Circuit Court for Worcester County
Case No. C-23-CR-18-000177

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3160

September Term, 2018

JONATHAN TORIN KIDDER

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: October 23, 2020

Jonathan Kidder caused two accidents with his sport utility vehicle in the span of a few minutes. First, he struck and killed a cyclist, Jose Pineda Madrid, as Mr. Madrid rode home from work. Mr. Kidder kept going, and a few minutes later, he rear-ended a stopped car. Then, he fled the scene on foot.

Mr. Kidder was charged with and convicted of negligent homicide by motor vehicle while under the influence of alcohol, negligent homicide by motor vehicle while impaired by alcohol, failure to remain at the scene of an accident involving death, negligent driving, driving while under the influence of alcohol, and driving while impaired by alcohol. He makes five arguments on appeal. *First*, he contends that his enhanced sentence for failure to stop at the scene of an accident involving a death is illegal because he wasn't charged with a necessary element. *Next*, he argues that the trial court excluded significant parts of the community from the jury in violation of his right to a fair and impartial jury. *Third*, he claims that the court erred when it read the State's requested jury instruction on his duty to keep a lookout. He contends *fourth* that the court abused its discretion during closing argument, that the evidence was insufficient to convict him of negligent homicide while under the influence of alcohol, and *finally* that his sentence for failure to remain at the scene of an accident involving death was illegal. We vacate Mr. Kidder's conviction for failure to stop at the scene of the accident involving death, remand for resentencing on that count, and affirm the remaining convictions.

I. BACKGROUND

A. Jury Selection.

The trial court explained its jury selection methodology to the parties:

> We need 12 jurors and we need one alternate, that's 13. Four strikes for the State and four strikes for the defense. . . . [A]nd then one strike for the alternate for the State and two strikes for the alternate for the defense. That results in the number of 24.
>
> What the Court's intention [] regarding the voir dire process is to ask all of the questions in their entirety noting any affirmative or negative responses on the jury list by the juror number. And since the questions are enumerated, it's actually a pretty easy process to follow.
>
> **Once all of the questions have been propounded to the venire panel, the court will then determine . . . if there are 24 individuals who have not answered affirmatively or negatively to any question.**
>
> **If they have not answered affirmatively or negatively, there would be no reason to bring them up to the bench for additional questioning**. . . .
>
> [I]f there are 24 such individuals, then we can immediately go to alternative strikes in the selection process.[1]

[1] The court explained that it was using a method outlined in a manual from the Maryland State Bar Association:

> As we discussed back in chambers, the process that the Court intends to follow is a process that actually is obtained and referenced in [the] model jury selection question manual put together by the Maryland State Bar Association Special Committee on Voir Dire 2015 through 2016 report. In that publication it references methods—this is the last page, page 91 where it says methods commonly used in Maryland for jury selection.
>
> And it is No. 4 as the commonly used method in Maryland for jury selection, albeit commonly used might be a term of art because at least according to this publication, there are just a few Circuit Court judges who utilize this method.
>
> But I note that it is not—and I'll discuss what the method is in just a moment. But I note pursuant to the publication, it is not a disapproved method as is method No. 3 which actually has a highlight that says method disapproved in [*Wright v. State*, 411 Md. 503 (2009)], and it cites two other cases.

(emphasis added). Defense counsel objected to the court's method because it prohibited qualified members of the venire from sitting on the jury, but he acknowledged that he didn't have standing to make that argument. He then objected that the court's method amounted to *sua sponte* strikes for cause without any individual inquiry of the juror's ability to serve:

> [DEFENSE COUNSEL]: Individuals, citizens of this country who meet the qualifications have the right to be called for jury service and would presumably have a right to sit on a jury. **And the method in question this morning essentially would prohibit individuals for benign reasons who would otherwise have no issues sitting in judgment of a case like this**. . . .
>
> And I can imagine a situation where . . . the Worcester County jury office [brought] in 200 jurors for every case, there would never be a situation where we would need to inquire into affirmative answers, and individuals who are related to law enforcement officers would per se be prohibited from serving on a jury in their community.
>
> [THE COURT]: Until the venire got wind of what it was that would keep them off of a jury. And then everyone would stand up or answer for some question.
>
> [DEFENSE COUNSEL]: You[r] Honor's certainly correct. The second—**now, I acknowledge the issue with me presenting that argument as I don't have standing**. . . .
>
> I think a more pragmatic argument comes from the rules, cause challenges need to be raised by parties and ruled on by the Court. **The procedure suggested by the Court, it would essentially be tantamount to the Court exercising sua sponte cause challenges without inquiring as to whether an individual would be unable to sit fairly and impartially in this case.**

(emphasis added). The court overruled the objection. It stated that *voir dire* in Maryland is not "for the purpose of determining or ferreting out information about potential jurors so that peremptory challenges can be exercised," but that if it were unable to find 24 people

who didn't respond to a voir dire question affirmatively, it would "examine the jurors." The court stated that it was "not even remotely close to determining [] that people who have answered affirmatively or negatively to any question [] are not qualified jurors, and that they should therefore be stricken for cause."

The overwhelming majority of the potential jurors responded to one or more *voir dire* questions, and many (marked below by asterisks) responded to more than one:

Question	**Jurors**
Do you know anything about this alleged incident or have you seen or heard anything about it from any person or source including the Internet and news media? **T1.26.**	314, 367, 406, 176, 337, 207, 418, 343, 227, 388, 336, 345, 401
Do you know any of the counsel from any professional, business or social relationship?	378, 300, 278, 343
Do you know any of [the] witnesses in any capacity?	274, 295, 300*, 378*, 406*, 176*, 327, 346, 207*, 375, 283, 334, 359, 303
Would you give any greater or lesser credit or weight to the testimony of a police officer over that of a witness in another occupation merely because of his or her status as a police officer?	364, 278*, 374, 418*, 375*, 283*, 388*, 336*, 323
Have you been, A, the victim of a crime similar to the crimes charged today; a witness to a crime, that was B, and, C, arrested for, charged with or convicted of a crime other than a minor motor vehicle violation?	368, 300*, 378*, 406*, 307*, 327*, 176*, 393, 282, 122, 317, 356, 400, 207*, 395, 273, 420, 330, 283*, 342, 359*, 401*, 323*
Have you or any member of your immediate family ever been a member of a law enforcement agency?	374*, 348, 329, 383, 364*, 300*, 380, 278*, 327*, 337*, 395*, 418*, 273*, 342*, 303*, 401*, 323*
Do you have any urgent personal or business obligation that you cannot reschedule that could interfere with your ability to give your full attention to this trial?	343*, 283*, 336*
Do you have any physical or mental ailments or problems such as hearing, sight or otherwise which would render you incapable of performing your duty as a juror in this case if selected?	346*, 317*, 279

The court identified only fourteen people who didn't respond to any questions. Beyond those fourteen, the court questioned other members of the venire who had responded to at least one question.[2] Once the court identified twenty-four prospective jurors (the fourteen who hadn't responded to any questions and ten examined individually by the court), the parties exercised their peremptory strikes and the jury was selected. The court skipped over the names of jurors who had responded to questions and who had not been questioned individually.

B. Trial.

Trial took place on November 7 and 8, 2018. Felix Cruz Gonzalez, who lived close to the location of the first accident, testified that he heard a "boom" around 10:00 p.m. and left his apartment to find a bicycle with a "red light flashing." He discovered Mr. Madrid's body and called 911. Maryland State Police Trooper Connor Willey reported to the scene at 10:09 p.m. and discovered Mr. Madrid's body in a ditch near the road. Dr. Russell Alexander, the Chief Medical Examiner, testified that Mr. Madrid sustained "multiple fractures" in the base of the skull that led to a "relatively rapid[]" death. Dr. Alexander noted that Mr. Madrid's ribs were broken, his hip bones were dislocated, and his liver was "torn." He stated that someone with a torn liver like Mr. Madrid's "could bleed to death . . . within multiple minutes," even with medical treatment.

[2] The court questioned venire members 122, 176, 207, 227, 273, 274, 278, 279, 282, 283, 295, 300, 303, and 307 individually.

Trooper Willey testified that Mr. Madrid's bike had reflectors on both wheels, a headlamp (it was knocked off in the collision), reflectors on the pedals, and a blinking red light on the rear. Pieces of the headlight and right sideview mirror from Mr. Kidder's car were found near Mr. Madrid's body.

Police obtained footage from a nearby business that showed Mr. Madrid riding his bike along Racetrack Road at around 10:00 p.m. Trooper Willey explained that as Mr. Madrid was seen riding southbound "a tan Chevy Yukon" entered the frame of the video traveling southbound as well. He "observe[d] the vehicle strike the bicyclist from the rear." He didn't see the Yukon swerve.

Trooper Jeffrey Hoffmeister testified that he reported to the scene of a second accident, at around 10:15 p.m., at the intersection of Route 50 and Keyser Point Road. Mr. Kidder wasn't there. Devon Alexander told police he was driving a white Toyota Highlander and waiting in the left turn lane of westbound Route 50 to turn onto southbound Keyser Point Road. He said that Mr. Kidder drove his Yukon into the back of Mr. Alexander's car and when they both got out, "he could detect a very strong odor of alcohol coming from Mr. Kidder." Mr. Alexander asked Mr. Kidder if he was drunk. Mr. Kidder said, "that he had a rough day with his girlfriend" and didn't see Mr. Alexander's car. Mr. Alexander recalled further that Mr. Kidder repeated "he was fucked multiple times" and that he didn't have insurance. Mr. Kidder's speech was slurred, his eyes were red, and he struggled to keep his balance. Mr. Alexander's aunt and cousin, Rebecca and Ethan Kalchthaler, came to the scene after the accident. Ms. Kalchthaler testified that Mr. Kidder

was "rummaging around through his car" and said that "[h]is girlfriend had broken up with him." She recalled him saying multiple times that "he was fucked" and that he smelled strongly of alcohol. Ethan Kalchthaler testified similarly that he could smell alcohol on Mr. Kidder, that he "kept on saying that he was fucked," and that he left the scene on foot before police arrived.

Trooper Hoffmeister noted that Mr. Alexander's car had "[h]eavy rear end damage," that the "front end" of the Yukon was damaged, and the right sideview mirror was missing.

The State's DNA analyst, Julie Kempton, testified that she tested swabs from the Yukon's side mirror, side fog light, and a plastic cup. She found blood on both the inside and outside of the fog light fragments. She also found Mr. Madrid's DNA on the side mirror and the interior of the fog light. DNA from the steering wheel air bag matched Mr. Kidder.

C. Closing Argument and The Court's Instructions to the Jury.

During closing argument, counsel for Mr. Kidder suggested that Mr. Madrid's negligence was the cause of the accident, and the State objected:

> [DEFENSE COUNSEL]: We can speculate as to whether this accident was caused by Mr. Kidder's negligence. We can also speculate as to whether this accident was caused by Mr. Madrid's negligence. We don't have evidence showing who is responsible for this accident. And if we don't have evidence, the State has failed to meet [its] burden.
>
> Fundamentally the issue here is that the bicyclist was just as likely to have caused this accident as the Yukon in that moment.
>
> ***
>
> [THE STATE]: Your Honor, I would make an objection . . . . The reason I make it now is I think a curative instruction from the Court needs to be given based on Mr.

> Gilbert's statement that we don't know whose negligence is at fault. Contributory negligence by way of case law cannot be considered by a fact-finder in cases of DUI homicide, DWI homicide, gross negligence, manslaughter to criminal negligence, manslaughter.

Counsel for Mr. Kidder said he wasn't arguing contributory negligence, but was pointing out "that if [Mr. Madrid] was negligent and swerved into the roadway or something like that were to happen, that Mr. Kidder wouldn't be responsible . . . ." The court disapproved counsel's use of the word "negligence" and instructed him not to repeat it. The court also ruled that the State could address Mr. Kidder's argument in its rebuttal "like you normally would in closing argument." And the State did—on rebuttal, the State replied that there should be no suggestion that Mr. Pineda Madrid was negligent:

> Let's talk about my hypothetical situation that Mr. [Madrid] darts out in front of the car. Ladies and gentlemen, contributory negligence is not a defense to criminal negligence. If it were, [the court] would have told you about it in the instructions when we gave you the law. It's not. There's no evidence and **there should be no suggestion that Mr. [Madrid] in any way was negligent**. But even if he was, which he wasn't, that's not a defense and can't be considered by this jury.

After the State finished, defense counsel objected and argued that the State had mischaracterized its negligence point:

> I believe that when the State indicated that negligence of the victim cannot be considered by them in their determinations, it's not entirely accurate. Again, the issue isn't whether some negligence would preclude a finding of negligence on the part of the other party, the issue is causation. And if the jury . . . in watching that video sees Mr. Madrid moving in and out of the travel portion of the roadway, then they could conceivably perceive that to be negligent behavior and that is the cause of the accident, no negligence on the part of Mr. Kidder.

The court took a recess to review a transcript of the State's argument and the cases the State cited. Ultimately, the court decided that it didn't "find [the State's] comments to [] run afoul with the current state of law in the State of Maryland," and it declined Mr. Kidder's requests for a mistrial or a curative instruction.

Finally, the State requested a jury instruction on Mr. Kidder's duty to keep a lookout as a driver:

> Drivers of motor vehicles have a duty to both
>
> 1. "observe carefully the road in front of them" and
>
> 2. "be reasonabl[y] aware of what is occurring along the sides of a street or highway"
>
> The duty to keep a lookout "follows the motorist wherever he directs his vehicle".

(*quoting Morris v. Williams*, 258 Md. 625, 628 (1970)).

The defense objected on the ground that the proposed instruction would push the jury unfairly toward a finding of guilt:

> We do acknowledge that [the duty to keep a lookout instruction] does appear to be an accurate statement of law as it stands. It comes from a 1970 opinion, Morris [v.] Williams, 258 Md. [625]. . . .
>
> I have one primary issue that moves in two ways . . . . The first I think is that it impinges upon the negligence determination of the finder of fact. It outlines a specific duty when really the understanding and apprehension of that duty is solely within the province of the finder of fact.
>
> And second, . . . I think it's res ipsa loquitur from law school, the thing speaks for itself. . . .
>
> I think that by instructing the jury as the Court proposes it relieves them and relieves the State of establishing the necessary element of this case beyond a reasonable doubt, namely the negligence involved in this case.

The court denied the motion.

Mr. Kidder was found guilty of all charges. He was sentenced to ten years (five suspended) for negligent homicide by motor vehicle while under the influence of alcohol and ten years (five suspended) for failure to immediately stop a vehicle at the scene of an accident involving death under an enhanced penalty provision, to be served consecutively.[3] Mr. Kidder appeals. We supply additional facts as needed below.

II. DISCUSSION

Mr. Kidder raises five questions on appeal that we rephrase and reorder.[4] *First*, is it

[3] Counts 2, 4, 5, and 6, as follows, merged with Count 1: negligent homicide while impaired by alcohol, negligent driving, attempting to drive a vehicle while under the influence of alcohol, and attempting to drive a vehicle while impaired by alcohol. Count 3 was failure to stop at a scene involving death.

[4] Mr. Kidder raised five Questions Presented:

> 1. Did the trial court err by using a method of jury selection that excluded significant parts of the community from the jury without a finding of bias?
>
> 2. Did the trial court err when it instructed the jury on the duty to keep a lookout?
>
> 3. Did the trial court abuse its discretion when it allowed the prosecutor to misstate the law and mislead the jury during rebuttal closing argument?
>
> 4. Was the evidence presented sufficient to convict Mr. Kidder of Negligent Homicide by Motor Vehicle While Under the Influence of Alcohol?
>
> 5. Is Mr. Kidder's sentence illegal because the Criminal Information did not charge the enhancement element of knowledge?

The State rephrased the Questions Presented as:

> 1. Did the trial court properly conduct jury selection?

illegal for Mr. Kidder's sentence to be enhanced for failure to remain at the scene of an accident? *Second*, did the trial court err during jury selection when it selected a jury partially from a pool that did not respond affirmatively or negatively to *voir dire*? *Third*, did the trial court err when it instructed the jury on Mr. Kidder's duty to keep a lookout? *Fourth*, did the trial court abuse its discretion when it declined to declare a mistrial or give a curative instruction after the State argued that the jury could not consider Mr. Madrid's negligence? And *fifth*, was the evidence sufficient to convict Mr. Kidder of negligent homicide while under the influence of alcohol?

A. Mr. Kidder's Enhanced Sentence For Failure To Stop At The Scene Was Illegal Because The State Failed To Charge Him With A Necessary Element Of The Crime.

First, Mr. Kidder argues that his enhanced sentence for count three, failing to remain at the scene of the accident involving death, is illegal because the State didn't notify him of an essential element of the crime: knowledge. The State responds that Mr. Kidder failed to preserve this argument at trial. It asserts that Mr. Kidder waived the argument when he participated in amending the relevant jury instruction and didn't object to the instruction when given the chance. Mr. Kidder doesn't argue that he preserved his sentencing

2. Did the trial court properly instruct the jury that Kidder had a duty to keep a lookout while driving?

3. Did the trial court properly regulate closing argument?

4. Was the evidence presented sufficient to convict Kidder of negligent homicide by motor vehicle while under the influence of, or impaired by, alcohol?

5. Did Kidder waive his challenge to the maximum potential penalty for failing to remain at the scene of an accident?

argument properly. Instead, he suggests that the sentence is illegal under Rule 4-345(a) and can be amended at any time, regardless of preservation. For reasons we explain, we agree with Mr. Kidder and vacate and remand for resentencing on Count Three.

Article 21 of the Maryland Declaration of Rights provides "[t]hat in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence . . . ." This constitutional guarantee is intended to give the defendant an opportunity to prepare fully for trial:

> [The purpose of Article 21's guarantee is] (i) to put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (ii) to protect the accused from a future prosecution for the same offense; (iii) to enable the defendant to prepare for his trial; (iv) to provide a basis for the court to consider the legal sufficiency of the charging document; and (v) to inform the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Shannon v. State, 241 Md. App. 233, 242 (2019) (*quoting Counts v. State*, 444 Md. 52, 57–58 (2015)). Deficiencies in charging documents implicate the criminal defendant's right to be informed of the State's charges against him. *See id.*; *see also Ayre v. State*, 291 Md. 155, 163 (1981). Maryland Rule 4-345 states that the court can correct an illegal sentence at any time. *See Mack v. State*, 244 Md. App. 549, 581 (2020) (stating that sentences that are "'inherently illegal'" are subject to "open-ended correction[]" under Rule 4-345). Whether a sentence is illegal under Rule 4-345(a) is reviewed *de novo*. *Bailey v. State*, 464 Md. 685, 696 (2019) (*citing State v. Crawley*, 455 Md. 52, 66 (2017)).

Here, the trial court sentenced Mr. Kidder for an element that wasn't charged. Mr. Kidder was charged under Maryland Code (1977, 2020 Repl. Vol.), § 20-102(b)(1) of the Transportation Article ("TA"), which states that "[t]he driver of each vehicle involved in an accident that results in death of another person immediately shall stop the vehicle as close as possible to the scene of the accident . . . ." Section 20-102(c)(2)(ii) of the Transportation Article caps the punishment for a person convicted under TA § 20-102(b)(1) at five years or a fine not exceeding $5,000 or both. However, TA § 20-102(c)(3)(ii) outlines an enhanced penalty of ten years where the *additional* element of knowledge is proven:

> A person who violates this section **and who knew or reasonably should have known that the accident might result in the death of another person and death actually occurred** to another person, is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $10,000 or both.

(emphasis added). The court sentenced him to ten years under TA § 20-102(c)(3)(ii), even though the State didn't include knowledge anywhere in its description of the charge in the criminal information:

STATEMENT OF CHARGES

UPON THE FACTS CONTAINED IN THE APPLICATION OF Officer: WILLEY, TFC IT IS FORMALLY CHARGED THAT KIDDER, JONATHAN TORIN at the dates, times and locations specified below:

CITATION	STATUTE	PENALTY	DESCRIPTION OF THE CHARGE
00000SD43642	TA 20 102 (b1)		FAILURE TO IMMEDIATELY STOP VEHICLE AT SCENE OF AC CIDENT INVOLVING DEATH On or About 05/06/2018 at 10:09PM ROUTE 589 AT GUM POINT RD BERLIN-WORCESTER CO MD Against the Peace, Government, and Dignity of the State.

Further, there's nothing in the record to suggest that the State provided the defense any

notice before trial that it intended to pursue an enhanced sentence. Rather, counsel for the parties met *during trial* to discuss adding a knowledge element to the jury instruction on failure to immediately stop at the scene of an accident involving death.[5]

As such, the State failed to charge Mr. Kidder with a necessary element of that crime. "'It is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment.'" *Shannon*, 241 Md. App. at 243 (cleaned up) (*quoting Johnson v. State*, 427 Md. 356, 375 (2012)). Convicting a defendant for an uncharged crime "'would be a sheer denial of due process.'" *Id.* (*quoting Stickney v. State*, 124 Md. App. 642, 646 (1999)). Under Maryland common law, "where the legislature has prescribed different sentences for the same offense, depending upon *a particular circumstance of the offense*, [] the presence of that circumstance **must be alleged** in the charging document, *and* must be determined by the trier of fact applying the reasonable doubt standard." *Wadlow v. State*, 335 Md. 122, 129 (1994) (emphasis added).

[5] The jury instruction for failure to stop at the scene given to the jury read:

> The defendant is charged with failing to stop his vehicle at the scene of an accident involving death. In order to convict the defendant, the State must prove the following: (1) that the defendant was involved in an accident; (2) that the defendant knew or should have known that he was involved in an accident; (3) that the defendant did not stop his vehicle at the scene of the accident; (4) that the defendant knew or should have known that the accident would result in the death of another individual; and (5) that the accident resulted in the death of [Mr. Madrid].

The State's failure to charge Mr. Kidder with knowledge left the court without jurisdiction to sentence him for a crime that included that element. *See Williams v. State*, 302 Md. 787, 791–92 (1985) ("A claim that a charging document fails to charge or characterize an offense is jurisdictional" because "a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction . . . ."). The State didn't give Mr. Kidder any notice that it intended to pursue an enhanced penalty based on knowledge. Therefore, Mr. Kidder didn't have the opportunity to prepare before trial to defend himself, as Article 21 guarantees. And without a charge *that included knowledge*, the court couldn't impose the enhanced sentence. Mr. Kidder's enhanced sentence is illegal and must be vacated.

For what it's worth, the State could have fixed the error but didn't. "When the State delineate[s] the particular section of the statute [in the criminal information], . . . it charge[s] only the conduct and circumstances proscribed in that section, and, *absent appellant's consent*, [is] barred from later amending the indictment to charge *different circumstances*." *Tapscott v. State*, 106 Md. App. 109, 135 (1995) (emphasis added). The State could have pursued the enhanced sentence if it had gotten Mr. Kidder's consent to amend the criminal information first. Instead, the State sought Mr. Kidder's agreement to revise the jury instruction on failure to stop. But that's not enough—slipping a required element of the crime into a jury instruction ignores the purpose of Article 21. The proper solution would have been to seek Mr. Kidder's affirmative consent to what is essentially an additional charge. *See id.*

The State contends that even if there is error, it's harmless under *Bailey v. State*, 464 Md. 685, 701–02 (2019), because Mr. Kidder "cannot show that he would have proceeded differently had he been given notice in the charging document." We are unconvinced. Harmless error analysis applies where a notice was given in a defective manner, *not* where the failure to give notice violates a substantive right:

> The failure to provide notice impacts **substantive rights and undermines completely the purpose of the notice requirement.** However, when there is a procedural defect with the notice, such as untimely notice or other defects, the enhancement is subject to harmless error analysis.

Bailey, 464 Md. at 701 (emphasis added). Here, the State failed to provide any notice that Mr. Kidder was being charged with committing the crime knowingly. That's not a procedural mistake—it's substantive, and in that regard, *Bailey* can readily be distinguished. In *Bailey*, the State provided ten days' notice that it intended to pursue an enhanced sentence when it was required to give fifteen. *Id.* at 691–92. The Court of Appeals applied harmless error because the State had complied substantially, and the timing differential constituted a procedural failure. *Id.* at 701. In this case, the omission from the charging document violated Mr. Kidder's substantive rights, so we reverse the sentence imposed for Count Three, failure to stop at the scene of an accident involving death, and remand for resentencing on that count for a term not to exceed the statutory maximum of 5 years and $5,000.

B. The Circuit Court's Jury Selection Is Not Impermissible But Is Ill-Advised.

Mr. Kidder argues that the trial court "excluded groups of prospective jurors based

on those jurors' shared characteristics, without a finding of bias." He asserts that the method effectively "struck jurors for insufficient cause and violated Mr. Kidder's right to trial by a jury drawn from a fair cross section of the community . . . ." The State responds that the method was proper because no identifiable group was excluded. The State's correct that, on this record, the court didn't violate the Constitution or the Maryland Declaration of Rights. But as we explained recently in *Williams v. State*, 246 Md. App. 308 (2020), that doesn't mean that the selection method is sound. To the contrary, the trial court's method risks skewing the jury improperly and places an unfair burden on the defendant.

In Maryland, we conduct limited *voir dire* intended "to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]" *Williams*, 246 Md. App. at 340–41 (alterations in original) (*quoting Pearson v. State*, 437 Md. 350, 356 (2014)). The trial court has discretion over *voir dire* and determines "the content and scope of questions" and "how *voir dire* will be conducted." *Dingle v. State*, 361 Md. 1, 14 (2000). We review *voir dire* procedural decisions for abuse of discretion. *Williams*, 246 Md. App. at 341; *see Wright v. State*, 411 Md. 503, 507 (2009).

In *Williams*, we started with the criminal defendant's constitutional right to a jury selected from a fair cross-section of the community:

> [The defendant] has a constitutional right to a jury selected from a fair cross section of the community, but "[i]t is not necessary . . . that the jury actually selected be representative of the community." *Wilkins v. State*, 270 Md. 62, 65 (1973). Not every jury must "contain representatives of all the economic, social, religious, racial, political[,] and geographical groups of the community . . . ." *Id.* (*quoting Thiel v. S. Pacific Co.*, 328 U.S. 217, 220 (1946)). Still, "prospective jurors shall

> be selected by court officials without systematic and intentional exclusion of any of these groups." *Id.* And section 8-104 of the Courts & Judicial Proceedings Article ("CJ"), Maryland Code (1973, 2013 Repl. Vol.) states that "[e]ach jury for a county shall be selected at random from a fair cross section of the adult citizens of this State who reside in the county."

Williams, 246 Md. App. at 344 (first alteration added). We review "whether the court's method 'produced a systematic or intentional exclusion of any *cognizable group* or class of qualified citizens.'" *Id.* (emphasis in original) (*quoting Wilkins*, 270 Md. at 66). To make that determination, we apply the following test:

> [First,] there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.

Id. (alteration in original) (*quoting Wilkins*, 270 Md. at 67).

As in *Williams*, the record doesn't support a finding that a cognizable group was excluded from the jury. All the same, we found this method of jury selection needlessly risky. Mr. Kidder argues that a "significant number of the jurors" were excluded without inquiry from the court or counsel for the parties. But he can't tell us specifically how the exclusion of these individuals translated into the exclusion of one or more cognizable groups. And that's precisely why the method is fraught: defense counsel bears a significant

burden to draw out information that would allow the court to determine whether a cognizable group was being excluded. It leaves the defense with little opportunity to discover that information because the process bypasses substantive inquiry about the individuals excluded from the panel. It's hard to imagine, for example, how a defendant could identify characteristics like a shared relevant belief based only on apparent visual information. *See King v. State*, 287 Md. 530 (1980) (finding that a court violated a defendant's right to a jury drawn from a fair cross-section of the community when two jurors were excluded for believing that marijuana laws should be changed). Defendants might be prejudiced by not knowing that cognizable groups were excluded from the jury. And we can imagine how, especially in a less-populated county, word might quickly get around that jury service could be avoided by simply answering *any* question during voir dire. So although we cannot say on this record that Mr. Kidder's rights to a fair jury were violated, this method of jury selection needlessly risks a violation and should be avoided.

C. The Trial Court Did Not Abuse Its Discretion In Instructing The Jury On Mr. Kidder's Duty To Keep A Lookout.

Next, Mr. Kidder argues that the court erred by giving the jury an instruction on his duty to keep a lookout, an instruction that, he says, "suggest[ed] a conclusion that compelled a finding of guilt." The State responds that the instruction was proper because it was a correct statement of the law, was generated by the facts of the case, and wasn't fairly covered by the other instructions. We agree with the State.

Generally, an appellate court reviews a trial court's decision to give a jury instruction for abuse of discretion. *Armacost v. Davis*, 462 Md. 504, 523 (2019). A court

abuses its discretion when it commits an error of law in giving a jury instruction. *Id.* (*citing Harris v. State*, 458 Md. 370, 406 (2018)). We review whether "the instruction at issue was a correct exposition of law and whether it was applicable to the case at hand." *Id.* (*citing State v. Bircher*, 446 Md. 458, 462–63 (2016)). We review jury instructions "as a whole, in the context of the entire charge to the jury." *Thomas v. State*, 183 Md. App. 152, 167 (2008) (*quoting Smith v. State*, 403 Md. 659, 663 (2008)). "'[S]o long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them.'" *Id.* at 166–67 (*quoting Smith*, 403 Md. at 663). However, if a challenged instruction is "'ambiguous, misleading[,] or confusing'" to jurors, we must reverse and remand for a new trial. *Id.* at 167 (*quoting Smith*, 403 Md. at 663).

Here, the State proposed and the court read the following instruction:

> Drivers of motor vehicles have a duty to both
>
> 1. "observe carefully the road in front of them" and
>
> 2. "be reasonabl[y] aware of what is occurring along the sides of a street or highway"
>
> The duty to keep a lookout "follows the motorist wherever he directs his vehicle".

(*quoting Morris v. Williams*, 258 Md. 625, 628 (1970)). The State's instruction on duty to keep a lookout was taken from *Morris*, a civil negligence case in which a young girl was struck and killed after she ran from a park into the street. Mr. Kidder concedes that the law included in the instruction was correct but argues that the instruction was so misleading

that it forced the jury to find Mr. Kidder guilty of DUI homicide.[6] And although the instruction was derived from a civil negligence case, it stated correctly the negligence element of the crime of DUI homicide:

> A person may not cause the death of another as a result of the person's negligently driving, operating, or controlling a motor vehicle or vessel while . . . under the influence of alcohol.

Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), CR § 2-503(a)(1). The instruction guided the jury's consideration of negligence but did not compel the jury to find Mr. Kidder had committed a DUI homicide.

D. The Trial Court Did Not Abuse Its Discretion During The State's Rebuttal Closing Argument.

Next, Mr. Kidder argues that the court abused its discretion by allowing the State to "assert in rebuttal closing argument that the jury could not consider Mr. Madrid's negligence." He contends the prosecutor "misstated the law and restricted the jury from considering the defense theory" that Mr. Madrid could have been the sole cause of the accident. The State responds that the court regulated closing argument properly.

The trial court "is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case" and has broad discretion over the scope of closing. *Ingram v. State*, 427 Md. 717, 726 (2012) (*citing Mitchell v. State*, 408 Md. 368, 380–81 (2009)). Generally, an appellate court won't disturb the trial court's judgment absent a "clear abuse of discretion that likely injured a party." *Id.* (*citing Grandison v.*

[6] Mr. Kidder doesn't contend that the law in *Morris* was incorrect as applied to his criminal DUI homicide case.

State, 341 Md. 175, 225 (1995)). "An abuse of discretion exists 'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *Cagle v. State*, 462 Md. 67, 75 (2018) (*quoting Alexis v. State*, 437 Md. 457, 478 (2014)).

During closing arguments, the parties argued not only about Mr. Kidder's negligence, which of course was at issue, but also Mr. Kidder's contention that Mr. Madrid had been negligent as well. The State asserted that Mr. Kidder "drove [his car] in a negligent manner" and that "negligent driving [] caused the death of Jose Pineda [Madrid]." In response, defense counsel stated:

> We can speculate as to whether this accident was caused by Mr. Kidder's negligence. We can also speculate as to whether this accident was caused by Mr. Madrid's negligence. We don't have evidence showing who is responsible for this accident. And if we don't have evidence, the State has failed to meet their burden.

The State objected and requested a curative instruction on the ground that "[c]ontributory negligence by way of case law cannot be considered by a fact-finder in cases of DUI homicide, DWI homicide, gross negligence, manslaughter to criminal negligence, manslaughter." The defense countered that it wasn't arguing *contributory* negligence but raising instead the possibility that if Mr. Madrid was the sole cause of the accident through his own negligent conduct and that Mr. Kidder had not been negligent in any way, Mr. Kidder "wouldn't be responsible" for negligent homicide. The court asked defense counsel repeatedly why he used the word negligence. The court then instructed defense counsel to "use potential hypothetical examples," but not to use the word negligence in the remainder

of his closing. The State was "permitted to address [] what he's raised like you normally would in closing." The court denied the State's request for a curative instruction.

During the State's rebuttal, the prosecutor addressed Mr. Kidder's argument that Mr. Madrid may have been the only negligent party but framed it as a contributory negligence argument:

> Let's talk about my hypothetical situation that Mr. [Madrid] darts out in front of the car. Ladies and gentlemen, contributory negligence is not a defense to criminal negligence. If it were, [the court] would have told you about it in the instructions when we gave you the law. It's not. There's no evidence and there should be no suggestion that Mr. [Madrid] in any way was negligent. But even if he was, which he wasn't, that's not a defense and cannot be considered by this jury. Blame the victim. Everything else fails, Mr. [Madrid] is at fault.

Defense counsel objected to the State's response and argued that the State's explanation of what the jury could consider was "not entirely accurate" because "the issue isn't whether some negligence would preclude a finding of negligence on the part of the other party, the issue is causation." Defense counsel reiterated that he wasn't asserting that Mr. Madrid could have been contributorily negligent but rather that he could have been the *only* negligent party and, therefore, the cause of the accident. He requested either a mistrial or a curative instruction. The court took a recess to "review[] the record" and relevant caselaw, and when it returned, it stated that "there [was] no mention by [the State] [] that indicate[d] anything other than an argument as it related to the contributory negligence, not the sole negligence of one party versus the other" and denied the objection.

The court didn't abuse its discretion. It could have, after specifically forbidding the defense from using the word "negligence," sustained the defense's objection after the State reintroduced the term during its rebuttal closing argument. But it was within its discretion to deny the request—after all, the granular discussion of negligence was largely irrelevant to the jury's task of determining whether Mr. Kidder was guilty of DUI homicide. The defense's argument that Mr. Madrid could have been the sole cause of the accident was unsupported by any factual basis in the record. But the defense wasn't restricted from presenting the argument that Mr. Madrid could have been the sole cause—and it did, but through hypotheticals instead of the word negligence. The State probably shouldn't have revisited the problematic language that the court had ruled on earlier, but the court's decision to overrule the defense's objection on the State's rebuttal fell well within its sound discretion.

E. The Evidence Was Sufficient To Convict Mr. Kidder Of Negligent Homicide While Under The Influence Of, Or Impaired By, Alcohol.

Fourth, Mr. Kidder argues that the evidence was insufficient to find him guilty of DUI and DWI homicide because the State failed to prove he "was driving in a negligent manner," and the jury was left to "speculate that Mr. Kidder's actions, rather than Mr. Madrid's," were the cause of the accident. The State responds that the evidence presented was sufficient for a jury to find Mr. Kidder guilty of negligent homicide, and we agree.

When reviewing a conviction for sufficiency of the evidence, we ask whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Spell v. State*, 239 Md. App. 495, 510 (2018) (emphasis added)

(*quoting Fuentes v. State*, 454 Md. 296, 307–08 (2017)); *see Kouadio v. State*, 235 Md. App. 621, 633 (2018). "'In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State.'" *Spell*, 239 Md. App. at 510. It is not our role to retry the case. *Id.* "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (*citing Tarray v. State*, 410 Md. 594, 608 (2009)). "[T]he finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation . . . .'" *Id.* at 183 (*quoting State v. Smith*, 374 Md. 527, 534 (2003)).

DUI homicide is a statutory offense. Maryland Code (177, 2012 Repl. Vol., 2019 Supp.), TR § 21-902(a)(1)(i) states that "[a] person may not drive or attempt to drive any vehicle while under the influence of alcohol." TR § 21-902 applies to a person "causing the death of another as the result of his negligent driving, operation or control of a motor vehicle while intoxicated." *State v. Moon*, 291 Md. 463, 469 (1981). Maryland Code (2002, 2012 Repl. Vol., 2020 Supp.), CR § 2-503(a)(1) criminalizes homicide by motor vehicle while under the influence of alcohol:

> A person may not cause the death of another as a result of the person's **negligently driving**, operating, or controlling a motor vehicle of vessel **while . . . under the influence of alcohol**[.]

(emphasis added). Negligent driving is defined in the Transportation Article as "driv[ing]

a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual." TR § 21-901.1(b). DUI homicide requires only simple negligence, whereas automobile manslaughter requires proof of gross negligence. CR § 2-503(a); Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), CR § 2-209(b) ("A person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle or vessel in a grossly negligent manner."); *see DeHogue v. State*, 190 Md. App. 532, 547 (2010) (gross negligence applied in automobile manslaughter).

Mr. Kidder asserts that the State failed to prove that his negligent driving caused Mr. Madrid's death. We disagree. As the State points out in its brief, a driver has a duty "to maintain an adequate lookout to assure that he always knows what may be in his path" and that duty "follows the motorist wherever he directs his vehicle." *Murphy v. Bd. of Cty. Com'rs*, 13 Md. App. 497, 510 (1971). The State produced video footage at trial that showed Mr. Madrid cycling while wearing light colored clothes and with multiple reflectors on his bike. Mr. Madrid's bike had a headlight and red blinking light on the rear. Mr. Kidder's right-side mirror and pieces of his right fog light were found on the road near Mr. Madrid's body. The video showed Mr. Madrid riding along a straight portion of the road well-lit by streetlamps and lights from nearby buildings. He wasn't, for example, concealed by a sharp curve that may have made it difficult for Mr. Kidder (or a sober driver) to avoid him. And Mr. Kidder caused a second accident minutes later—witnesses at that accident testified that Mr. Kidder had red eyes, smelled of alcohol, slurred his words, struggled to balance, repeated that "he was fucked," and abandoned his car and the scene

on foot.

Mr. Kidder argues that "[w]hile Mr. Madrid might have been 'plainly visible' on the video, it doesn't not follow that Mr. Kidder had the same vantage point while driving on Racetrack Road." And he asserts that evidence was presented that the "bright church sign[] could have obscured Mr. Kidder's view . . . ." But Mr. Kidder fails to understand the standard for sufficiency—we need only find that *any* rational trier of fact could have found the elements of the crime from the evidence presented. *See Spell*, 239 Md. App. at 510. Mr. Kidder proposes an alternative interpretation of the video evidence and suggests that other evidence could be understood as affecting Mr. Kidder's line of sight. But we don't decide whether *we* would have come to a different conclusion—we ask only whether there was enough evidence to support a jury's finding of guilt. *See McCoy v. State*, 118 Md. App. 535, 539 (1997) ("[T]he appellate concern is not whether the jury should or should not have been persuaded of the appellant's guilt."). There was more than enough evidence here, and we will not disturb the jury's verdict.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY VACATED AS TO THE SENTENCE ON COUNT THREE AND REMANDED FOR RESENTENCING ON THAT COUNT, AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID 90% BY APPELLANT, 10% BY WORCESTER COUNTY.