Circuit Court for Montgomery County
Case No. 124904-C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 517 & 610

September Term, 2016

SHAKA WAKEFIELD & AUDIAS SANCHEZ

v.

STATE OF MARYLAND

Wright,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: December 29, 2017

Shaka Wakefield and Audias Sanchez, drivers of separate cars, were charged in the Circuit Court for Montgomery County with three counts of manslaughter by motor vehicle. The State's theory of the case turned in large measure on whether the fatal collision was caused by a race—a "speed contest," in statutory terms—between the two drivers. They were tried together over Ms. Wakefield's objection, and at the conclusion of the trial, a jury returned guilty verdicts on all counts. On appeal, Ms. Wakefield reprises her claim that she should have been tried separately, contends that the circuit court erred by admitting improper expert testimony, and argues that the prosecutor made improper remarks during closing argument. Mr. Sanchez contends that the court erred in denying his motions for judgment of acquittal at the close of the State's case and the close of the entire case, by denying his request for a jury instruction as to the meaning of a speed contest, and by denying his request for a special verdict sheet. We affirm.

I. BACKGROUND

On June 9, 2013, at approximately 9:45 p.m., Mr. Sanchez, in a Chevy Camaro, and Ms. Wakefield, in a Volkswagen Passat, drove southbound on Georgia Avenue in Silver Spring at speeds substantially higher than the speed limit. They collided with a Nissan Sentra that was in the process of turning left from Kayson Street onto northbound Georgia Avenue. As a result of the crash, the four passengers in the Nissan were ejected from the vehicle and three of them died. Mr. Sanchez and Ms. Wakefield were charged with three counts of manslaughter by motor vehicle, and both pleaded not guilty.

Before trial, Mr. Sanchez's counsel filed a notice of intent to call an accident reconstruction expert, Peter J. Leiss, and the State moved in limine under Maryland Rule 5-702 to preclude his testimony. Ms. Wakefield moved to sever her trial from Mr. Sanchez's on the grounds that the expert testimony was not mutually admissible and that the defendants' dueling theories of the case would prejudice her. The court heard and denied both motions, and Mr. Sanchez and Ms. Wakefield proceeded as co-defendants before a jury. The trial began on December 14, 2015 and finished on December 21, 2015.

On behalf of the State, Officer James Hanlon of the Montgomery County Police Department testified that on June 9, 2013, at approximately 9:48 p.m., he responded to a call about a collision at the intersection of Georgia Avenue and Kayson Street. When the Officer arrived, he saw car debris on the road and a woman, who appeared to be alive, lying in the middle of the street. He noticed a child, still in her car seat, upside down on the sidewalk, with an adult male lying next to her. As the Officer approached the man and the child, a firefighter informed him that they were dead. Officer Hanlon and the other officers and first responders secured the crime scene and interviewed witnesses.

One witness was Leah Kocsis, who was driving southbound on Georgia Avenue in the right lane, at approximately 40 miles per hour, when "two cars flew past" her going at least 70. Shortly thereafter, she noticed debris in the road, first a boot and then a bumper. She pulled over, called 9-1-1, and noticed a vehicle in pieces and bodies on the road. While Ms. Kocsis was on the phone with 9-1-1, Ms. Wakefield, who appeared "sort of angry," approached Ms. Kocsis and grabbed her phone, saying that her arm was hurt and that

someone had hit her back bumper. Seeking to avoid a confrontation, Ms. Kocsis asked for her phone back and told Ms. Wakefield to wait by her car. Ms. Kocsis later gave a statement to police. She testified at trial that she did not see any interaction between the two drivers or hear any tires squealing or screeching.

Another witness, Nelson Lopez Panameno, an automotive technician by trade, testified that on the night of the collision, he was in his daughter's driveway cleaning out the trunk of his car when he "heard engines speeding up," as if they were "taking off." The noise was loud and caught his attention. He looked in the direction of the noise and saw two cars speeding past, going southbound, then heard tires squealing, then a crash. Mr. Lopez called 9-1-1 and ran toward the scene of the crash, where he saw the front portion of a car spinning in the southbound lane and the rear portion on the other side of the road. He also saw a woman lying in the southbound lane, pleading in Spanish, and, on the northbound side, a man lying on the sidewalk next to an overturned car seat with a child still in it. Mr. Lopez estimated that in his career as an automotive technician, he had evaluated more than 2,000 vehicles for collision repair, and that this was the "worst car accident" he had ever seen.

Scott Stokes, a Master Firefighter Paramedic with Montgomery County Fire & Rescue Services, testified that he drove a fire truck to the scene of the accident and had to dodge car debris as he approached the collision site. When he arrived, he could see that there had been a very serious car accident and that multiple people had been ejected from a vehicle and were seriously injured. He first assessed the child, later identified as four-

year-old Elizabeth Pineda; she was still in her car seat, upside down on the sidewalk on the northbound side of the road. He got down on his hands and knees, shined a flashlight under the car seat, and saw that her head was caved in and that she was dead. Next, he assessed an adult male victim, later identified as the child's uncle, Felipe Pineda. He was lying on the sidewalk next to the child, "not breathing, glassy eyed, and a little bit gray," and dead as well. Mr. Stokes went to the third victim, later identified as Elizabeth's father, Salvador Ramos, who was lying in the road in a northbound lane. He was suffering from agonal respiration, which indicated severe head trauma and "was not going to live no matter what [Mr. Stokes did]." Finally, Mr. Stokes went to the fourth victim, later identified as Elizabeth's mother, Elba Pineda, who was conscious and breathing but had "multiple bruises and abrasions throughout her entire body," and "compound fractures of her lower extremities." She was "conscious and alert" and was pleading in Spanish, "mi bébé." Mr. Stokes secured her in the ambulance and accompanied her to the hospital.

Ms. Pineda, the sole survivor from the Nissan, testified that on the day of the accident, she had been at church with her daughter, then returned home to her brother, Mr. Pineda, and husband, Mr. Ramos. Her brother needed a ride home, and they all piled into the Nissan. Her husband drove, while she sat in the front passenger seat, her daughter sat in a car seat in the back seat directly behind her, and her brother sat in the rear driver's side seat. After leaving their neighborhood, they traveled down Kayson Street and stopped at the stop sign at the intersection of Kayson Street and Georgia Avenue. Her husband looked both ways, then began to turn left onto Georgia Avenue. While they turned, they

saw a car they hadn't seen before, and then "there was a terrible impact." The car began to "spin and spin and spin," she "flew away [in]to the street," and "lost consciousness."

The court qualified Detective Alexander Power of the Montgomery County Police Department's Collision Reconstruction Unit as an expert in collision reconstruction, including crash data retrieval, operation, and analysis. Detective Power led the crash investigation—he photographed the scene, conducted interviews, analyzed roadway markings, inspected the vehicles, and retrieved the air bag control module from Mr. Sanchez's vehicle. Based on his analysis of the evidence gathered during the investigation, Detective Power concluded that Ms. Wakefield's vehicle hit the Nissan about one second before Mr. Sanchez's vehicle hit it. Ms. Wakefield's car hit the Nissan near the rear fender, causing the Nissan to spin and begin to split apart, and then Mr. Sanchez's vehicle hit the Nissan's front driver side door. The Detective testified that he could not determine when the Nissan completely split apart or when the passengers were ejected; he admitted that it was possible that they were ejected after Mr. Sanchez's vehicle hit. After colliding with the Nissan, Mr. Sanchez's car traveled 360 feet before stopping and rear-ending Ms. Wakefield's car, which then traveled an additional 25 feet.

The airbag control module in Mr. Sanchez's car revealed that Mr. Sanchez had been driving 106 mph as of two-and-a-half seconds before his airbag deployed, then slowed down to 89 mph as of a half-second before deployment. Neither Ms. Wakefield's car nor the Nissan had a viable air bag module, but using standard collision reconstruction procedures, Detective Power estimated that Ms. Wakefield's car had been traveling at least

77.8 mph at the time of impact and that the Nissan was going approximately 10 mph. Detective Power also concluded that Mr. Sanchez would have hit the Nissan whether or not Ms. Wakefield had hit it, and that if Mr. Sanchez and Ms. Wakefield had been going the speed limit, 45 mph, the Nissan would have made the left turn without being hit.

Mr. Sanchez then called Peter J. Leiss, an expert in crash reconstruction, vehicle crash dynamics, and occupant kinematics. Mr. Leiss reviewed the discovery provided by the State, including Detective Power's reconstruction report and underlying investigative file, and agreed with Detective Power's assessment of how the accident had occurred. He concluded, though, that the occupants of the Nissan had been ejected from the Nissan when Ms. Wakefield's vehicle hit it, in the second before Mr. Sanchez's vehicle hit. Mr. Leiss based his conclusion on what he characterized as "probably short hairs" embedded in the headliner above the left rear door of the Nissan. He opined that these hairs were evidence that one of the occupants had been ejected from the driver's side rear door window. The State filed a motion in limine to preclude Mr. Leiss from testifying on the ground he was not qualified to give expert testimony. The court denied the motion, and Ms. Wakefield did not object to Mr. Leiss's testimony during trial.

Russell Alexander, Assistant Medical Examiner of the Chief Medical Examiner's Office for the State of Maryland, performed autopsies on the three victims. He testified that all three victims died from injuries sustained in the car accident, but could not determine the exact time at which any one of the injuries had occurred.

The State also introduced, by stipulation, a summary of the statements Mr. Sanchez and Ms. Wakefield made to police. As stipulated, Mr. Sanchez told officers that at approximately 9:35 p.m., he was driving his 2011 Chevy Camaro on Georgia Avenue. He stopped at the Citgo gas station in Aspen Hill, close to Hewitt Avenue. When he left the gas station, he drove northbound on Georgia Avenue and made a U-turn to go southbound toward his house. The light was green as he passed through the intersection of Hewitt Avenue. As he approached Main Street, he was in the far left lane when a Volkswagen Passat passed him in the middle lane. Mr. Sanchez was traveling between 50 and 65 miles per hour, and "accelerated a little bit more when the car passed him, but he didn't try to make it like somebody can think, like a race." Mr. Sanchez then saw a Nissan turning from Kayson Street to go northbound on Georgia Avenue. When the turning car was in the middle of southbound Georgia Avenue, the Passat struck it, which caused it to start rotating clockwise, traveling northbound toward him. Mr. Sanchez applied the brakes, but collided with the front corner of the Nissan, lost control, and eventually stopped on the opposite side of Georgia Avenue.

According to the stipulation, Ms. Wakefield told officers that on the night of the accident she was driving southbound on Georgia Avenue when she saw her mother at the Citgo gas station at the Lotte Plaza. She stopped, talked with her mother for five minutes, and left. Ms. Wakefield made a right, then turned left onto southbound Georgia Avenue at Wendy Lane, traveling southbound on Georgia Avenue in the middle lane. As she approached Hewitt Avenue, the stop light was turning from red to green. She said that she

drove through the intersection at approximately 50 mph, passing a Camaro in the left lane that had been stopped at the light. As she approached Kayson Street, she saw "a burgundy sedan dart[] out from her right side like it was trying to cross Georgia Avenue." She applied the brakes, but still hit the back half of the sedan, continued to travel forward, swerved to the right, then was hit from behind by the Camaro. She denied racing the Camaro.

At trial, Ms. Wakefield testified that she was traveling between 40 and 50 mph when she "saw a car dart out from [her] right hand side." She started to decelerate, but as she got closer, she noticed the car wasn't moving. She attempted to take "a hard right around the vehicle," but was unsuccessful.

During the State's rebuttal case, Detective Power testified that it was "not possible," as Ms. Wakefield claimed, that the Nissan was stopped in the middle of the road, given the direction the Nissan was facing after the collision, and that her claim of traveling between 40-50 mph at the time of the accident would have meant that her vehicle had sped up after the accident, which was also "impossible."

In closing, the State made reference, without objection, to the emotional nature of the case and the impact it had had on those involved, including the prosecutor himself and a paramedic who responded to the accident. At the close of evidence, Mr. Sanchez's counsel requested a special jury instruction explaining the meaning of a "speed contest," as well as a special verdict sheet that would allow the jury to indicate whether the verdict was based on a speed contest theory, a gross negligence theory, or both. The court denied

both requests. When a note from the jury asked about the definition of a speed contest, the court told the jury to "rely on [their] own common sense and everyday experience."

The jury returned guilty verdicts on all three counts of manslaughter by a motor vehicle as to both Ms. Wakefield and Mr. Sanchez. The court sentenced Ms. Wakefield to a total of thirty years in prison with all but ten years suspended, and sentenced Mr. Sanchez to thirty years in prison with all but twenty years suspended. This timely appeal followed.

II. DISCUSSION

Ms. Wakefield raises three contentions on appeal[1] and Mr. Sanchez raises four that we have re-ordered and condensed into three.[2] *First*, Ms. Wakefield contends that it was

[1] In her brief, Ms. Wakefield phrased her Questions Presented as follows:

> I. Whether it was plain error for the trial court to admit the expert testimony of Leiss when Leiss did not meet the requirements of Maryland Rule 5-702 because he (i) was not qualified to testify as an expert in forensic science and (ii) did not have an adequate factual basis or reliable methodology to support his opinions?
>
> II. Whether the trial court abused its discretion in denying Appellant's motion to sever when the expert testimony offered by Leiss (i) was not mutually admissible because it was hostile to Appellant's defense and inconsistent with the State's theory, and (ii) the prejudice to Appellant outweighed judicial economy of a joint trial?
>
> III. Whether improper remarks made by the prosecutor during closing arguments, taken cumulatively, likely misled the jury and denied Appellant of a fair trial?

[2] In his brief, Mr. Sanchez phrased his Questions Presented as follows:

plain error for the court to admit Mr. Leiss's expert testimony because he did not satisfy Maryland Rule 5-702. *Second*, she contends that the trial court abused its discretion in denying her motion to sever the trial. And *third*, she contends that the prosecutor made improper remarks during closing argument that prejudiced her unfairly.

Mr. Sanchez contends *first* that the court erred in denying both his motion for judgment of acquittal at the close of the State's evidence and his renewed motion for judgment of acquittal at the close of evidence. He argues that there was insufficient evidence of a speed contest and insufficient evidence that he caused the death of any of the victims directly. *Second*, he contends that the court erred in denying his request for a special verdict sheet. And *third*, he contends that the court erred in denying his request for a jury instruction as to the meaning of the term "speed contest."

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1. Whether the trial court erred in denying Appellant's motion for judgment of acquittal at the close of the State's case where there was (a) insufficient evidence of a speed contest and (b) insufficient evidence that Appellant caused the death of the victims.

2. Whether the trial court erred in denying Appellant's renewed motion for judgment of acquittal at the close of the entire case where there was (a) insufficient evidence of a speed contest and (b) insufficient evidence that the Appellant caused the death of any of the victims.

3. Whether the trial court erred in denying Appellant's request for a jury instruction as to the meaning of a speed contest.

4. Whether the court erred by denying the Appellant's request for a special verdict sheet.

The State counters that Ms. Wakefield's contentions about improper expert testimony and the prosecutor's improper remarks during closing argument were not preserved for appellate review and that the court did not abuse its discretion in denying her motion to sever the trial. With regard to Mr. Sanchez, the State argues that the evidence was sufficient to sustain his convictions, that the court did not abuse its discretion by denying his request for a special verdict sheet, and that he waived any claim of error relating to a request to deliver an instruction of the definition of a "speed contest."

A. Ms. Wakefield's Objections To Mr. Leiss's Testimony Are Not Preserved And Do Not Warrant Plain Error Review.

At trial, the court certified Mr. Leiss as an expert in crash reconstruction, vehicle crash dynamics, and occupant kinematics. Based on his review of discovery provided by the State, including Detective Power's reconstruction report and underlying investigative file, Mr. Leiss agreed with Detective Power's assessment of how the accident had occurred. He concluded, however, that the occupants of the Nissan had been ejected from the vehicle when Ms. Wakefield's vehicle collided with it, in the second before Mr. Sanchez's vehicle struck the Nissan. He based that conclusion in part on what he believed were "probably short hairs" embedded on the headliner above the left rear door of the Nissan—evidence that, he opined, one of the occupants had been ejected from the driver's side rear door window. If Mr. Sanchez's car had caused the ejection, Mr. Leiss concluded, the occupants would have been ejected through the front of the car, a hypothesis that, in his view, was not supported by the evidence.

Ms. Wakefield contends that it was plain error for the court to admit Mr. Leiss's testimony because he and his opinions fail to satisfy Maryland Rule 5-702. In particular, she argues that Mr. Leiss was "not qualified as an expert in forensic science," and thus not qualified to opine that the smears and short black hairs above the door of the Nissan were human hair and blood, and that he did not have "an adequate factual basis or reliable methodology to support his opinion[]" that the Nissan's occupants were ejected before Mr. Sanchez's vehicle collided with it. She claims that "[b]ut for the highly prejudicial and misleading nature of [Mr.] Leiss' testimony, the jury would have been far more likely to find [her] criminally negligent," rather than grossly negligent.

To be sure, an expert must be qualified to testify:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702. Unfortunately, Ms. Wakefield lodged neither of these objections at trial, and therefore has waived them. Md. Rule 4-323 ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). She doesn't dispute that these contentions aren't preserved, but she asks us to exercise our discretion to review them for plain error.

Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (citation omitted). Although appellate courts have discretion to overlook non-preservation, *Morris v. State*, 153 Md. App. 480, 512 (2003), Maryland courts will exercise their discretion to do so "only when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Kelly v. State*, 195 Md. App. 403, 432 (2010) (citations omitted). "[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.* (citations omitted). We can undertake plain error review where "(1) there is an error that the defendant did not affirmatively waive, (2) the error is clear and obvious, *i.e.*, not subject to reasonable dispute, and (3) the error affected the outcome of the trial, and, therefore, is material." *Perry v. State*, 229 Md. App. 687, 711 (2016) (citations omitted).

Ms. Wakefield does not cite, nor have we found, any case in which a Maryland appellate court reviewed the wrongful admission of expert testimony for plain error, and we decline to do so here. The decision to admit Mr. Leiss's testimony about when the occupants of the Nissan were ejected from the vehicle is not a "clear and obvious" error, but even if it were, any such error did not bear upon Ms. Wakefield's guilt or innocence. There is no dispute that Ms. Wakefield's car hit the Nissan first and caused the Nissan to begin to split apart. The State did not rely, nor did it need to, on the timing of the victims' ejection from the vehicle to prove its case against Ms. Wakefield.

Moreover, Mr. Leiss never opined on Ms. Wakefield's negligence, which refutes any notion that without his testimony the jury would have been far more likely to have found her criminally negligent rather than grossly negligent. Indeed, Mr. Leiss agreed with most of Detective Power's testimony, except as to when the victims were ejected from the vehicle. And Mr. Leiss did not opine as to whether Ms. Wakefield engaged in a race with Mr. Sanchez. So even if Mr. Leiss had not testified, the jury could reasonably have concluded from the evidence presented that Ms. Wakefield was guilty of vehicular manslaughter by engaging in a speed contest that resulted in three deaths;[3] or driving in a grossly negligently manner that contributed to the cause of the three deaths.[4] Therefore, even if it were error to admit Mr. Leiss's testimony, it would have been harmless, and not a candidate for plain error review.

B. The Trial Court Did Not Abuse Its Discretion In Denying Ms. Wakefield's Motion To Sever Her Trial From Mr. Sanchez's.

Before trial, Ms. Wakefield filed a motion to sever her trial from Mr. Sanchez. The court held a hearing, at which she argued that Mr. Leiss's testimony was not mutually admissible and that it prejudiced her. This argument echoed the argument that the State had made during the hearing on its motion *in limine* to exclude Mr. Leiss's testimony based on his failure to qualify as an expert pursuant to Maryland Rule 4-253. Ms. Wakefield

[3] *See Pineta v. State*, 98 Md. App. 614, 626 (1993) (any driver participating in an illegal race that results in a third person's death is guilty of vehicular manslaughter, "regardless of which driver actually collides with the victim or the victim's vehicle.")

[4] Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), of the Criminal Law Article § 2-209(b) ("*Prohibited*—A person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle . . . in a grossly negligent manner.").

contended that the State's attempt to preclude Mr. Leiss from testifying demonstrated that the evidence was not mutually admissible, and that the State would not have been able to offer Mr. Leiss's testimony against Ms. Wakefield in a separate trial:

> The State is basically indicating that [Mr. Leiss's] testimony also could be put forward by the State if they so chose. But, I'm not sure how, I find that argument a little disingenuous since the State was just trying to gut this witness's testimony or preclude him from testifying altogether.
>
> So we would argue that that factor just doesn't apply here. And, we would argue that the prejudice sustained by Ms. Wakefield is substantial, and that any judicial economy would not be served or possibly served but is substantially outweighed. We're relying basically on the rule as it is written in 4-253 under section (c).

The State responded that Ms. Wakefield's argument focused only on whether the evidence was mutually admissible, and the State argued it was:

> . . .[T]here's nothing that the defense for Ms. Wakefield is saying that would make this expert that Mr. Sanchez is bringing, Mr. [Leiss], that he wouldn't be mutually admissible against her. He's basically agreeing to the math that Detective Power said.
>
> He's saying that she was the first wrecking vehicle. Same thing that my expert is saying. There's some leaps that he was making that the State was trying to limit because I think they're beyond the scope of his opinion. But, so far as him actually being mutually admissible, there's nothing. **They're not saying antagonist defenses.** They're not using any other things for severance.
>
> **They're using straight mutual admissibility**. And, we could put Mr. [Leiss] on the stand to testify to the collision as it occurred if the State wanted to because there's nothing in there that wouldn't come in against her in [a] separate trial. So

> there's no reason to sever this case especially at this stage based on this evidence.

(Emphasis added).

The court found the evidence mutually admissible and denied the motion:

> [T]here's no dispute that the offenses, the charges against Mr. Sanchez and Ms. Wakefield are identical. The evidence that's been proffered that Ms. Wakefield finds prejudicial is evidence that, if the State chose to do so, they could use in its case against Ms. Wakefield.
>
> Accordingly, I do not find that there is sufficient prejudicial evidence to warrant a severance of this case. I'm going to deny the motion to sever.

We agree.

Maryland Rule 4-253 governs joinder and severance in criminal cases. Subsection (a) provides that two or more defendants can be tried together "if they are alleged to have participated in the same act or transaction offense or offenses." Subsection (c) directs the court to balance "the likely prejudice caused by the joinder . . . [and] the consideration of economy and efficiency in judicial administration." *State v. Hines*, 450 Md. 352, 369 (2016) (citation omitted). "'[P]rejudice' within the meaning of Rule 4-253 is a 'term of art,' and refers only to prejudice *resulting* to the defendant *from* the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Hines*, 450 Md. at 369 (emphasis in original) (citation omitted). But if the evidence is mutually admissible, severance is not warranted because there is no prejudice. *Osburn v. State*, 301 Md. 250, 254 (1984); *Ogonowski v. State*, 87 Md. App. 173, 187 (1991). We review the denial of a motion to sever for abuse of discretion. *Hines*, 450 Md. at 366.

Ms. Wakefield argues that the evidence was not mutually admissible because it was hostile to her defense and inconsistent with the State's theory. During the hearing on her motion to sever, however, Ms. Wakefield argued only that Mr. Leiss's testimony was inconsistent with Detective Power's testimony regarding when the occupants of the Nissan were ejected. As such, her new theory is not preserved for appellate review. *See* Md. Rule 8-131 ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

But even if her arguments were preserved, we would not be persuaded. Ms. Wakefield relies on *Day v. State*, 196 Md. 384 (1950), and *Erman v. State*, 49 Md. App. 605 (1981), both of which involved evidence that would not have been mutually admissible *and* happened to be prejudicial—not, as she argues here, evidence that was inadmissible *because* it was prejudicial. Those cases held that the prejudice to the defendant came from the risk that the jury might disregard a limiting instruction and consider, against the defendant, non-mutually admissible evidence. Indeed, under a joinder/severance analysis "[p]rejudice as a term of art means damage from inadmissible evidence, not damage from admissible evidence." *Sye v. State*, 55 Md. App. 356, 362 (1983) (holding that the trial court did not abuse its discretion in denying a motion for severance when the co-defendants had antagonistic defenses because the evidence was mutually admissible).

We agree with Ms. Wakefield that the State cannot present two directly conflicting theories at separate trials for defendants accused of the same crime. *See Sifrit v. State*, 383 Md. 77, 106 (2004) (holding that a due process violation will be found when the

demonstrated inconsistency between trials of defendants accused of the same crime exists at the core of the State's case). But we disagree that Mr. Leiss's testimony about when the occupants were ejected from the Nissan was inconsistent with the State's core theory of the case. The State argued at trial that Ms. Wakefield and Mr. Sanchez engaged in an impromptu speed contest or drove in a grossly negligent manner, and that their driving behavior caused the deaths of the three victims. The precise moment *when* the victims were ejected from the Nissan was not relevant to the State's theory of the case. So even if, at Ms. Wakefield's trial, the State had presented Mr. Leiss's testimony that the victims had been ejected from the car after Ms. Wakefield's car collided with it, and then, at a subsequent trial for Mr. Sanchez, presented Mr. Power's testimony that it was impossible to determine when the victims were ejected from the car, the inconsistency doesn't undercut the core of the State's theory. "Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts." *Sifrit*, 383 Md. at 106. As such, Mr. Leiss's testimony would have been mutually admissible, and the trial court did not abuse its discretion in denying Ms. Wakefield's motion to sever.

C. Ms. Wakefield's Argument About Improper Remarks During Closing Argument Is Not Preserved For Appellate Review.

Finally, Ms. Wakefield contends that during closing argument, "the prosecutor made numerous improper remarks that appealed to the passions and emotions of the jury and improperly shifted the burden of proof to the defendants." She argues that the cumulative effect of the remarks "likely misled the jury and, consequently, severely

prejudiced [her]." She acknowledges that her counsel did not object to the prosecutor's remarks during the trial, but asserts that she did not waive any objections, and that thus the appropriate standard of review is plain error. *Herring v. State*, 198 Md. App. 60, 83–84 (2011).

This too is not an appropriate matter for plain error review, although we will, in light of the gravity of the charges, explain why we discern little or no error here. As a general rule, "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted). Attorneys are allowed "to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded wide range." *Herring*, 198 Md. App. at 84 (citation omitted). Even so, there are certain boundaries that an attorney may not exceed in delivering his or her closing argument. *Mitchell v. State*, 408 Md. 368, 381 (2009). For example, an attorney may not "comment upon facts not in evidence or . . . state what he or she would have proven." *Mitchell*, 408 Md. at 381 (citation omitted). An attorney is also not permitted to "appeal to the prejudices or passions of the jurors or invite the jurors to abandon objectivity that their oaths require." *Id.* (internal citations omitted).

But not every improper comment made during closing argument requires reversal. "[R]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005) (citations omitted). "What exceeds

the limits of permissible comment or argument by counsel depends on the facts in each case." *Smith and Mack v. State*, 388 Md. 468, 488 (2005). "[The] determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Lawson*, 389 Md. at 592 (citations omitted). "[A]n appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Id.* (citations omitted).

Ms. Wakefield contends that the prosecutor improperly appealed to the passions of the jury on several occasions and encouraged them to "use emotion rather than reason" to decide the case. In particular, she challenges two sets of comments regarding Elizabeth Pineda: *first*, "Poor Elizabeth. A 4-year-old obviously seeing the small photos you did. It was very traumatic to this little girl;" and *second*, "the fact that Elizabeth was upside down in her car seat. Skidded across Georgia Avenue. Imagine what she looked like in actual photos." We agree that these remarks had little or no bearing on Ms. Wakefield's guilt or innocence, and only emphasized the speed at which the cars must have been traveling to have caused the car to have split apart and for Elizabeth to have been ejected from the car. But when evaluated in the context of the entire case, these comments did not affect the ability of the jury to render a fair and impartial verdict. *See Lawson*, 389 Md. at 605–06 (explaining that under plain error review, prejudice can only be determined by considering the error in the context of the entire case, including the cumulative effect of all errors).

In addition to the prosecutor's comments about Elizabeth, Ms. Wakefield challenges the prosecutor's statements about the emotions of the emergency responders and witnesses.

The prosecutor argued to the jury that witness Nelson Lopez "has a small daughter" and "he gets to see the baby seat live. He gets to see the situation live," and that paramedic Scott Stokes "[broke] down on the stand" and "[l]iterally fell apart talking about how he had to go over and triage."

In context, though, these statements did not encourage the jury to "use emotion rather than reason" to decide the case, but described the emotional state of the witnesses and how that might bear on their credibility:

> One of the things the judge instructed you was on evaluating credibility and looking also at how people reacted on the stand.
>
> Think about how seasoned police officers, think of how a paramedic of what? 29 years or something like that. Breaks down on the stand. You have a collision reconstructionist. You have a lot of people that were there. Physically there. And the emotional response and the impact that this has had was powerful. It's two and a half years later and it still resonates.
>
> Why? Because this was horrific. This was not an accident. This was not a routine incident that would take place on Georgia Avenue. This is horrific. There is a reason you viewed the car. Seeing photos is one thing. Seeing that carnage in person should show you that [] only [] an outrageously high speed could cause that kind of trauma to a vehicle.

Similarly, when referring to the fact that Mr. Lopez "has a small daughter" and "gets to see this live," the prosecutor sought to rehabilitate Mr. Lopez's credibility after defense counsel had drawn attention to inconsistencies in his account of the scene:

> [Defense Counsel] spent a lot of time tearing down [Mr. Lopez] and he said something different that night. He said something else. But they don't talk about what their people said and how they gave different accounts. And [Mr. Lopez]

> told you he has a small daughter. He gets to see the baby seat live. He gets to see the situation live. The impact this had on all of us on paper, all of us that didn't get to go that night on paper is one thing. Imagine seeing it.

Finally, Ms. Wakefield complains that the prosecutor acknowledged his own emotional reaction to the case when he said, "Yes. I'm emotional." But, again, in context, it appears that the prosecutor was responding to the defense's references to Ms. Wakefield's military service:

> What I will start with [is what Defense Counsel for Ms. Wakefield] actually said to you [–] if Mr. Ramos would have waited a few seconds, he'd be here.
>
> . . . If they would have been slowed down, he would have been able to take his brother. And what is that? It's his fault that they are speeding like they were? The first time I told you there would be no explanation for 106 [mph] because there isn't one. There isn't one. Yes. I'm emotional. The topic is. Yes. I'm loud. It doesn't change what the facts are.
>
> * * *
>
> [Defense Counsel] argued that you should not take into account any emotion and everybody wants you not to feed off my behavior. Everybody is worried about my behavior. My behavior doesn't count. They [don't] want you to give any emotion or any thought to the family that was killed but they want to talk about [Ms. Wakefield] being in the reserves and everything else because they want you to give some benefit based on that. You can't have it both ways. They can't.

The prosecutor's comments, although emotional, were not improper. Attorneys are "free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, . . . [and] may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Spain v. State*, 386 Md.

145, 152–53 (2005). And even if they were improper, they didn't mislead the jury—there was ample evidence to convict Ms. Wakefield of vehicular manslaughter based on the accident reconstructionists' and eyewitnesses' testimony. Further, the trial court instructed the jury that closing arguments were not evidence. *See Herring*, 198 Md. App. at 86 (declining to invoke plain error review when, among other reasons, the trial court instructed the jury that counsels' arguments were not evidence). This is not a case, as *Lawson* was, in which the evidence was comparatively thin, that turned heavily on the jury finding the victim credible, and in which the court undertook no corrective measures.[5] 389 Md. at 604.

We also are not persuaded that the prosecutor's remarks during closing argument shifted the burden of proof to the defendants by "commenting on the defendants' failure to produce evidence that they did *not* engage in a race." We acknowledge that a prosecutor is not free "to comment upon the defendant's failure produce evidence to refute the State's evidence because it could amount to an impermissible shift of the burden of proof," *id*. at 595 (citation omitted), but that's not what happened here.

[5] Ms. Wakefield cites numerous cases from other jurisdictions to support her argument that the prosecutor's remarks during closing argument unfairly prejudiced her. None helps her. In *State v. Long*, 293 Conn. 31, 51 (2009), the Supreme Court of Connecticut held that the prosecutor's remarks were not improper because it was based on facts in evidence and did not appeal to the jury's emotions. In contrast, in *People v. Brooks*, 175 Ill. App. 3d. 136, 147 (1st. Dist. 1988), the Appellate Court of Illinois held the prosecutor repeatedly referenced the quality of the victim's life and his family for no other reason than to inflame the emotions of the jury. Finally, in *State v. Keenan*, 66 Ohio St. 3d 402, 409 (1993), the prosecutor consistently substituted emotion for reasoned advocacy in his closing argument, expressly encouraged the jury to react emotionally to the evidence, "denigrated" defense counsel, and called the defendant an "animal."

Instead, the prosecutor distinguished the relative quality of the testimony presented by the two sides:

> It's obvious what was taking place. And you have witnesses who told you what was taking place because of what they saw. They provide you enough information to find them guilty of all charges beyond a reasonable doubt based on the snapshots that they can give you. Blowing past [Ms. Kocsis] as if she is standing still. [Mr. Lopez] right there on the corner. And then the only thing that didn't think they are racing, they are still both driving at such outrageous and wanton and reckless speeds and yet they just so happen to be doing the same thing together but yet independent there is no evidence from Mr. Leiss when you really boil it down like I did with the vehicles to show that example.
>
> To show that there are still more people in the car. It is actually impossible based on if Mr. Leiss is really sticking to this window because where did it face. Also think about timing. You have to think about again Mr. Ramos was 248 pounds. He went out that window. This is what Mr. Leiss would have you believe. The car split in half.
>
> Ramos went back and out all in a half second to a second and they were all scattered sand they didn't get hit by anything else until they went and rolled around the road. It's just not credible. It's just not.

Viewed in context, the comment "there is no evidence from Mr. Leiss when you really boil it down" seeks to impeach Mr. Leiss's credibility with regard to his conclusion that Mr. Ramos was ejected from the car window, not to imply that the defense had the burden to prove they weren't racing.

Even if we viewed this statement as a comment on the defense's failure to produce evidence that the defendants weren't racing, it was one comment in the middle of a lengthy closing argument and did not likely influence the jury or prejudice Ms. Wakefield.

See Calloway v. State, 141 Md. App. 114, 120 (2001) ("Even an improper remark does not necessarily compel reversal of a conviction unless the jury was actually misled or it was likely they were influenced to the prejudice of the defendant.") (citations omitted); *Rubin v. State*, 325 Md. 552, 589 (1992) (declining to exercise plain error review when prosecutor made improper remarks by stating facts not in evidence during closing argument because there was "overwhelming proof of guilt"). And the trial court instructed the jury that the prosecutor bore the burden of proof: "[t]he State has the burden of proving the guilt of the defendant beyond a reasonable doubt. The defendant is not required to prove his or her innocence." As such, we decline to invoke plain error review. *See Mitchell*, 408 Md. at 393 (holding that even if the prosecutor's comments during closing argument were improper, they did not shift the burden to the defendant because, among other reasons, the trial court instructed the jury that the State had the burden of proof); *Clermont v. State*, 348 Md. 419, 433 (1998) (declining to exercise plain error review when the court instructed the defendant was presumed "not guilty" rather than "innocent" because the jury instructions accurately and completely conveyed the burden of proof and the defendant's presumption of innocence).

D. The Evidence Was Sufficient To Sustain Mr. Sanchez's Convictions.

Mr. Sanchez contends that the trial court erred in denying his motions for judgment of acquittal at the close of the State's case and his renewed motion for judgment of acquittal at the close of all evidence. He argues that the State did not produce sufficient evidence to prove that he was racing or that he caused the death of any of the victims. The State counters that there was sufficient evidence to sustain the convictions based on a speed

contest between the two cars or a finding that Mr. Sanchez drove in a grossly negligent manner. We find that the evidence sufficed to sustain the convictions under either theory.

When reviewing the sufficiency of evidence to support a conviction, we look at whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). Our concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (alterations in the original) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). And "we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence." *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (alterations in the original) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)).

Any driver participating in an illegal race that results in a third person's death is guilty of vehicular manslaughter, "regardless of which driver actually collides with the

victim or the victim's vehicle." *Pineta v. State*, 98 Md. App. 614, 626 (1993). But excessive speed is insufficient by itself to sustain a conviction of vehicular manslaughter from illegal racing. *Walker v. Hall*, 34 Md. App. 571, 582 (1977). There also must be evidence of some kind of an agreement to engage in a race, *id.*, although the agreement need not be stated expressly and may be inferred by conduct. *Hensen v. State*, 133 Md. App. 156, 172 (2000).

Mr. Sanchez cites *Walker*, 34 Md. App. at 582, and *Haddock v. Stewart*, 232 Md. 139 (1963) for the proposition that the evidence was insufficient to permit a reasonable inference that he was racing, but those cases are readily distinguishable. In *Walker*, the only evidence of a race was the fact that the two cars were both speeding and an eyewitness had testified that he saw one car going about 70 mph, then a slow-moving vehicle, followed by another speeding vehicle that passed the slower car. 34 Md. App. at 578. The witness said he "automatically took it for granted" that the two fast moving cars were racing, *id.*, but we noted that there was no evidence of racing other than the witness' exclamation that he "automatically took it for granted" that the cars were racing. That, we held, served as nothing more than a "conclusory, knee-jerk" reaction, and was not legally sufficient to prove a speed contest. *Id.* at 582 (internal quotations and citations omitted).

Similarly, in *Haddock*, the only evidence of a race was that the cars were both speeding. *Haddock*, 232 Md. at 144. One of the drivers, Mr. Smith, died from the collision and there were no eyewitnesses. *Id.* at 140. Mr. Haddock testified that Mr. Smith attempted to engage him in a race, but that he declined. *Id.* at 141. We concluded that the

evidence produced to show a speed contest "[did] not rise above surmise and conjecture" and thus was insufficient to prove Mr. Haddock was racing Mr. Smith. *Id.* at 144.

The evidence in this case amply supported the conclusion that Mr. Sanchez engaged in a race with Ms. Wakefield. As a starting point, Detective Power testified—from data retrieved from Mr. Sanchez's car—that he was traveling 106 mph just seconds before the collision, and he opined that Ms. Wakefield's car was traveling at least 77.8 mph at impact. Eyewitness testimony corroborated the State's theory too. Mr. Lopez, an automotive technician, testified that right before the crash, he "heard engines speeding up," going southbound like they were "taking off." Ms. Kocsis, another eyewitness, testified that she was driving about 40 mph when "two cars flew past [her] in the middle and left lane" of Georgia Avenue "going at least 70 [mph]." Additionally, Ms. Wakefield told police that as they were travelling southbound on Georgia Avenue prior to the crash, the front bumper of Mr. Sanchez's car was positioned to her car's rear bumper. From this evidence, the jury could readily have concluded that Mr. Sanchez and Ms. Wakefield were racing.

Indeed, contrary to Mr. Sanchez's assertion, the facts of the present case are more akin to *Hensen*, 133 Md. App at 156, where we found sufficient evidence of racing. In *Hensen*, the defendant claimed that there was insufficient evidence to prove he was racing because there was no evidence of an explicit agreement to race. *Id.* at 171. We concluded that testimony from eyewitnesses that the defendants "were traveling at exceptionally high rates of speed, in proximity with each other, and weaving in and out of traffic[]" provided "ample evidence that the parties had agreed, albeit by conduct, to race each other only

minutes before the fatal collision." *Id.* at 171–72. Here, as in *Hensen*, Mr. Sanchez and Ms. Wakefield were travelling at exceptionally high rates of speed, in proximity to each other, "engines speeding up" and the "two cars fly[ing] past" side-by-side before they collided with Mr. Ramos's vehicle within one second of each other.

The State's other theory of vehicular manslaughter is defined in statute. Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.) § 2-209(b) of the Criminal Law Article ("CL") provides that "[a] person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle . . . in a grossly negligent manner." In the context of vehicular manslaughter, "gross negligence" means "a wanton or reckless disregard for human life." *Burlas v. State*, 185 Md. App. 559, 569–70 (2009) (internal quotations and citations omitted). Mr. Sanchez argues that the State provided insufficient evidence to prove vehicular manslaughter under a gross negligence theory because their experts admitted that it was impossible to establish when and by which impact the injuries and deaths occurred. As such, Mr. Sanchez contends, "the jury was left with insufficient evidence that [he] caused anyone to die."

It's true that in order to prove manslaughter under a gross negligence theory, the State must establish that Mr. Sanchez caused the death of the victims. CL § 2-209(b). We disagree, however, that the State failed to do so. A defendant "is only criminally liable for what he has caused, that is, there must be a causal relationship between his act and the harm sustained for which he is prosecuted." *Burlas*, 185 Md. App. at 578–79. But "[t]o constitute the cause of the harm, it is not necessary that the defendant's act be the sole

reason for the realization of the harm which has been sustained by the victim." *Palmer v. State*, 223 Md. 341, 353 (1960) (citation omitted). Indeed, a "defendant does not cease to be responsible for his otherwise criminal conduct because there were other conditions which contributed to the same result." *Palmer*, 223 Md. at 353.

There is no dispute that Mr. Sanchez's vehicle collided with Mr. Ramos's car approximately one second after Ms. Wakefield's car struck it. Mr. Sanchez offered the jury a theory under which he and his car didn't cause the three deaths, but the jury wasn't obliged to follow it. The jury could, and apparently did, find more credible the State's theory, which was supported with expert testimony and evidence from which a reasonable jury could conclude that he caused the death of the victims. *See id.* ("[T]he question of proximate cause is usually a question of fact for the determination of the jury, or other trier of fact."). The fact of an alternative theory doesn't render the State's evidence insufficient, and the trial court did not err in denying Mr. Sanchez's motions for acquittal. *See Hensen*, 133 Md. App. at 172 (finding the evidence sufficient to prove vehicular manslaughter because the accident and deaths were a reasonably foreseeable consequences of the defendant's driving, even though his vehicle was not the one that actually collided with the victim's vehicle).

E. The Trial Court Did Not Err In Denying Mr. Sanchez's Request For A Special Verdict Sheet.

At trial, the State presented two theories by which Mr. Sanchez and Ms. Wakefield could have been found guilty: (1) that Mr. Sanchez and Ms. Wakefield engaged in a speed contest, the consequence of which resulted in the victims' deaths; or (2) that Mr. Sanchez

and Ms. Wakefield each drove in a grossly negligent manner that caused the death of the victims. At the close of the evidence, the jury was instructed that it could only find Mr. Sanchez (and Ms. Wakefield) guilty if the State proved beyond a reasonable doubt that either: (1) Mr. Sanchez and Ms. Wakefield engaged in a speed contest and the victims died as a consequence, "regardless of which driver actually collided with the victim's vehicle resulting in death;" or (2) in the absence of a speed contest, Mr. Sanchez's (and Ms. Wakefield's) "grossly negligent conduct was a cause of the death of another person."

Because the jury was instructed as to two possible theories of guilt, Mr. Sanchez's counsel asked the court for a special verdict sheet so that the record would reflect whether the verdict was based on the State's speed contest theory, gross negligence theory, or both. The trial court declined to give the special verdict sheet, and instead submitted a verdict sheet that simply asked whether the defendants were not guilty or guilty of vehicular manslaughter.

Mr. Sanchez contends that the trial court erred in denying his request for a special verdict sheet that indicated upon which theory the jury found him guilty. He concedes that the "jury verdict would be flawed" only if we were to hold that there was insufficient evidence of a speed contest but sufficient evidence of causation. By failing to require the jury to specify the theory on which it convicted him, he contends that the general verdict sheet leaves questions in that regard, and might even allow a jury to vote to convict but on different theories.

We agree that "[t]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Dixon v. State*, 364 Md. 209 (2001) (quoting *Yates v. United States*, 354 U.S. 298, 312 (1957); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("With respect to findings of guilt on criminal charges, the [Supreme] Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict."). But we don't have that problem here: we already have found that the evidence sufficed to support a conviction based on either theory, so there would be no basis on which to set aside the verdict.[6]

F. The Trial Court Did Not Abuse Its Discretion In Denying Mr. Sanchez's Requested Jury Instruction As To The Meaning Of A Speed Contest.

Finally, Mr. Sanchez contends that the trial court erred when it denied his request for a special jury instruction on the meaning of a speed contest at the close of evidence, and again in response to the jury's question asking for a definition of that term. The State responds that Mr. Sanchez waived his argument as to the jury instruction because he failed to object when the trial court read the jury instructions and that he did not challenge in his

[6] Citing *Tarray v. State*, 410 Md. 594, 616 (2009), the State argues that a special verdict sheet was not needed, whether or not there was insufficient evidence to prove a speed contest, because there was sufficient evidence to support a finding as to one of its theories of guilt, *i.e.* gross negligence. We need not address whether Mr. Sanchez's convictions could stand based solely on one theory of liability, though, because we already have found that the evidence supported the convictions under either independently.

brief the court's answer to the jury's question. We agree that Mr. Sanchez did not preserve his argument about the special jury instruction at the close of evidence. But he did preserve his argument that the court improperly refused to answer the jury's question. Even so, we find no error.

Jury instructions "are reviewed in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issued raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003) (citation omitted). We review a trial court's refusal to give a jury instruction for abuse of discretion. *Bazzle v. State*, 426 Md. 541, 548 (2012). Whether the evidence is sufficient to generate the requested instruction in the first instance, however, is a question of law that we review *de novo*. *Fleming*, 373 Md. at 433 (citation omitted).

Prior to the court instructing the jury, Mr. Sanchez submitted a written request for a number of special jury instructions, including one as to the meaning of a speed contest:

> Speeding and racing are not the same thing, and the proof of speeding alone does not prove the occurrence of a race. The gist of racing is a competition between two or more vehicles and the facts must support an inference of some agreement to race.

When discussing the jury instructions with the court, however, Mr. Sanchez's counsel did not request the speed contest instruction specifically, nor did he object when the court read the instructions themselves, without including this one. Instead, Mr. Sanchez's counsel focused on his request for a special instruction regarding alcohol impairment. The trial

court refused to give the alcohol impairment instruction and Mr. Sanchez asked the court to note his objection.

In addition to failing to request a special instruction on the definition of a speed contest, the defense didn't object when the court read the instructions to the jury, as required by Maryland Rule 4-325(e): "No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." As such, Mr. Sanchez's contention is not preserved for appellate review. *Hunt v. State*, 345 Md. 122, 150 (1997) ("[F]ailure to challenge a jury instruction in accord with Md. Rule 4-325(e) will act as a bar to any subsequent assignment of error thereto.").

He did, however, preserve his objection to the court's decision not to give this instruction in response to the jury's question as to the meaning of a speed contest. At the outset, jury instruction are designed "to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at the correct verdict." *Cruz v. State*, 407 Md. 202, 209 (2009). Trial courts have the discretion to decide whether to give a supplemental jury instruction in a criminal case. *Cruz*, 407 Md. at 210 (citation omitted). But this discretion isn't boundless: a 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 that is central to the case." *Id.*

During deliberations, the jury posed a question to the court in a note: "What is the definition of a speed contest?" Mr. Sanchez's counsel asked the court to instruct the jury

that "the gist of racing is a competition between two or more vehicles and the facts must support an inference of some agreement to race." The State argued that there is no legal definition of a speed contest and that informing the jury to use their common sense was appropriate under the facts of the case. The trial court refused to give the instruction suggested by Mr. Sanchez's counsel and instead instructed the jury to "rely on [their] own common sense and everyday experience."

To be sure, "trial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Appraicio v. State*, 431 Md. 42, 53 (2013). And we see no error in the trial court's response to the jury's question here. The jury had already been instructed generally about the elements of the crimes at issue:

> When a person has been killed as a consequence of the *illegal racing* of motor vehicles, any driver participating in the race may be convicted of manslaughter by motor vehicle regardless of which driver actually collided with the victim's vehicle resulting in death.
>
> If you concluded that the State has failed to prove beyond a reasonable doubt that the defendants were involved in a *speed contest* then you can only find a defendant guilty of motor vehicle manslaughter if you find beyond a reasonable doubt that said defendant's grossly negligent conduct was a cause of the death of another person.

(Emphasis added). The instruction the court gave equates a speed contest with illegal racing, which is not a confusing concept—cars may not legally race each other on public streets, period, and drivers that do are engaged in a speed contest. We find that the jury instructions stated the law correctly, were not misleading, and covered the issue raised by the evidence. We see no abuse of discretion in the trial court's decision to tell the jury to

use their common sense and everyday experience in determining the definition of a speed contest. *See Fleming*, 373 Md. at 433 (explaining that reversal is inappropriate if the instructions, taken as a whole, "correctly state the law, are not misleading, and cover adequately the issue raised by the evidence").

Mr. Sanchez points us to *Cruz*, 407 Md. at 202, but the analogy doesn't work. In *Cruz*, the defendant was charged with first-degree assault. *Id.* at 204. At the close of evidence, the court agreed that it would only instruct the jury on battery, the sole second-degree assault theory advanced by the State, and the defense tailored its closing argument to that instruction. *Id.* at 221. In response to a jury question during deliberations, the trial court instructed on a new theory of culpability, attempted battery. *Id.* at 220. The Court of Appeals held that the trial court abused its discretion in giving the supplemental jury instruction because it prejudiced the defendant, as "defense counsel essentially conceded the defendant's intent to make contact and walked into an attempted battery verdict." *Id.* at 221.

Mr. Sanchez suffered no such prejudice. There is no statutory or formal legal definition of speed contest, and no pattern jury instruction using that term. And although it's true that there must be some evidence of an agreement to race, the members of the jury could understand this concept fully from their common sense and everyday experience.[7]

[7] Car racing on public streets is well understood in popular music, for example, across generations and genres. *See, e.g.*, CHUCK BERRY, MAYBELLENE (Chess Records 1955) ("As I was motivatin' over the hill/I saw Maybellene in a coup de ville/A Cadillac a-rollin' on the open road/Nothin' will outrun my V8 Ford/The Cadillac doin' 'bout ninety-five/She's bumper to bumper rollin' side by side"); THE BEACH BOYS, LITTLE DEUCE

And the decision not to give a supplemental instruction here stands in stark contrast to the cases in which Maryland appellate courts have found an abuse of discretion for failing to respond adequately to a jury's question. *See State v. Baby*, 404 Md. 220, 263 (2008) (holding the trial court abused its discretion by failing to address the jury's questions about whether a woman could withdraw consent after intercourse had begun where the court referred the jury back to the legal definition of rape); *Brogden v. State*, 384 Md. 631, 634 (2005) (holding the trial court abused its discretion when it issued a supplemental

COUPE (United Western Records 1963) ("Well I'm not braggin' babe so don't put me down/But I've got the fastest set of wheels in town/When something comes up to me he don't even try/Cause if I had a set of wings man I know she could fly."); DEEP PURPLE, HIGHWAY STAR (Warner Bros. 1972) ("Nobody gonna take my car/I'm gonna race it to the ground/Nobody gonna beat my car/It's gonna break the speed of sound/Oooh it's a killing machine/It's got everything/Like a driving power big fat tires/And everything"); COMMANDER CODY AND HIS LOST PLANET AIRMEN, HOT ROD LINCOLN (Sony/ATV 1975) ("Now the fellas ribbed me for bein' behind/So I thought I'd make the Lincoln unwind/Took my foot off the fas'n'man alive/I shoved it down into overdrive"); JERRY REED, EASTBOUND AND DOWN (RCA 1977) ("Keep your foot hard on the pedal/Son, never mind them brakes/Let it all hang out 'cause we got a run to make/The boys are thirsty in Atlanta and there's beer in Texarkana/And we'll bring it back no matter what it takes"); BRUCE SPRINGSTEEN, RACING IN THE STREET (Columbia 1978) ("Tonight, tonight the strip's just right/I wanna blow 'em off in my first heat/Summer's here and the time is right/For racing in the street"); FOREIGNER, REV ON THE RED LINE (Atlantic 1979) ("Two in a row, everybody knows/at the green light you rev it on the red line"); RUSH, RED BARCHETTA (Mercury Records 1981) ("Suddenly ahead of me, across the mountainside/A gleaming alloy air-car shoots towards me, two lanes wide/I spin around with shrieking tires, to run the deadly race/Go screaming through the valley as another joins the chase"); METALLICA, FUEL (Elektra 1997) ("Take the corner, join the crash/Headlights, head on, headlines/Another junkie lives too fast/Yeah lives way too fast, fast, fast, oohhOH!"); MYSTIKAL, SMASHING THE GAS (GET FASTER) (2003) ("Big truck driver/Fast car rider/You hear them horses comin' what you gon' do/Get out the way, move fool!"); PETEY PABLO, NEED FOR SPEED (Jive Records 2003) ("See ya later alligator/I'm gone/Dippin' trucks, duckin' cars/Watch out for the wall/I can hold my own/Out here on the dangerous road").

instruction concerning a defense not raised by the defendant that was not applicable to the count as presented and that inappropriately shifted the burden of proof); *Lovell v. State*, 347 Md. 623, 659–60 (1997) (holding the trial court abused its discretion in a capital case when it refused to give a supplemental jury instruction clarifying the mitigating factor "youthful age," without which there was a "very real risk" that the jurors would have reached an "erroneous[]" conclusion regarding the mitigating factor); *Battle v. State*, 287 Md. 675, 685 (1980) (finding reversible error where the trial court's response to an ambiguous question by the jury was confusing and potentially misleading). The jury knew from the instructions the court already had given that a speed contest meant illegal racing, and the court didn't abuse its discretion by directing the jury to rely on its common sense and life experience to answer the speed contest question here. *See Appraicio*, 431 Md. at 56 (holding the trial court did not abuse its discretion in responding to a question posed by the jury as to whether they could consider the fact that there were no police reports or police testimony that they should "consider [the evidence] in light of your own commonsense and your experiences").

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.