law adequately, the judge did not abuse his discretion in declining to give appellant's requested instruction on absence of flight.

VII.

Appellant next argues that the evidence is insufficient to support his convictions. Appellant argues that the evidence was insufficient to support his conviction for engaging in a race or speed contest in violation of § 21-1116(a) because, while the evidence may have been sufficient to establish that he was speeding, it was not sufficient to establish that he was engaged in a race. Appellant argues that speeding and racing are not the same thing and that proof of speeding without some evidence of an agreement to race is insufficient to support his conviction. Appellant further argues that, because the race or speed contest was

"the only basis for the gross negligence required to prove the charge of manslaughter," if the evidence is insufficient to support appellant's conviction for engaging in a race or speed contest, it is insufficient to support appellant's conviction for manslaughter.

Appellant acknowledges that Mr. Ahumada testified that he heard the revving of an engine but argues that the evidence shows that appellant had his windows up with music playing and that he may not have been able to hear the revved engine. He points to his trial testimony that he was not aware of what the other cars around him were doing. He notes that one of the State's eyewitnesses that night admitted to speeding but testified that he did so without regard to what appellant and Mr. Ahumada were doing.

The State notes that we are not required to credit or to consider appellant's self-serving testimony upon which he bases his arguments. *Cerrato-Molina v. State*, 223 Md. App. 329, 351 (2015) ("At the end of the case and with respect to the burden of production, the exculpatory inferences do not exist. They are not a part of that version of the evidence most favorable to the State's case."). Instead, the State points to Mr. Ahumada's testimony that both he and appellant revved their engines, that he understood that as an attempt to start a race, and that both cars accelerated immediately from the intersection.

We review the sufficiency of the evidence 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." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Scriber v. State,* 236 Md. App. 332, 344 (2018). As a reviewing court, we do not judge the credibility of witnesses or resolve conflicts in the evidence. *Scriber*, 236 Md. App. at 344. The question before us is "not whether the evidence *should*

*have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (emphasis in original).

Mr. Ahumada testified that at two separate intersections, both he and appellant revved their engines and that he understood this to mean that appellant was "trying to instigate something, trying to start something." It is not an unusual assumption that the revved engine would be the signal to initiate a race. *See Pineta v. State*, 98 Md. App. 614, 618-19 (1993) ("According to various State witnesses, the two vehicles then 'revved' their engines and engaged in a 'drag race' on Georgia Avenue."). Immediately after these perceived challenges, both appellant and Mr. Ahumada accelerated. Ms. Murillo testified that both cars took off a lot faster than the rest of traffic immediately after this incident. This evidence is sufficient to support the inference that appellant was engaging in a race or speed contest.

The evidence was sufficient to support appellant's conviction.

VIII.

Finally, appellant raises the issue of merger of driving in a race or speed contest and manslaughter. The State agrees and concedes error and we agree.

Appellant argues that this Court should vacate his one-year, concurrent sentence for driving a vehicle in a race or speed contest. Appellant argues that his conviction for driving a vehicle in a race or speed contest should have been merged with his conviction for manslaughter for sentencing purposes.

This court held in *Pineta v. State*, 98 Md. App. 614, 621 (1993) that, where the offense of reckless driving was based solely on evidence that the defendant engaged in a race or speed contest, the speed contest "became, in effect, a lesser-included offense of reckless driving." The court held that a conviction for driving a vehicle in a race or speed contest must merge with a conviction for reckless driving. Similarly, engaging in a speed contest or race merges with a conviction for manslaughter based upon the same facts. We vacate appellant's sentence on Count 2, engaging in a speed contest or race.

**SENTENCE ON COUNT 2 IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. ALL OTHER JUDGMENTS AFFIRMED COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY MONTGOMERY COUNTY.**