No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CEDRIC FLOYD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner Cedric Floyd respectfully requests, pursuant to Supreme Court Rule 13.5, a thirty-two (32) day extension of time to file his petition for certiorari in this Court:

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

2. On July 7, 2017, the Alabama Court of Criminal Appeals affirmed the conviction and remanded the case with instructions for the trial court to make factual

findings regarding an aggravating circumstance the court relied on in sentencing Mr. Floyd to death. Floyd v. State, No. CR-13-0623, 2017 WL 2889566, at *76 (Ala. Crim. App. July 7, 2017) (Exhibit A). On return to remand, the Alabama Court of Criminal Appeals affirmed Mr. Floyd's death sentence. Floyd v. State, No. CR-13-0623, 2018 WL 3407966, at *9 (Ala. Crim. App. July 13, 2018) (Exhibit B). On August 24, 2018, the Court of Criminal Appeals denied Mr. Floyd's application for rehearing. (Exhibit C). On February 22, 2019, the Supreme Court of Alabama denied Mr. Floyd's Petition for Writ of Certiorari and issued a certificate of judgment. (Exhibit D). Petitioner's time to file a petition for a writ of certiorari expires on May 23, 2019. This application is being filed more than ten (10) days before that date.

3. Mr. Floyd is an inmate facing a death sentence, and his case raises serious constitutional issues that require careful presentation in his petition for certiorari. Undersigned counsel has taken on Mr. Floyd's appeal in this Court pro bono but needs additional time to prepare the petition.

4. Counsel currently is involved in many other death penalty cases, including numerous cases on direct appeal. Many of these cases have imminent filing deadlines and require counsel's immediate attention. Moreover, the State of Alabama has no system for providing legal representation to death row prisoners after the completion of their direct appeal. There are many Alabama death row prisoners currently without counsel facing filing deadlines in this Court, in state postconviction

cases, and in the lower federal courts. Counsel is actively engaged in assisting these prisoners.

FOR THESE REASONS, Mr. Floyd respectfully requests that an order be entered extending his time to file a petition for certiorari by thirty-two (32) days, to and including June 24, 2019.

Respectfully submitted,

S/ Ryan C. Becker
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May 10, 2019

EXHIBIT A

2017 WL 2889566
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Cedric Jerome FLOYD
v.
STATE of Alabama

CR–13–0623
|
07/07/2017

Synopsis

Background: Defendant was convicted in the Circuit Court, Escambia County, No. CC-11-247, of murder of his former girlfriend made capital because it was committed during the course of burglary of girlfriend's home, and was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals, Kellum, J., held that:

allowing sheriff's department to make defendant wear electronic stun device throughout his trial was not punishment for defendant's decision to wear civilian clothing;

defendant failed to establish actual prejudice due to pretrial publicity requiring change of venue;

defendant was not entitled to polling expert at public expense;

evidence regarding altercations between defendant and victim were admissible as collateral act evidence;

trial court's refusal to qualify defendant's witness as an expert in blood-spatter analysis and crime-scene investigation was not abuse of discretion;

evidence did not warrant jury instructions on voluntary intoxication and reckless manslaughter as a lesser-included offense; and

jury instructions on reasonable doubt and other concepts adequately conveyed the law.

Affirmed as to conviction; remanded with directions as to sentencing.

Joiner, J., concurred in part and concurred in result, and filed opinion.

Burke, J., concurred in result.

Appeal from Escambia Circuit Court (CC–11–247). Bert W. Rice, J.

Attorneys and Law Firms

Ryan C. Becker and Alicia A. D'Addario, Montgomery; and Glenn L. Davidson, Mobile, for appellant.

Luther Strange, atty. gen., and Beth Jackson Hughes, asst. atty. gen., for appellee.

Opinion

KELLUM, Judge.

***1** Cedric Jerome Floyd was convicted of murder made capital because it was committed during the course of a burglary. See § 13A–5–40(a)(4), Ala. Code 1975. The jury unanimously found beyond a reasonable doubt the existence of four aggravating circumstances—that the murder was committed during the course of a burglary, see § 13A–5–49(4), Ala. Code 1975; that the murder was committed while Floyd was under a sentence of imprisonment, see § 13A–5–49(1), Ala. Code 1975; that the murder was committed after Floyd had previously been convicted of a felony involving the use or threat of violence, see § 13A–5–49(2), Ala. Code 1975; and that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A–5–49(8), Ala. Code 1975. By a vote of 11–1, the jury recommended that Floyd be sentenced to death for his capital-murder conviction. The trial court followed the jury's recommendation and sentenced Floyd to death. [1]

Facts

The evidence adduced during the guilt phase of the trial indicated the following. In the early morning hours of January 2, 2011, Tina Jones, a single mother of four, was shot and killed in her home in Atmore. Floyd and Jones had dated for approximately two years before the murder. The State presented evidence indicating that the relationship had been tumultuous and that there had been altercations between Floyd and Jones during their relationship. Jones ended the relationship in November 2010, approximately two months before she was killed, and began dating another man.

On December 31, 2010, Jones and her three youngest children [2] spent the night at Jones's aunt's house because, according to Lakeshia Finley, Jones's cousin, Jones was afraid of Floyd. Jones's uncle, James Jones ("James") and his girlfriend, Sarah Marshall ("Sarah"), who were living with Jones at the time, were alone at Jones's house that night, or thought they were. James testified that when he woke on January 1, 2011, he found Floyd sitting in the living room smoking a cigarette. James said that he did not know how Floyd had gotten into the house. James telephoned Jones and told her that Floyd was in the house. He and Sarah then left; Floyd was still in the house when James and Sarah left.

After learning that Floyd had been in her house, Jones, accompanied by her father, Curtis Jones, and Finley, went to the Atmore Police Department to report the incident. Floyd also went to the police department. Jones informed Officer John Stallworth that Floyd had broken into her house and had stolen her cellular telephone. Officer Stallworth explained to Jones that she could file a complaint for burglary and theft, but Jones declined, telling Officer Stallworth that she wanted a restraining order against Floyd but that she did not want Floyd arrested. Officer Stallworth explained to Jones that the police department did not issue restraining orders, and he explained the steps Jones could take to obtain a restraining order. At Jones's request, Officer Stallworth instructed Floyd not to return to Jones's residence and told Floyd that if he did so he would be arrested on sight. Floyd agreed not to return to Jones's residence.

***2** Throughout the day on January 1, 2011, Floyd sent numerous text messages to Jones's 18–year-old daughter, Ky'Toria Lawson, who lived with Jones. In many of the messages, Floyd threatened Jones and other members of her family. Floyd also told Ky'Toria that he had let the family dog out of the backyard fence and that it had been hit by a car. Some of Floyd's text messages were also sexual in nature. Ky'Toria told Jones about the text messages, and that afternoon she and Jones went to the police station to report the messages, where, once again, Jones spoke with Officer Stallworth. Jones told Officer Stallworth that she was afraid of Floyd because, when Floyd had previously been in jail, he had telephoned her and had told her that he had people watching her and reporting to him. Jones also told Officer Stallworth that her aunt had told her that Floyd had said that he was going to kill Jones and then kill himself. Neither Jones nor Ky'Toria filed a complaint against Floyd at that time. Ky'Toria testified that she did not file a complaint because she was scared that she would have to testify against Floyd and that Floyd would then "come after us." (R. 2518.) Officer Stallworth assured them that officers would drive by Jones's house throughout the night. Officer Stallworth instructed Jones to turn her porch light on that night and, if Floyd came to her house, to turn her porch light off to signal the officers driving by that Floyd was inside the house.

Around 11:00 p.m. that night, Ky'Toria came home with her friend, Tramescka Peavy. Jones was asleep in her bedroom, and Ky'Toria and Peavy woke her up and spoke to her. Ky'Toria and Peavy then went to Ky'Toria's bedroom to watch a movie. Ky'Toria said that as soon as the movie started, she fell asleep. Peavy testified that she did not fall asleep but dozed off and on. At approximately 12:45 a.m., Ky'Toria awoke to a loud bang. Ky'Toria said that she jumped when she heard the noise and that Peavy grabbed her. At that point, Floyd entered Ky'Toria's bedroom and demanded her car keys. Ky'Toria testified that Floyd appeared to be in a hurry. Ky'Toria asked Floyd why he was there, at which point, Floyd grabbed Ky'Toria's cellular telephone and Peavy's cellular telephone, eyeglasses, and Army-issued dog tags, and fled. Peavy attempted to chase Floyd, but Ky'Toria stopped her. Peavy testified that Floyd dropped her eyeglasses and dog tags in the living room but that he kept both her and Ky'Toria's cellular telephones.

At that point, Ky'Toria, whose bedroom was across the hall from James and Sarah's room, but on the other side of the house from Jones's bedroom, woke up James and Sarah. James and Sarah both testified that they were awakened that night by Ky'Toria screaming that Floyd was in the house. The three then went into the den and

Ky'Toria telephoned emergency 911. Testimony indicated that the call was made at 12:46 a.m. At that point, Ky'Toria did not know that her mother had been killed, and she simply asked the 911 dispatcher to send police to the house because Floyd was there. James then looked for Jones and found her lying on the floor in a pool of blood in the hallway just outside her bedroom. Sarah then telephoned emergency 911 to request an ambulance.

Police and paramedics arrived at the scene shortly after the emergency calls. Paramedics began working on Jones. Police cleared the house and later transported James, Sarah, Ky'Toria, and Peavy to the police station, where they gave statements to police about the events of that night. Diana Chavers, one of the medics who responded to the emergency call, testified that when she arrived she was informed by police that the victim had multiple gunshot wounds and was believed to be deceased. Chavers said that Jones was not breathing and did not have a pulse. However, when Chavers placed a cardiac monitor on Jones, there appeared to be some electrical activity in the heart. Chavers and her partner then attempted to resuscitate Jones. To clear Jones's airway for intubation, Chavers had to remove several teeth from Jones's throat; the teeth had been knocked out and had lodged in Jones's throat as a result of a gunshot to Jones's face. The resuscitation efforts were ultimately unsuccessful and Jones was transported to the hospital where she was pronounced dead on arrival.

Dr. Eugene Hart, a forensic pathologist with the Alabama Department of Forensic Sciences who performed the autopsy on Jones, testified that the cause of Jones's death was multiple gunshot wounds. Specifically, Dr. Hart testified that Jones suffered three gunshot wounds—one to the back of the head, one to the face, and one to the back. Dr. Hart characterized the gunshot wound to the back of the head as a "hard contact gunshot wound," meaning that the gun was pressed firmly against Jones's head when it was fired. (R. 2921.) Dr. Hart said that the bullet traveled from back to front through Jones's brain, with a slightly downward trajectory. Dr. Hart testified that the gunshot wound to Jones's face was not a contact wound, but was fired from less than 12 inches away. The bullet, Dr. Hart said, went through the bridge of Jones's nose and down through the upper jaw, finally stopping in Jones's lower jaw. Dr. Hart removed both of those bullets and sent them for ballistics testing. As for the gunshot wound to the back, Dr. Hart testified that the bullet entered the upper left portion of Jones's back and exited through the left front of the chest. Dr. Hart characterized this wound as an "indeterminate range gunshot wound" based on the lack of soot and stippling around the wound. (R. 2936.) Dr. Hart said that the lack of soot or stippling may have been because Jones was clothed at the time the shot was fired or it may have been because the shot was fired from a distance; because he could not make that determination conclusively, he characterized the wound as being from an indeterminate range. Dr. Hart testified that the gunshot wounds to Jones's face and back were likely survivable, but that it was unlikely that Jones could have survived the gunshot wound to the back of her head.

***3** At the scene, police found that the window in Jones's bedroom had been broken from the outside and shards of glass were on the bedroom floor. One of those shards was stained with blood, and subsequent DNA testing revealed that the blood was Floyd's. On a dresser in Jones's bedroom, police found a .38 caliber revolver, which was later determined through ballistics testing to be the murder weapon. The revolver contained three spent shell casings, and hair was found on the end of the barrel. There was blood spatter on the carpet in Jones's bedroom and in the hallway where Jones was found, and a bullet fragment was found on the floor in the hallway. In the front yard, police found a bandana and a jacket, and Floyd later admitted that the jacket belonged to him; inside one of the pockets of the jacket was an unopened pack of Newport brand cigarettes. What appeared to be a "freshly smoked cigarette" was found on the deck just outside Jones's bedroom window; the cigarette was a Newport brand. (R. 2800.) Additional cigarette butts and beer cans were found near the backyard fence.

Shortly after 1:00 a.m., approximately 30 minutes after Jones was fatally shot, Floyd telephoned emergency 911 using Jones's cellular telephone. Floyd told the dispatcher that he was the person the police were looking for and that he was in Freemanville, that he was unarmed, and that he wanted to turn himself in. Officers picked up Floyd in Freemanville and transported him to the Atmore Police Department, where Floyd gave two statements to police confessing to killing Jones.

In his first statement, given to Jason Dean, the chief of police, and Chuck Brooks, an investigator with the Atmore Police Department, which was recorded and played for the jury, Floyd stated that all he remembered

was "jumping over the fence and jumping through the window. And she was just lying on the floor." (R. 3285–86.) Floyd said that he did not remember how many times he had shot Jones, but that he had tried to shoot himself and "it wouldn't work." (R. 3286.) Floyd said that the previous day, he had found out that Jones had been cheating on him, and he had traded his automobile for a .38 caliber gun and $300. Floyd said that he had left the gun in Jones's bedroom before he left Jones's house; specifically, Floyd said that he "just threw it on the dresser." (R. 3294.) Floyd also stated that the jacket found in Jones's front yard was his and that he had dropped it as he fled the scene. Finally, Floyd said that someone had driven him to and from Jones's house that night, but he refused to identify that person.

After giving his first statement, Floyd was placed in a cell at the Atmore Police Department. At approximately 3:45 a.m., Glenn Carlee, Atmore's Director of Public Safety, went to the cell and spoke with Floyd. In his second statement, which was not recorded, Floyd again confessed to killing Jones. According to Carlee, Floyd stated: "I messed up. I killed the woman I love. ... I wanted to be with her, but the gun wouldn't work." (R. 3476.) Floyd reiterated to Carlee that he had jumped over the fence in Jones's backyard and had then jumped through the bedroom window and shot Jones. Floyd also reiterated that he had traded his automobile for the gun he had used to kill Jones, but he refused to tell Carlee from whom he had gotten the gun.

In March 2011, Scott Walden, an investigator with the Atmore Police Department, went to the Escambia County detention facility to interview an informant in an unrelated case. As he was leaving, Inv. Walden said, he saw Floyd in the hallway. Floyd told Inv. Walden that he wanted to speak to him, but Inv. Walden told Floyd that he could not speak with Floyd without Floyd's lawyer present. Inv. Walden advised Floyd that his lawyer could set up a meeting to discuss whatever Floyd wanted to discuss. At that point, Floyd stated: "The bitch didn't get me a lawyer. She took me there and brought me back." (R. 3180.) Floyd was apparently referring to the person who had driven him to and from Jones's house the night of the murder.

In December 2011, Inv. Walden again went to the Escambia County detention facility, this time to obtain a DNA swab from Floyd, and Floyd again made a statement to Inv. Walden:

> ***4** "He said, you know, I tried to talk to you last time you wouldn't talk to me. But I'm telling you, the girl took me there and brought me back. I want to talk to you. If you could help me out and get a lower sentence."

(R. 3184.) Again, Inv. Walden refused to speak with Floyd without the presence of Floyd's attorney.

Floyd's defense at trial was twofold. First, Floyd argued that he was not the perpetrator of the crime, and he attacked the State's case against him. Through cross-examination of witnesses, Floyd elicited testimony that law enforcement took only 24 photographs at the crime scene; that law enforcement did not attempt to gather fingerprints from the crime scene or the murder weapon; that law enforcement did not submit for DNA testing the cigarette butts, beer cans, and bandana found at the scene, or the hair found on the barrel of the murder weapon; that law enforcement did not submit for forensic testing the clothing he was wearing the night of the crime to determine if the victim's blood was present; that law enforcement did not conduct a gunpowder-residue test to determine if he had recently fired a gun; and that law enforcement conducted no blood-spatter analysis of the crime scene. Floyd also elicited testimony that the clothing he was wearing the night of the crime had no bloodstains and that there was no "physical or scientific" evidence that the murder weapon found at the scene was the gun Floyd had purchased the day of the murder. (R. 3349.)

Floyd also presented testimony from Jack Remus, a forensic consultant, who testified as to how he would have investigated Floyd's case if he had been called to the crime scene. Essentially, Remus testified that he would have submitted for DNA testing the cigarette butts and beer cans found at the scene; that he would have had the gun found at the scene processed for both DNA and fingerprints; that he would have submitted Floyd's clothing to be processed for DNA and other trace evidence; and that he would have tested Floyd's person for gunpowder residue. Remus also stated that he would have taken more than 24 photographs of the crime scene. Remus said that he would have taken photographs of the various pieces of evidence at a 90–degree angle with a ruler or other measure present in the photograph in order to accurately portray the evidence, and that he would have taken long-range, medium-range, and close-

up photographs of the entire crime scene to ensure that an analysis of bloodstains, among other things, could be conducted using the photographs. Remus said that he reviewed the photographs of the crime scene taken by law enforcement and that the photographs were not taken at the correct angle and were not sufficient to conduct a blood-spatter analysis of the scene. However, he did testify that the photographs were sufficient for him to conclude that the bloodstains on the floor and wall in the hallway where Jones was found were not spatter from the shooting, but were stains from when Jones was moved to the ambulance.

Floyd also attacked his statements to police and posited that he had not, in fact, confessed to the murder. Floyd stressed that in his first statement to Chief Dean and Inv. Brooks, he had said that he remembered only jumping through the window and seeing Jones on the floor, not that he had shot Jones. He also presented testimony from a dispatcher at the Atmore Police Department who testified that the dispatch logs indicated that at 2:45 a.m. on January 2, 2011, Floyd was taken from the Atmore Police Department and transported to a county facility, thus making it impossible for him to have given his second statement to Carlee at 3:45 a.m. while in a cell at the Atmore Police Department, as Carlee had testified.

***5** Second, Floyd argued that he was intoxicated at the time of the crime and thus was unable to form the intent to kill. Roy Donta James ("Roy") testified that he and his girlfriend picked up Floyd from his house in Poarch around 11:00 a.m. on January 1, 2011, and spent most of the day with Floyd. Roy said that he and Floyd initially went to his house, then drove around Atmore for a few hours that afternoon, and then returned to his house around 5:30 p.m. or 6:00 p.m. Roy said that he and Floyd drank alcohol and ingested approximately seven grams of powder cocaine throughout the day. Roy stated that he initially drove Floyd home around 8:00 p.m. that evening, but a short time later, Roy said, Floyd called and asked Roy to come get him again. Roy picked up Floyd around 9:30 p.m. and the two went to a casino for a short time, then went to a local nightclub for a short time where Roy said he purchased a bottle of liquor, and then went back to Roy's house for a short time. Roy then again drove Floyd home sometime between 11:00 p.m. and midnight. Roy testified that he did not see Floyd use his cellular telephone at all that day. Rather, Roy said, Floyd asked to use Roy's cellular telephone.

Ernest Dean Rolin, Jr., testified that on January 1, 2011, he was in Poarch at his girlfriend's house, located on the same street Floyd lived on, when around 5:00 p.m he saw Floyd standing in the middle of the street. Floyd asked Rolin to drive him to Atmore, and Rolin said that he dropped Floyd off in Atmore around 5:20 p.m. Rolin said that he saw Floyd again in Poarch outside of his girlfriend's house at approximately 8:00 p.m. Floyd again asked Rolin to drive him to Atmore, and Rolin dropped Floyd off near an auto parts store in Atmore. Rolin testified that Floyd did not appear intoxicated when he saw him that day and that he did not see Floyd ingest any drugs, although he admitted to giving Floyd crystal methamphetamine. However, Rolin testified at a pretrial hearing and a transcript of that testimony was introduced into evidence by the State. In his pretrial testimony, Rolin stated that Floyd did appear intoxicated when he saw Floyd that day and that he did see Floyd ingest the crystal methamphetamine he had given Floyd.

At the penalty phase of the trial, the State introduced evidence that Floyd had pleaded guilty in September 2007 to first-degree rape and attempted first-degree sodomy and had been sentenced to 15 years' imprisonment for each conviction, which sentence had been split, and Floyd had been ordered to serve 2 years in confinement followed by 5 years on probation. The State also presented evidence that in September 2010, Floyd had pleaded guilty to first-degree criminal mischief and had been sentenced to 15 years' imprisonment, split to serve 3 years in a community-corrections program followed by 3 years on probation. The State also recalled to testify Ky'Toria Lawson and Sarah Marshall and called to testify Michael Dennis, Jones's older brother, Eloise Dirden, Jones's aunt, and Kerrya Jones, Jones's oldest son, to testify about the impact Jones's death had on their lives.

Floyd waived his right to counsel and represented himself during the penalty phase of the trial. Floyd waived opening statement and closing argument and presented no evidence in mitigation. After the jury returned its penalty-phase verdict, Floyd reinvoked his right to counsel, and at the sentencing hearing before the trial court, counsel introduced into evidence various records relating to Floyd, including medical records, school records, and records from his participation in a community-corrections program, as well as reports from Dr. Doug McKeown and Dr. Ronald McCarver, both forensic psychologists

who had evaluated Floyd before trial to determine his competency to stand trial and his mental state at the time of the offense, and a report from a private investigation firm.

Floyd also presented testimony from four witnesses. Alma Mose, Floyd's grandmother, testified that she had raised Floyd, that Floyd's mother and father were absent from his life, and that Floyd, in fact, did not meet his father until after he had been accused of killing Jones. Mose said that Floyd took music lessons and attended church regularly when he was a child but that when he was about 14, he was sexually abused by the mother of one of his friends, and that he then began getting into trouble. He began hanging around with older boys, using illegal drugs, and committing petty crimes, and he was committed to the Department of Youth Services. Floyd also had to take anger-management classes in school because he started fights. Mose said that, although Floyd dropped out of school after the ninth grade, he did get his GED. In his late teens, Mose said, Floyd suffered a head injury in an automobile accident. Mose said that Floyd fathered three children, with three different women, and that, although Floyd did not provide financially for his children, he spent a lot of time with them. Mose asked the court to sentence Floyd to life imprisonment without the possibility of parole. Mose said that Floyd did not shoot and kill Jones but that Floyd's new girlfriend had killed Jones and that Floyd was protecting his girlfriend because she was pregnant and he did not want her going to prison for the murder.

***6** Robert Brewer, a substance-abuse counselor, testified that Floyd was referred to him by a probation officer for substance-abuse treatment as a condition of probation. Brewer assessed Floyd in December 2010, determined that Floyd had a substance-abuse problem, and outlined a one-year plan of "intensive outpatient treatment." (R. 4278.) Brewer said that he was Floyd's counselor for about three weeks before Floyd was arrested and could no longer participate in the program. In the month that Floyd was enrolled in the treatment program, he tested positive for cocaine three times, including on December 30, 2010, and he tested negative one time.

Robert DeFrancisco, a forensic psychologist, testified that he reviewed Floyd's school and medical records as well as the reports prepared by Dr. McKeown and Dr. McCarver.[3] In his capacity as the psychologist for the county detention facility, Dr. DeFrancisco also met Floyd several times while Floyd was in jail awaiting trial. Dr. DeFrancisco testified that Floyd's IQ when he was 5 years old was 109 but that when Floyd was evaluated before trial, Floyd's IQ was 82. This "clinically significant drop" in IQ, Dr. DeFrancisco said, is consistent with "prefrontal lobe damage," either from a head injury or from consistent use of illegal narcotics, such as cocaine and methamphetamine. (R. 4298–99.) Dr. DeFrancisco stated that no testing was performed on Floyd to determine if Floyd, in fact, suffered brain damage, but he stated that Floyd had suffered head trauma and had a substance-abuse problem. According to Dr. DeFrancisco, a person suffering from prefrontal lobe damage will have "a hard time making decisions," will be "impulsive," and will have "difficulty controlling themselves." (R. 4300.) Dr. DeFrancisco also testified that, in his opinion, Floyd suffered from antisocial or borderline personality disorder, which adversely affected his "ability to conform his behavior to society's standards." (R. 4300.)

Lisa Diaz, a social worker who conducted a mitigation investigation, testified that when Floyd was young, he was generally seen as a good person, that he often helped his neighbors, and that he was involved in sports and church activities. However, Diaz said that Floyd had no father figure growing up, that he was bullied in school, and that he began having behavioral issues when he was a teenager. According to Diaz, Floyd "got with the wrong crowd" and began socializing with much older people. (R. 4366.) When he was in the 7th grade, Floyd was diagnosed with defiant and aggressive behavior because he had difficulty obeying rules and responding to authority. Based on his diagnosis and his poor grades, Floyd was placed in "[e]motionally-[c]onflicted" special-education classes. (R. 4357.) Diaz said that Floyd continually got into trouble during his teenage years and began using drugs when he was 17. Diaz also testified that Floyd suffered two head injuries in his youth—one was sustained during an automobile accident and another when he was hit in the head with a pistol.

Standard of Review

On appeal, Floyd raises numerous issues for our review, many of which he did not raise by objection in the trial court. Because Floyd was sentenced to death, his failure to object at trial does not bar our review of these issues;

however, it does weigh against any claim of prejudice he now makes on appeal. See Dill v. State, 600 So.2d 343 (Ala. Crim. App. 1991), aff'd, 600 So.2d 372 (Ala. 1992); Kuenzel v. State, 577 So.2d 474 (Ala. Crim. App. 1990), aff'd, 577 So.2d 531 (Ala. 1991).

***7** Rule 45A, Ala. R. App. P., provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

"The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." Hall v. State, 820 So.2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So.2d 152 (Ala. 2001). Plain error is "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." Ex parte Trawick, 698 So.2d 162, 167 (Ala. 1997), modified on other grounds, Ex parte Wood, 715 So.2d 819 (Ala. 1998). "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." Hyde v. State, 778 So.2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So.2d 237 (Ala. 2000). "The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant." Ex parte Trawick, 698 So.2d at 167. "[P]lain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error." Ex parte Walker, 972 So.2d 737, 753 (Ala. 2007). Thus, "[u]nder the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial." Wilson v. State, 142 So.3d 732, 751 (Ala. Crim. App. 2010). "[T]he plain error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)).

Analysis

I.

Floyd contends that he was denied due process and a fair trial when, he says, the State used the murder as the underlying felony required to establish burglary in order to elevate the crime to a capital offense. (Issue XXIII in Floyd's brief.) Floyd argues that "[t]he use of the murder alone to elevate the charge to capital murder violates the requirement that capital murder statutes 'genuinely narrow' the class of persons eligible for the death penalty" because, he says, it "convert[s] any intentional murder to capital murder based solely on whether it occurs in a building." (Floyd's brief, pp. 96–97; citations omitted.) Floyd did not raise this issue in the trial court; therefore, we review it for plain error. See Rule 45A, Ala. R. App. P.

***8** Floyd was indicted for murder made capital because it was committed during the course of a burglary as follows:

> "The Grand Jury of said County charge that before the finding of this indictment Cedric Jerome Floyd, whose name to the Grand Jury is otherwise unknown, did intentionally cause the death of another person, to-wit: Tina Roshell Jones, by shooting her with a revolver, and the said Cedric Jerome Floyd caused said death during the time that he, knowingly and unlawfully entered or remained, or attempted to enter or remain, unlawfully in a dwelling of another, to-wit: Tina Roshell Jones, with intent to commit a crime therein, to-wit: murder, and while effecting entry or while in the dwelling or in immediate flight therefrom, the said Cedric Jerome Floyd was armed with an explosive or deadly weapon, to-wit: revolver, in violation of § 13A–5–40(a)(4) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 39.)

In Shaw v. State, 207 So.3d 79 (Ala. Crim. App. 2014), this Court rejected an identical argument:

> "Shaw next argues that his two convictions for the capital offense of murder during the course of a

burglary were improper because, he says, the State improperly relied on the murder of each victim as the underlying offense to establish the burglary. Specifically, Shaw argues that use of the murder itself to elevate the crime to capital murder 'violates the requirement that capital murder statutes "genuinely narrow" the class of persons eligible for the death penalty.' (Shaw's brief, p. 91.)

"....

"This Court has previously considered and rejected this argument. In Hyde v. State, 778 So.2d 199 (Ala. Crim. App. 1998), we stated:

> " '[Hyde] erroneously argues that the trial court erred in allowing the murder to be elevated to capital murder based on the same facts that constituted the murder itself. Because the State showed that the appellant committed the murder during a burglary of Whitten's house, the murder was properly elevated to, and the appellant was properly convicted of, the capital offense of burglary/murder. See § 13A–5–40(a)(4), Ala. Code 1975.'

"778 So.2d at 213. In Whitehead v. State, 777 So.2d 781 (Ala. Crim. App. 1999), this Court held:

> " 'Whitehead contends that "the use of the murder itself to elevate the murder to capital murder violates the requirement that capital murder statutes 'genuinely narrow' the class of persons eligible for the death penalty." (Whitehead's brief to this court, p. 20.) This same argument was raised on appeal by Whitehead's codefendant Hyde and was rejected by this court. See Hyde [v. State], [778 So.2d 199 (Ala. Crim. App. 1998)]. Likewise, we reject Whitehead's argument. Whitten's murder was elevated to capital murder because it was committed during the course of a burglary and because the victim was a witness, not because of the murder itself. See § 13A–5–40(a)(4), Ala. Code 1975. Because the State sufficiently proved the elements of burglary, Whitehead was properly convicted of the capital offense of murder during a burglary.'
>
> "777 So.2d at 839. Here, the murders were elevated to capital murders because they were committed during the course of a burglary and not because of the murders themselves. See Whitehead, supra. Shaw was properly charged and convicted of murdering Doris Gilbert and Robert Gilbert during the course of a burglary."

***9** 207 So.3d at 109.

As in Shaw, the murder in this case was elevated to capital murder, not because of the murder itself, but because the murder was committed during the course of a burglary. Therefore, we find no error, much less plain error, in Floyd being charged with and convicted of murdering Jones during the course of a burglary.

II.

Floyd contends that the trial court erred in ordering him to wear an electronic stun device throughout his trial. (Issue I in Floyd's brief.) Specifically, Floyd argues that the trial court ordered him to wear the stun device "because he elected to wear civilian clothing at trial" (Floyd's brief, p. 10) and that "[t]he trial court's procedure of utilizing a stun belt whenever a 'defendant is in civilian clothes' ... effectively punished [him] for exercising his full right to a presumption of innocence." (Floyd's brief, p. 13.) Floyd also argues that requiring him to wear a stun device denied him his right to a fair trial because, he says, it placed him in constant fear of being electrocuted and thereby infringed on his ability to participate in his trial and to communicate with his counsel.

Our review of the record indicates that, although Floyd mentioned to the trial court that the stun device was uncomfortable and that he felt threatened by the stun device because the law-enforcement officers controlling the device had previously testified against him [4] and, in his opinion, were taking actions designed to provoke him, at no point did Floyd specifically object to the use of the stun device on the grounds he now raises on appeal. [5] Therefore, we review Floyd's claims under the plain-error rule. See Rule 45A, Ala. R. App. P.

The record reflects that the stun device was mentioned only four times throughout the proceedings. The first mention of the stun device occurred during a pretrial hearing on June 11, 2012, approximately a week before Floyd's trial was originally scheduled to begin, but over a year before Floyd's trial was ultimately held in September 2013. At that hearing, the trial court informed the parties that the sheriff's department was in charge of courtroom security and that the department would "probably" require Floyd to wear an electronic stun device during the trial:

> ***10** "THE COURT: Okay. And furthermore, on cases where the defendant—and we have had these before—where the defendant is in civilian clothes and not shackled as much as he would be if he's in his prison clothes, jail clothes. The sheriff has a procedure of using the stun belt with a remote control, electronic security device. Which, the sheriff is responsible for security, but I just, in talking with the sheriff, that's my understanding that's probably the direction they will handle it. I don't program all of that, other than there is a pattern that has been utilized in other cases before us. And I mention that just so that the defense and the defendant is aware that, I don't know if it's a leg belt or a—
>
> "CAPTAIN FREEMAN: Yes, sir, it's actually called a Stun–Cuff. And we can place it on the arm or the leg and just have a remote for the officer to keep on his person.
>
> "THE COURT: Okay. And if there were some problem, it's able to be turned on and the individual is immediately—
>
> "CAPTAIN FREEMAN: Exactly. It works just like a taser, it's 50,000 volts.
>
> "THE COURT: Okay. Well, that's just part of the process. And I really don't think that any time it'll be used. But I recognize, one, that does permit the defendant to not look too shackled, or so much of a prison look, because he'll be wearing just regular clothing and he'll look good. I know that y'all, meaning, I'm looking at the Chief Deputy over here, one of the chief deputies, y'all will be in charge of security. I am not to the extent that there is any kind of handcuffing or ankle braces, that's up to y'all. But I'll look at defense, if there's an issue about it, or you think that it's being improperly done or it's unfairly done, I want to make sure the defense knows that the Court's ears are always open. And if there's a problem you can come to me and immediately let me know. But I would expect that both sides could work together in regard to it.
>
> "(commotion in hallway)
>
> "THE COURT: .... Okay. From defense side then, anything else that you think we should cover while we're together this morning?
>
> "[Floyd's counsel]: Nothing that I can think of, Judge."

(R. 267–69.)

Subsequently, on the third day of voir dire, defense counsel informed the court that "it is the wish of our client to place ... on the record" that "our client feels threatened by the—as a result of the stun belt being placed upon him. He also feels threatened by one or more of these officers, since they have previously testified against him." (R. 1517–18.) On the fifth day of voir dire, defense counsel informed the court that Floyd was "wearing a very uncomfortable shock device" and that Floyd believed that the security officers were "attempting to provoke him and aggravate him" and "disrupt these proceedings" by "get[ting] near him during the proceedings and in front of the jurors" which, Floyd claimed, "violat[ed] his right to a free or impartial proceeding" and "creat[ed] a perception or problem that may present itself later." (R. 1734.) Finally, during a recess on the second day of the guilt phase of the trial, the trial court noted for the record that the week before, during the first week of voir dire, Floyd "had removed the electrodes from his stun belt" and the sheriff's department had been forced to obtain "a new belt for him, which is a vest," from another county. (R. 2694.)

> " ' "Every court has power to preserve and enforce order in its immediate presence; to prevent interruption, disturbance, or hindrance to its proceedings; and to control all persons connected with a judicial proceeding before it." ' Thomas v. State, 555 So.2d 1183, 1184–85 (Ala. Cr. App. 1989), quoting Clark v. State, 280 Ala. 493, 497, 195 So.2d 786 (1967), appeal dismissed, cert. denied, 387 U.S. 571, 87 S.Ct. 2071, 18 L.Ed.2d 967 (1967). ' "While recognizing that an accused generally has a right to be tried without being

subjected to physical restraints, and that this right has been embodied in various constitutional and statutory guaranties, the courts have also recognized that this right is subject to exception, especially on such grounds as the need to prevent (1) the accused's escape, or (2) the accused's resort to violence, or (3) the accused's disruption of the trial." ' Thomas, 555 So.2d at 1185, quoting Annot., 90 A.L.R.3d 17, 23 (1979)."

***11** Wood v. State, 699 So.2d 965, 966–67 (Ala. Crim. App. 1997).

Generally, "[i]t is in the sound discretion of the trial court to restrain the defendant, and such discretion should not be disturbed." Brock v. State, 555 So.2d 285, 289 (Ala. Crim. App. 1989). "The decision to restrain a defendant rests with the trial judge, and, absent an abuse of discretion, this Court will not disturb his ruling on appeal." McCall v. State, 833 So.2d 673, 676 (Ala. Crim. App. 2001). " 'Ultimately, ... it is incumbent upon the defendant to show that less drastic alternatives were available and that the trial judge abused his discretion by not implementing them.' " Brock, 555 So.2d at 289 (quoting Wilson v. McCarthy, 770 F.2d 1482, 1486 (9th Cir. 1985)). As this Court noted in Windsor v. State, 683 So.2d 1027 (Ala. Crim. App. 1994), aff'd, 683 So.2d 1042 (Ala. 1996):

"The trial court can best determine what security measures are necessary. 'Within constitutional limits, great weight must be accorded the discretion of the trial court. The trial judge is responsible for maintaining order in his courtroom. He understands infinitely better than we what is necessary to perform his duty.' Goodwin v. State, 495 So.2d 731, 733 (Ala. Crim. App. 1986)."

683 So.2d at 1033.

In Belisle v. State, 11 So.3d 256 (Ala. Crim. App. 2007), aff'd, 11 So.3d 323 (Ala. 2008), this Court addressed a similar issue involving an electronic stun device and found no plain error in the use of such a device. We explained:

"We have approved of the use of a similar device—a 'stun belt'—to maintain security in a courtroom. See Snyder v. State, 893 So.2d 488 (Ala. Crim. App. 2003). However, we have never had occasion to address this issue under the 'plain error' standard of review.

"Belisle relies on [United States v.] Durham[, 287 F.3d 1297 (11th Cir. 2002),] to support this argument. However, we believe that this case is more similar to Scieszka v. State, 259 Ga.App. 486, 578 S.E.2d 149 (2003). The Georgia Court of Appeals in Scieszka distinguished the case of Durham based on the fact that the issue had never been presented to the trial court. The court stated:

" 'As an initial matter, we note that there is nothing in the record indicating that it was the trial court that required Scieszka to wear the stun belt. Scieszka's trial attorney never objected to the belt or otherwise brought the matter to the trial court's attention, and there was accordingly no ruling on the matter by the court.

" '....

" 'Our Supreme Court has held that the use "of a remedial electronic security measure" is permissible where it is shielded from the jury's view and where there is no evidence that defendant was harmed by its use. Young v. State, 269 Ga. 478, 479(2), 499 S.E.2d 60 (1998). In the Young case, the court found that there was nothing in the record to show that the use of such an electronic device was "so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial." (Citation and punctuation omitted.) Id. In another case, the Supreme Court rejected the defendant's argument regarding the use of a stun belt, finding that there was "nothing in the record to support [the defendant's] contention that the device [(although not visible to the jury)] nonetheless had a detrimental psychological effect on his ability to participate in the trial." Brown v. State, 268 Ga. 354, 359–360(7), 490 S.E.2d 75 (1997). And in Stanford v. State, 272 Ga. 267, 271(8), 528 S.E.2d 246 (2000), the court again found no merit to the defendant's arguments regarding the use of an electronic security device because he failed to object to the device and because it was not visible to the jury.

***12** " 'Scieszka's argument must similarly fail because he raised no objection to the use of the stun belt and thus did not obtain a ruling from the trial court on the issue. Moreover, the record is devoid of any evidence of harm or prejudice arising from the use of the stun belt at his trial.

> " 'And contrary to Scieszka's assertion, the recent opinion by the Eleventh Circuit Court of Appeals in United States v. Durham, 287 F.3d 1297 (11th Cir. 2002), does not require a different result. In Durham, the Eleventh Circuit expressed serious concerns regarding the use of these devices and their effect on a defendant's ability to participate in his defense. Id. at 1305–1306. Nevertheless, the defendant in that case had filed a motion seeking to prohibit the stun belt's use, and the district court had ruled that the device could be used in light of the defendant's history of escape attempts. Id. at 1302–1303. The Eleventh Circuit remanded the case, requiring the district court to make factual findings regarding the use of the stun belt and to consider on the record the use of less restrictive alternatives. Id. at 1307–1309. Thus, Durham is distinguishable from this case because the use of the stun belt in that case was court-sanctioned, following the defendant's objection.'
>
> > "259 Ga.App. at 487–88, 578 S.E.2d at 150–51. For the reasons discussed in Scieszka, we refuse to find plain error when the issue was not brought to the court's attention, when there is no evidence that Belisle was prejudiced, and when Belisle's substantial rights have not been affected. Rule 45A, Ala. R. App. P."

11 So.3d at 281–82. See also McMillan v. State, 139 So.3d 184, 228–29 (Ala. Crim. App. 2010); Reynolds v. State, 114 So.3d 61, 82 (Ala. Crim. App. 2010); and Hyde v. State, 13 So.3d 997, 1005–07 (Ala. Crim. App. 2007) (all holding that the use of an electronic stun device does not rise to the level of plain error).

In this case, the record does not support Floyd's contention that the trial court ordered him to wear the stun device as punishment for his choosing to wear civilian clothing during the trial. Indeed, the record contains no order, written or oral, by the trial court requiring any specific security measure. Rather, the record indicates that the trial court deferred to the sheriff's department on all security matters and that the sheriff's department, not the trial court, made the decision to use the stun belt. That being said, it is clear from the June 2012 hearing that the trial court believed that a stun device would be an appropriate security measure, not as a way to punish Floyd, but as a way to maintain security while simultaneously protecting Floyd's presumption of innocence so that when Floyd appeared in front of the jury, he would "not look too shackled, or [have] so much of a prison look." (R. 268.)

Because Floyd did not specifically object to the use of the device, there is little in the record regarding the device, other than that the first device was a cuff worn on the leg or the arm and that the second device was a vest. Nothing in the record indicates that either device was visible to the jury or inhibited Floyd in any way. Floyd's argument that his constant fear of being electrocuted prevented him from participating in his trial and consulting with his counsel is unsupported by the record—which reflects repeated instructions by the trial court that security personnel allow Floyd movement during trial, including walking to the bench for bench conferences—and, quite frankly, is specious, given that Floyd clearly had no fear of being electrocuted when he disabled the first device.

***13** We also point out that the record contains ample evidence indicating that restraining Floyd was necessary in this case. While in jail awaiting trial on the capital-murder charge, Floyd escaped in October 2012 and was recaptured a few days later in another state, and he was convicted of promoting prison contraband in the spring of 2013. We recognize that these incidents occurred after the stun device was first mentioned in June 2012. However, that does not negate their impact on the necessity for restraining Floyd. As already noted, the trial court did not at the June 2012 hearing, or at any other time, order that Floyd wear the stun device; that decision was made by the sheriff's department. The record, however, does not indicate when the sheriff's department made that decision. At the June 2012 hearing, the trial court indicated only that the sheriff's department would "probably" use a stun device during trial. (R. 267.) Nothing in the record indicates that the decision to use a stun device during Floyd's September 2013 trial was made before Floyd had escaped or had been convicted of promoting prison contraband.

The record also reflects that during voir dire, Floyd attempted to make a weapon out of the flexible pen he

had been provided by the sheriff's department and that he removed the electrodes from the first stun device that was used, forcing the sheriff's department to obtain a second device from another county. (R. 2694.) During the charge conference outside the presence of the jury, Floyd disengaged the leg brace the sheriff's department had placed on him, and a recess had to be taken so that Floyd could be shackled. The record also indicates that during the trial Floyd had to be cautioned about the sheriff's department's rules regarding food and clothing and about furtive movements he had made that had caused concern among security personnel.

Floyd was on trial for the most serious offense in Alabama. He had prior convictions for rape, attempted sodomy, and criminal mischief. While awaiting trial, he had escaped from custody and had been charged with, and convicted of, promoting prison contraband, and during trial he dismantled two different restraints that had been placed on him. There is no indication in the record that the stun device Floyd wore during trial was visible to the jury or that it prevented Floyd from participating in his trial and consulting with his counsel. Simply put, nothing in the record indicates that the stun device worn by Floyd adversely affected his substantial rights or prejudiced him in any way. Therefore, we find no error, much less plain error, as to this claim.

III.

Floyd contends that the trial court erred in denying his motion for a change of venue. (Issue VIII in Floyd's brief.) Specifically, Floyd argues that media coverage of the murder and of his criminal history was so extensive and prejudicial that he could not receive a fair trial in Escambia County.

Approximately one month before trial, Floyd filed a motion for a change of venue, arguing that media coverage of the case "[a]t each stage of the criminal proceedings" had been so extensive, inflammatory, and prejudicial that "it [would be] impossible to conduct a fair trial by an impartial and unbiased jury in" Escambia County. (C. 1302.) In support of his motion, Floyd submitted numerous articles published in various local newspapers and on the Internet that had included information regarding the crime and his confession, his history with the victim of domestic violence, his escape from the county jail while awaiting trial on the murder charge, his conviction for promoting prison contraband while awaiting trial on the murder charge, and his prior convictions for rape, attempted sodomy, and criminal mischief and the subsequent revocation of his probation for those convictions, as well as his status as a registered sex offender. The trial court postponed ruling on the motion until after voir dire. At the conclusion of voir dire, the trial court heard argument from the parties and then denied the motion.

"When requesting a change of venue, '[t]he burden of proof is on the defendant to "show to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried." ' " Jackson v. State, 791 So.2d 979, 995 (Ala. Crim. App. 2000) (quoting Hardy v. State, 804 So.2d 247, 293 (Ala. Crim. App. 1999), aff'd, 804 So.2d 298 (Ala. 2000), quoting in turn Rule 10.1(b), Ala. R. Crim. P.).

> ***14** "[T]he determination of whether or not to grant a motion for change of venue is generally left to the sound discretion of the trial judge because he has the best opportunity to assess any prejudicial publicity against the defendant and any prejudicial feeling against the defendant in the community which would make it difficult for the defendant to receive a fair and impartial trial."

Nelson v. State, 440 So.2d 1130, 1132 (Ala. Crim. App. 1983). Therefore, "[a] trial court's ruling on a motion for a change of venue is reviewed for an abuse of discretion." Woodward v. State, 123 So.3d 989, 1049 (Ala. Crim. App. 2011).

> "In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated 'actual prejudice' against him on the part of the jurors; 2) when there is 'presumed prejudice' resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected."

Hunt v. State, 642 So.2d 999, 1042–43 (Ala. Crim. App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994).

A.

Floyd argues that he suffered actual prejudice because, he says, there are "tight connections inherent in small communities like Atmore" and several prospective jurors had connections to the case, either because they knew the victim's family or Floyd's family or because they knew potential witnesses in the case. (Floyd's brief, p. 62.) Floyd also points to two jurors who sat on his jury who indicated during voir dire that they had heard about the case, and he argues that it is "doubtful" that those two jurors could set aside what they had heard even though both stated during voir dire that they could. (Floyd's brief, p. 63.)

"Actual prejudice exists when one or more jurors indicated before trial that they believed the defendant was guilty, and they could not set aside their opinions and decide the case based on the evidence presented at trial." Hosch v. State, 155 So.3d 1048, 1118 (Ala. Crim. App. 2013). "The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved." Ex parte Grayson, 479 So.2d 76, 80 (Ala. 1985). " 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. ...' " Id. (quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)).

The record reflects that half the jurors who served on Floyd's jury had heard about the case through the media. However, all those jurors indicated during voir dire that they had no opinion as to Floyd's guilt or innocence and that they could set aside what they had heard and decide the case based on the evidence presented during trial. Floyd's argument that it is "doubtful" that two of those jurors could set aside what they had heard despite their statements to the contrary is based on pure speculation and is unsupported by the record. Moreover, the fact that several prospective jurors knew the victim's family, Floyd's family, or potential witnesses has no bearing on whether Floyd suffered actual prejudice unless those jurors had a fixed opinion as to Floyd's guilt that they could not set aside, which the record reflects is not the case. The record indicates that Floyd was not actually prejudiced by pretrial publicity so as to warrant a change of venue.

B.

Floyd also argues that prejudice should be presumed in this case because, he says, the publicity was not remote in time from his trial, but was constant from the time of the murder in January 2011 until his trial in September 2013; the publicity was sensational and inflammatory, revealing gruesome details of the murder as well as his extensive criminal history; the small size of the community coupled with the wide distribution of several local newspapers that had reported on the crime ensured that most people in the county had heard about the case; and numerous comments on the Internet in response to various articles about the crime revealed "the community's animus towards" him. (Floyd's brief, p. 60.)

***15** Prejudice is presumed " 'when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.' " Hunt, 642 So.2d at 1043 (emphasis omitted) (quoting Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)). " 'To justify a presumption of prejudice under this standard, the publicity must be both extensive and sensational in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice.' " Jones v. State, 43 So.3d 1258, 1267 (Ala. Crim. App. 2007) (quoting United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990)). "In order to show community saturation, the appellant must show more than the fact 'that a case generates even widespread publicity.' " Oryang v. State, 642 So.2d 979, 983 (Ala. Crim. App. 1993) (quoting Thompson v. State, 581 So.2d 1216, 1233 (Ala. Crim. App. 1991)). Only when "the pretrial publicity has so 'pervasively saturated' the community as to make the 'court proceedings nothing more than a "hollow formality" ' " will presumed prejudice be found to exist. Oryang, 642 So.2d at 983 (quoting Hart v. State, 612 So.2d 520, 526–27 (Ala. Crim. App.), aff'd, 612 So.2d 536 (Ala. 1992), quoting in turn, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)). "This require[s] a showing that a feeling of deep and bitter prejudice exists in [the county] as a result of the publicity." Ex parte Fowler, 574 So.2d 745, 747 (Ala. 1990).

In determining whether presumed prejudice exists, we look at the totality of the circumstances, including the size and characteristics of the community where the offense occurred; the content of the media coverage; the timing of the media coverage in relation to the trial; the extent of the media coverage; and the media interference with the trial or its influence on the verdict. See, e.g., Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619

(2010), and Luong v. State, 199 So.3d 139, 146 (Ala. 2014). "[T]he 'presumptive prejudice' standard is ' "rarely" applicable, and is reserved for only "extreme situations." ' " Whitehead v. State, 777 So.2d 781, 801 (Ala. Crim. App. 1999), aff'd, 777 So.2d 854 (Ala. 2000) (quoting Hunt, 642 So.2d at 1043, quoting in turn, Coleman, 778 F.2d at 1537)).

The record reflects that Escambia County is a relatively small rural county. According to the 2010 census, Escambia County had a population of just over 38,000 residents. The small size of the community weighs in favor of a finding of presumed prejudice.

However, the content of the publicity weighs against a finding of presumed prejudice. We have thoroughly reviewed all the articles submitted by Floyd in support of his motion, and we conclude that, although they did not paint a flattering picture of Floyd, they were largely factual, as opposed to inflammatory and sensational. Additionally, although most of the articles did reference some or all of Floyd's criminal history, "the mere fact that media coverage references a defendant's criminal history, by itself, is not sufficient to satisfy the presumed-prejudice standard," McCray v. State, 88 So.3d 1, 70 (Ala. Crim. App. 2010), and the record in this case reflects that only a few of the prospective jurors who had heard about the case through the media had heard about Floyd's criminal history.

The timing and extent of publicity also weigh against a finding of presumed prejudice. Based on Floyd's submissions to the trial court, only 20 articles about the crime were published in newspapers and on the Internet. Those articles were published in a 14–month period after the crime—between January 2011 and March 2013—and no articles were published in the 6 months leading up to Floyd's September 2013 trial.

Finally, nothing in the record indicates that the media interfered with the trial or influenced the jury's verdict. Floyd argues that numerous anonymous comments made in response to the articles published on the Internet establish that the media influenced the community and, thus, the trial. Although we agree with Floyd that some of the comments were inflammatory, we cannot say that they establish a "deep and bitter prejudice" in the community. "This Court cannot conclude that, in this age of digital communication, the published opinions of certain of the citizens in this particular community constitute grounds for presuming that a fair trial could not be conducted." Luong, 199 So.3d at 147.

***16** Based on the record before us, we cannot say that the media coverage in this case so pervasively saturated the community as to create an emotional tide against Floyd that rendered the court proceedings nothing more than a hollow formality. The publicity in this case was not so extensive and so inherently prejudicial as to constitute one of those "extreme situations" that warrant a presumption of prejudice.

For these reasons, the trial court properly denied Floyd's motion for a change of venue.

IV.

Floyd also contends that the trial court erred in denying his motion for funds to hire a polling expert. (Issue XXI in Floyd's brief.) Specifically, Floyd argues that "a polling expert was necessary to evaluate the community's bias" given the media's "inflammatory coverage of the offense, and the enhanced prejudice resulting from the small community." (Floyd's brief, p. 94.)

To be entitled to funds to pay for an expert, a defendant "must show more than a mere possibility that he or she will receive useful assistance from the expert." Ex parte Dobyne, 672 So.2d 1354, 1357 (Ala. 1995). "[F]or an indigent defendant to be entitled to expert assistance at public expense, he must show a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial." Ex parte Moody, 684 So.2d 114, 119 (Ala. 1996).

In Ex parte Grayson, 479 So.2d 76 (Ala. 1985), the Alabama Supreme Court noted that " '[t]he proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination,' Anderson v. State, 362 So.2d 1296, 1299 (Ala. Crim. App. 1978), not through extensive and expensive surveys." 479 So.2d at 80. Subsequently, in Travis v. State, 776 So.2d 819 (Ala. Crim. App. 1997), aff'd, 776 So.2d 874 (Ala. 2000), this Court echoed that sentiment, noting that "the proper method to determine whether a prospective juror is biased is through voir dire,

not through opinion polls," and we upheld the trial court's denial of the defendant's request for funds for a pollster on the ground that the defendant had "failed to establish a need for a pollster because the same information was available to him at trial through voir dire examination." 776 So.2d at 872. See also Riley v. State, 166 So.3d 705, 734 (Ala. Crim. App. 2013); Perkins v. State, 808 So.2d 1041, 1066 n.3 (Ala. Crim. App. 1999), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002); Hart v. State, 612 So.2d 520, 527 (Ala. Crim. App.), aff'd, 612 So.2d 536 (Ala. 1992); and Holladay v. State, 549 So.2d 122, 126 (Ala. Crim. App. 1988), aff'd, 549 So.2d 135 (Ala. 1989) (all upholding a trial court's denial of a defendant's request for funds for polling).

Similarly, here, Floyd has failed to establish a need for a polling expert. Voir dire in this case was extensive and thorough, lasting seven days, and the trial court permitted the parties to question individually each juror who indicated that he or she had read or heard about the case. Floyd was able to determine who had been exposed to pretrial publicity and the extent of that exposure through voir dire examination. A polling expert was unnecessary. Therefore, the trial court properly denied Floyd's motion for funds for a polling expert.

V.

Floyd contends that the trial court erred in allowing the venire to be death-qualified. (Issue XXIV in Floyd's brief.)[6] Specifically, Floyd argues that death-qualifying prospective jurors disproportionately excludes minorities and women from the jury and results in a conviction-prone jury. However, "[t]he practice of death-qualifying juries has been repeatedly held to be constitutional." Townes v. State, [Ms. CR–10–1892, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015). See also Johnson v. State, 823 So.2d 1, 14 (Ala. Crim. App. 2001), and the cases cited therein. Therefore, we find no error on the part of the trial court in allowing the venire to be death-qualified.

VI.

***17** Floyd contends that the trial court improperly limited his voir dire examination of prospective jurors regarding their views on the death penalty, in violation of Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). (Issue XVII in Floyd's brief.) Specifically, Floyd argues that the trial court erred in refusing to allow him to ask prospective jurors a hypothetical question about what factors they would consider in deciding a sentence if they were seated as jurors in an unrelated high-profile case involving a shooting in a Colorado movie theater.

During voir dire of the first panel of prospective jurors,[7] defense counsel asked prospective jurors if they had followed any high-profile criminal cases in the media, such as the theater shooting in Colorado. Several jurors indicated that they had. Defense counsel then asked:

> "In that particular case, imagine—if you would, let's just pretend for a second that we're not here in Escambia County, Alabama, that we're in Aurora, Colorado, and that you're on that jury out there. And just hypothetically speaking. And you understand that anything we say about that case in no way has any reflection on this case here. That's a case in another court in another place and you realize we're not talking about this.
>
> "If you were—if you were on that case out there, on that jury, and you and 11 other jurors heard all the testimony in that case, you were there for however long that trial lasted, and you found that you didn't hear any testimony that would have made you think there was self-defense involved; in other words—"

(R. 1471–72.)

At that point, the trial court interrupted defense counsel and, at a bench conference, asked defense counsel to clarify the purpose of the question. Defense counsel indicated that he wanted to ask prospective jurors about their views on the death penalty and what factors they would consider in making a penalty-phase decision but that he did not want to mention any of the facts of Floyd's case for fear of tainting the panel. The State asserted that defense counsel could simply ask jurors their views on

capital punishment without using a hypothetical about an unrelated case. The trial court agreed and limited defense counsel to questioning the jury about "issues that will assist [counsel] in helping [counsel] choose a jury" and instructed defense counsel to not use "hypotheticals that don't even—that are just made up like this." (R. 1477.) The court specifically noted that no jury trial had yet been held regarding the theater shooting in Colorado. The trial court also noted that it "may give [counsel] some liberties" (R. 1478) and "permit [counsel] to explore some of these issues when we get these people in here individually" but the court instructed defense counsel not to "put this entire panel through a hypothetical trial." (R. 1479.) Defense counsel then continued voir dire without using the hypothetical question. The record reflects that defense counsel thoroughly questioning each panel of jurors regarding the jurors' views on the death penalty and also questioned many of the jurors individually.

Rule 18.4(c), Ala. R. Crim. P., provides that "[t]he court shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors." In Morgan, supra, the United States Supreme Court held that a capital defendant is entitled to question prospective jurors about their views on the death penalty and to strike for cause those prospective jurors who would automatically impose the death penalty if the defendant is found guilty of the capital charge. However, "[t]he right to question veniremembers regarding their qualifications to serve on the jury or their interest or bias is limited by propriety and pertinence and is to be exercised within the sound discretion of the trial court, and the questions must be reasonable under the circumstances of the case." Smith v. State, 698 So.2d 189, 198 (Ala. Crim. App. 1996), aff'd, 698 So.2d 219 (Ala. 1997). See also Rule 18.4(d), Ala. R. Crim. P. ("Voir dire examination of prospective jurors shall be limited to inquiries directed to basis for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their strikes."). "In selecting a jury for a particular case, 'the nature, variety, and extent of the questions that should be asked prospective jurors' must be left largely within the sound discretion of the trial court." Bracewell v. State, 447 So.2d 815, 821 (Ala. Crim. App. 1983), aff'd, 447 So.2d 827 (Ala. 1984) (quoting Peoples v. State, 375 So.2d 561, 562 (Ala. Crim. App. 1979)). "A trial court is vested with great discretion in determining how voir dire examination will be conducted, and the court's decision as to the extent of voir dire examination required will not be overturned except for an abuse of that discretion." Travis v. State, 776 So.2d 819, 835 (Ala. Crim. App. 1997), aff'd, 776 So.2d 874 (Ala. 2000).

***18** The trial court's limiting Floyd's use, during panel voir dire, of a hypothetical question regarding what factors prospective jurors would consider in deciding a sentence if they were seated as jurors in an unrelated, factually dissimilar case they had seen in the media did not violate Morgan, supra. Floyd was permitted to, and did, question prospective jurors extensively regarding their views on the death penalty and whether they would automatically vote to impose the death penalty upon conviction. The trial court did not abuse its discretion in limiting the form of the questions used by defense counsel to obtain that information. Therefore, Floyd is entitled to no relief on this claim.

VII.

Floyd contends that the trial court erred in not investigating alleged juror misconduct that occurred during voir dire. (Issue XIV in Floyd's brief.) Specifically, Floyd argues that the trial court should have investigated when a prospective juror indicated that she had heard about the case from another prospective juror on the first day of voir dire. Floyd did not request that the trial court conduct an investigation into the alleged misconduct, nor did he object when the trial court did not do so sua sponte. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

During panel voir dire, prospective juror S.J. indicated that she had heard about the case. During individual voir dire of S.J., the following occurred:

> "[Floyd's counsel]: [S.J.] You had indicated that you had read something in the newspaper or saw something on television or some kind of news media regarding this.
>
> "[Prospective Juror S.J.] No. It was no[t] real media. That's why I said I heard something, but it was not through the media. I didn't know anything until I got here and Judge Rice said something about a criminal case. And the person sitting next to me told me of three criminal cases that were in the paper. And I feel like—well, that was all, but I thought I needed to ....

> "[Floyd's counsel]: Do you have any—hearing that or anything else that you may have heard, did that cause you to have a fixed opinion as to the guilt or innocence of Mr. Floyd?
>
> "[Prospective Juror S.J.]: No."

(R. 2310–11.) No further questions were asked of S.J. by the trial court or the parties.

Relying on Holland v. State, 588 So.2d 543 (Ala. Crim. App. 1991), and similar cases, Floyd argues that the trial court was required to investigate the conversation between S.J. and another prospective juror "to determine which veniremember discussed the media coverage during voir dire" and "whether any other veniremember on the panel heard the comments" and that the trial court's failure to do so denied him his rights to due process, to a fair trial, and to a reliable sentence. (Floyd's brief, p. 86.)

Floyd's argument is premised on the notion that the conversation between S.J. and the other prospective juror on the first day of voir dire amounted to misconduct. It did not. The record indicates that on the first day of voir dire, after the trial court had administered the oath to prospective jurors and had asked general qualifying questions, the court informed the venire that there were several criminal cases set for trial that week, most of which would last only one or two days, but one of which could last as long as two weeks. According to S.J., it was at this point that another prospective juror informed her of three criminal cases that had been reported in the newspaper. However, at this point in the process, the jurors had not been instructed not to discuss the cases or their jury service. It was not until the venire was later divided into two groups—one group for Floyd's trial and one group for the other criminal trials scheduled that week—and voir dire specific to Floyd's case began that the trial court instructed the jurors not to discuss Floyd's case or their jury service.

***19** Unlike in Holland, in which a prospective juror expressed to other prospective jurors her opinion that the defendant was guilty after being specifically instructed by the trial court not to discuss the case, the prospective juror in this case, after the trial court had informed the venire that there were several criminal cases set for trial, simply commented to S.J. about three criminal cases that had been reported in the media. That comment did not violate any instructions by the court and did not constitute misconduct. Because there was no misconduct, there was no need for the trial court to conduct an investigation.

Moreover, in Luong v. State, 199 So.3d 173 (Ala. Crim. App. 2015), this Court recognized that

> " '[t]here is no per se rule requiring an inquiry in every instance of alleged [juror] misconduct.' United States v. Hernandez, 921 F.2d 1569, 1577 (11th Cir. 1991). '[A] trial judge "has broad flexibility in such matters, especially when the alleged prejudice results from statements by the jurors themselves, and not from media publicity or other outside influences." ' United States v. Peterson, 385 F.3d 127, 134 (2nd Cir. 2004), quoting in turn United States v. Thai, 29 F.3d 785, 803 (2d Cir. 1994)."

199 So.3d at 186. This Court further recognized that when juror misconduct is alleged to have occurred during voir dire, "the voir dire process itself [is] sufficient to uncover bias." Id., citing State v. Vazquez, 87 Conn.App. 792, 867 A.2d 15 (2005).

Voir dire examination in this case was extensive, lasting seven days and spanning over 1400 pages in the record. Prospective jurors were initially questioned in panels, but those who indicated that they had heard about the case, as well as others, were questioned individually. Of the prospective jurors who indicated that they had heard about the case, S.J. was the only prospective juror who said that she had heard about the case from another prospective juror. Based on the circumstances in this case, the trial court was not required to conduct an investigation into the conversation between S.J. and the other prospective juror.

For these reasons, we find no error, much less plain error, as to this claim.

VIII.

Floyd contends that the State exercised its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). (Issue XI in Floyd's brief.) Specifically, Floyd argues that the State struck 15 of 22 African–American prospective jurors from the venire, that many of the African–American prospective jurors who

were struck answered questions similarly to Caucasian prospective jurors who were not struck, and that the State engaged in disparate questioning of African–American and Caucasian prospective jurors. Floyd did not raise a Batson motion in the trial court; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

As noted previously, "plain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error." Ex parte Walker, 972 So.2d 737, 753 (Ala. 2007). Thus, "[f]or an appellate court to find plain error in the Batson context, the court must find that the record raises an inference of purposeful discrimination by the State in the exercise of its peremptory challenges." Saunders v. State, 10 So.3d 53, 78 (Ala. Crim. App. 2007).

> "The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:
>
> "1. Evidence that the 'jurors in question share[d] only this one characteristic—their membership in the group—and that in all other respects they [were] as heterogeneous as the community as a whole.' [People v.] Wheeler, 22 Cal.3d [258,] 280, 583 P.2d [748,] 764, 148 Cal.Rptr. [890,] 905 [(1978)]. For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n.27, indicating that race was the deciding factor.
>
> ***20** "2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.
>
> "3. The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)].
>
> "4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.
>
> "5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So.2d 350, 355, (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 (1978).
>
> "6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy, 503 So.2d at 352 and 355.
>
> "7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.
>
> "8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. [229,] 242, 96 S.Ct. [2040,] 2049 [48 L.Ed.2d 597 (1976)].
>
> "9. The state used peremptory challenges to dismiss all or most black jurors. See Slappy, 503 So.2d at 354, Turner, supra."

Ex parte Branch, 526 So.2d 609, 622–23 (Ala. 1987).

We have thoroughly reviewed the record of voir dire examination, and after considering Floyd's arguments and the factors in Ex parte Branch, we find no inference in the record that the State engaged in purposeful discrimination against African–American prospective jurors when exercising its peremptory strikes. Therefore, we find no plain error as to this claim.

Guilt–Phase Issues

IX.

Floyd contends that the trial court erred in denying his counsel's motion to withdraw on the ground that counsel had a conflict of interest. (Issue V in Floyd's brief.) Floyd argues that counsel had an actual conflict of interest and that counsel's conflict was so great that it "damaged the attorney-client relationship beyond repair." (Floyd's brief, p. 44.) The trial court's denial of counsel's motion to withdraw, Floyd maintains, denied him his Sixth Amendment right to counsel and his rights to due process, a fair trial, and a reliable verdict.

The record reflects that the guilt phase of the trial began on Thursday, September 26, 2013. After opening statements and testimony from several prosecution witnesses over the course of two days, the trial recessed Friday afternoon for the weekend. Before trial resumed on Monday, September 30, 2013, defense counsel filed a demand for an emergency ex parte hearing to be held outside the presence of the State and outside Floyd's presence. At the hearing, defense counsel, through two attorneys they had retained to represent them,[8] informed the trial court that they wanted to withdraw from representing Floyd on the ground of conflict of interest, and they filed with the court a written motion to withdraw, alleging that "the Alabama Rules of Professional Conduct require that the undersigned attorneys withdraw" but that "the attorney-client privilege prevent[s] them from disclosing statements and conduct by the client which gives rise to this request." (C. 2010–11.)

***21** Defense counsel informed the trial court at the hearing that, around noon on Friday, defense counsel had been discussing some of the witnesses the State had subpoenaed to testify when Floyd told counsel "that their concern about a particular witness subpoenaed by the State was not necessary because he had made contact with [another person] and asked her to call this witness and advise the witness not to show up."[9] (R. 2965.) Counsel later clarified that only one of them had heard Floyd's statement. Counsel also informed the court that Floyd had contacted the person "on a secure line," which counsel indicated was "jail speak" for a cellular telephone. (R. 2968.) Counsel told the court that they believed that Floyd's self-reported action constituted the crime of tampering with a witness, see § 13A–10–124, Ala. Code 1975, and as soon as the trial recessed Friday afternoon, they had contacted two attorneys to advise them as to the best course of action. Those attorneys advised defense counsel not to "have any further contact with this defendant under any such circumstances" and "to seal their boxes [and] notify their investigators to shut down all proceedings," which defense counsel did. (R. 2966–67.)

Defense counsel argued that it would be "difficult" for them to continue to represent Floyd "knowing that he is out there continuing to violate the law." (R. 2978.) According to counsel, they had "felt this concern all along" and had feared "what this guy was doing," (R. 2980), and they characterized Floyd as a "loose cannon." (R. 3016.) When the trial court indicated that it was considering calling to testify at the hearing both the witness at issue and the person Floyd had allegedly contacted, counsel argued against such testimony, noting that it could possibly alert the State and/or Floyd to the situation. Defense counsel noted that they had not informed Floyd about the reason for the ex parte hearing or his absence therefrom, despite the fact that, during a recess in the hearing, Floyd had asked what was happening.

Counsel asserted, however, that "Floyd's past conduct, which includes escape, promoting prison contraband, and other conduct that we are privy to" made it "highly, highly probable" that Floyd was telling the truth about his actions. (R. 3006–07.) Defense counsel argued that they had "lost all trust and faith" in Floyd, and that, as a result, they could not "honestly go forward, based upon this information, and provide him with adequate representation as required under the constitution." (R. 3009.) Defense counsel said that they had spent the entire weekend consulting with their retained attorneys, as well as other attorneys, and that they had concluded that "[t]here is not a path that can go forward with us as counsel." (R. 2995.) Counsel repeatedly pointed out during the hearing that Floyd's constitutional rights were of paramount importance and had to be protected. When specifically asked by the trial court if they could "continue fighting and scraping and clawing like they have been" if the court denied their motion to withdraw, counsel indicated that they could not, "[i]f for no other reason than they can't monitor [Floyd] 24 hours a day." (R. 3003–04.)

Defense counsel also sought guidance from the trial court on how to handle the situation with Floyd if their motion

to withdraw was denied. Counsel noted that, if they informed Floyd of the reason for the ex parte hearing, Floyd would in all likelihood lose trust in them, as they had in him, and would request that they be removed as counsel. On the other hand, to not inform Floyd of the reason for the hearing would result in Floyd's not being made aware that what he had allegedly done was improper and could be viewed by Floyd as defense counsel's implicit approval of Floyd's attempting to contact a State's witness. Defense counsel pointed out that they did not believe that Floyd "realized that what he was telling [defense counsel] would cause these consequences." (R. 3009.) After the trial court denied the motion to withdraw, defense counsel indicated that they believed Floyd had a right to know what had happened during the ex parte hearing. However, the record does not reflect whether counsel informed Floyd about what had happened during the hearing.

***22** Throughout the hearing, the trial court expressed concern that Floyd was attempting to "manipulate the Court." (R. 2974.) The court noted that the only remedy if it granted the motion to withdraw was to declare a mistrial because it would be impossible for a newly appointed attorney to take over the case mid-trial. The court expressed concern with such a scenario, noting that a criminal defendant could provoke a mistrial simply by telling counsel that he or she had contacted a State's witness, even if no such contact had occurred. The court said that it was "troubled by any defendant in a capital murder case, just every time coming up with, probably go on the Internet, how to find ways to mistry your case. Allege this or say this or look cross-eyed. I mean, I don't want this defendant, or any defendant, to be in control of this trial." (R. 2997.) The court explained:

> "But this is the problem I'm having, too, is, I mean—and I'm not saying that I'd rule this way, but, I mean, what would prevent a defendant in any case to lean over to his counsel and say, Well, I sent somebody out to get that old State's witness. Or I sent a smoke signal out of the jail telling, better not show. I mean, he is, in a way, manipulating this Court."

(R. 3005.) The court noted that it could all be a ruse by Floyd and that it was not satisfied that Floyd "didn't just make it up." (R. 3006.) The court later stated it was "not totally convinced that this is a lost trial and that I'm not able to continue it, other than your representation that there is no way defense counsel could go forward representing this fellow." (R. 3015.)

After a recess, the trial court denied defense counsel's motion to withdraw. The court noted that it was "not unmindful of the pressure [its ruling] puts on defense counsel," but it expressed confidence in defense counsel's abilities to continue representing Floyd. (R. 3027–8.) After the ex parte hearing concluded, defense counsel refiled their motion to withdraw in open court, with Floyd present. Defense counsel subsequently filed a petition for a writ of mandamus, which this Court denied by order (case no. CR–12–2094).

"The decision to substitute or to remove court-appointed counsel and to appoint new counsel for an accused rests within the sound discretion of the trial court." Snell v. State, 723 So.2d 105, 107 (Ala. Crim. App. 1998). To warrant a substitution of counsel, there must be an actual conflict of interest or an irreconcilable conflict between counsel and the defendant so great that it resulted in a total lack of communication that prevented an adequate defense. See Snell, 723 So.2d at 107. See also Scott v. State, 937 So.2d 1065, 1080 (Ala. Crim. App. 2005); Boldin v. State, 585 So.2d 218, 219 (Ala. Crim. App. 1991); and Ex parte Bell, 511 So.2d 519, 522 (Ala. Crim. App. 1987). To prevail on an actual-conflict-of-interest claim under the Sixth Amendment, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

> "To prove that an actual conflict adversely affected his counsel's performance, a defendant must make a factual showing 'that his counsel actively represented conflicting interests,' Cuyler v. Sullivan, 446 U.S. at 350, 100 S.Ct. at 1719, ' "and must demonstrate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.' " ' Barham v. United States, 724 F.2d 1529, 1532 (11th Cir.) (quoting United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983)), cert. denied, 467 U.S. 1230, 104 S.Ct. 2687, 81 L.Ed.2d 882 (1984)."

Molton v. State, 651 So.2d 663, 669 (Ala. Crim. App. 1994).

In Scott, supra, this Court addressed a similar issue and explained:

"A trial court has broad discretion in considering whether to grant defense counsel's motion to withdraw. Unless defense counsel establishes an actual conflict of interest or an irreconcilable conflict between counsel and the defendant, the trial court's denial of the motion to withdraw will not be overturned. E.g., Ex parte Bell, 511 So.2d 519, 522 (Ala. Crim. App. 1987). We have previously discussed the principles relevant to appellate review of a motion to withdraw.

> ***23** " ' " '[T]he decision whether to remove an appointed counsel and appoint another counsel for defendant is within the sound discretion of the trial court.' Crawford v. State, 479 So.2d 1349, 1355 (Ala. Cr. App. 1985). See also, Tudhope v. State, 364 So.2d 708 (Ala. Cr. App. 1978).... The right to choose counsel may not be subverted to obstruct the orderly procedure in the court or to interfere with the fair administration of justice. United States v. Sexton, 473 F.2d 512 (5th Cir. 1973)."

" 'Briggs v. State, 549 So.2d 155, 160 (Ala. Crim. App. 1989).

" ' "In order to prevail on a motion for substitution of counsel, the accused must show a demonstrated conflict of interest or the existence of an irreconcilable conflict so great that it has resulted in a total lack of communication that will prevent the preparation of an adequate defense." Snell v. State, [723 So.2d 105, 107 (Ala. Crim. App. 1998)]. In Wilson v. State, 753 So.2d 683 (Fla. Dist. Ct. App. 2000), a defendant moved to have his counsel dismissed. When asked on what grounds he wished to have his counsel dismissed, the defendant responded that counsel had not conferred with him about the law and that he had lost faith in counsel. The trial court responded that he found defense counsel's performance to have been exemplary; however, '[c]onsistent with his behavior throughout the trial, the defendant refused to remain silent after the trial judge's rulings,' supra at 686. The trial court denied the appellant's motion, and the Florida Appellate Court upheld that decision, stating:

> " ' " '[T]rial courts are given broad discretion to determine whether a motion to withdraw should be granted.... The primary responsibility of the Court is to facilitate the orderly administration of justice. In making the decision of whether to grant counsel permission to withdraw, the trial court must balance the need for orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused. In doing so, the Court must consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and trial, and the possibility that any new counsel would be confronted with the same conflict. As long as the trial court has a reasonable basis for believing that the attorney-client relation has not deteriorated to a point to where counsel can no longer give effective aid in the fair presentation of a defense, the Court is justified in denying a motion to withdraw. The decision of a trial court to deny a motion to withdraw will not be disturbed absent a clear abuse of discretion.'"

" 'Wilson v. State, 753 So.2d at 688, quoting Sanborn v. State, 474 So.2d 309, 314 (Fla. Dist. Ct. App. 1985) (citations omitted).

" 'In the present case, the appellant has made no such showing that a conflict of interest or an irreconcilable conflict exists. Although the appellant alleged that his counsel visited him infrequently, he made no showing of a "total lack of communication," which would have prevented the preparation of a sufficient defense; all the appellant has demonstrated is a possible lack of "a meaningful relationship" or a lack of "confidence in court-appointed counsel," neither of which is guaranteed him under the United States Constitution or Alabama Constitution 1901. Therefore, the trial court did not abuse its discretion by failing to substitute or remove court-appointed counsel and appoint a new counsel for the appellant.'

***24** "Baker v. State, 906 So.2d 210, 226–27 (Ala. Crim. App. 2001), rev'd on other grounds, 906 So.2d 277 (Ala. 2004).

"Scott contends that an actual conflict of interest existed. Defense counsel presented no evidence to support this assertion when they filed the motion to withdraw, and they did not present any evidence in support of this claim during the hearing on the motion for a new trial. In fact, when defense counsel raised the issue in the motion for a new trial, they stated that they had moved to withdraw 'because of the conflict

that was created, not by—not by anyone other than the defendant, himself. He created a conflict, not by—it wasn't created by the Court, it wasn't created by the State, but it was created by the defendant and some potential witnesses.' (R. 1152–53.)

"As the State has argued, Scott failed to demonstrate either that a conflict of interest existed or that the alleged conflict adversely affected counsel's performance. Without such proof, Scott has failed to establish a constitutional violation. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

> "Furthermore, the motion to withdraw was made on the morning of trial, after nearly three years had passed from the date of the crimes; without question, the witnesses who had appeared for trial would have been inconvenienced if the motion had been granted. Finally, because Scott failed even to allege any facts regarding the nature of the controversy, it was possible, if not probable, that new counsel would be confronted with the same conflict. These factors, too, supported the trial court's denial of the motion to withdraw. See Baker v. State, 906 So.2d at 226–27. The trial court had a reasonable basis for denying the motion to withdraw. No abuse of discretion occurred, and Scott is not entitled to any relief on this claim."

Scott, 937 So.2d at 1080–82.

At the ex parte hearing, defense counsel presented no evidence indicating that they had an actual conflict of interest that adversely affected their performance or that there existed an irreconcilable conflict that resulted in a "total lack of communication." Counsel merely argued that it would be "difficult" for them to continue representing Floyd because they had lost "faith and trust" in Floyd, they believed that he was "out there continuing to violate the law," and they could not "monitor him 24 hours a day." However, as the trial court repeatedly pointed out at the hearing, there was no evidence indicating that Floyd had, in fact, contacted anyone about any State's witness, or would do so in the future, or that any State's witness had been contacted and asked not to testify. Lack of trust in a client does not establish an actual conflict of interest or an irreconcilable conflict so great that it results in a total lack of communication.

On appeal, Floyd argues that counsel's actions in spending a weekend investigating and preparing their motion to withdraw instead of working on his case, not informing Floyd on the record about the reasons they had filed the motion to withdraw and what had transpired during the hearing, [10] revealing to the trial court Floyd's statement that he had tampered with a witness, [11] and arguing that they believed Floyd's statement because of Floyd's other crimes [12] establish that counsel had an actual conflict of interest and an irreconcilable conflict so great that it resulted in a total lack of communication. In other words, Floyd argues that the very fact that counsel investigated the best course of action to take in response to his statement that he had tampered with a witness and then moved to withdraw from representing him establishes a conflict. We disagree. The fact that an attorney spends time trying to determine what action is appropriate under the Alabama Rules of Professional Conduct and then moves to withdraw from representation does not establish that the attorney had an actual conflict of interest that adversely affected the attorney's performance or that there existed an irreconcilable conflict that resulted in a total lack of communication with the client.

***25** Counsel's actions here did not amount to the active representation of conflicting interests and do not establish that counsel made choices between alternative courses of action that were harmful to Floyd. As counsel pointed out at the ex parte hearing, the "paramount obligation" was protecting the "constitutional rights of the defendant." (R. 3004.) It is clear from the record that counsel's extensive work on the issue of Floyd's alleged witness tampering, and their ultimate decision to move to withdraw from representing Floyd, was not to represent their own interests, but to ensure that Floyd's constitutional rights were protected. Indeed, the fact that counsel struggled with the issue for two days reflects counsel's acute awareness of their duty of loyalty to their client. Counsel's actions also do not indicate that there

was a "total lack of communication" between counsel and Floyd. At most, counsel's actions reflect that they were not comfortable representing Floyd because they did not trust him. Despite that lack of trust, however, the record reflects that defense counsel vigorously defended Floyd throughout the trial. See, e.g., Nix v. State, 747 So.2d 351, 354 (Ala. Crim. App. 1999) ("Where, as here, the record indicates that counsel was well prepared and represented the appellant ably and skillfully, the trial court's refusal to allow a substitution of the appellant's counsel is not an abuse of discretion.").

Moreover, defense counsel filed their motion to withdraw on the 3d day of the guilt phase of the trial—the 11th day of the trial overall—almost three years after the crime had been committed. There is no doubt that the witnesses who had appeared for trial would have been inconvenienced if counsel's motion had been granted and a mistrial declared. Additionally, as the trial court noted at the ex parte hearing, there was no evidence indicating that Floyd had, in fact, tampered with a witness, only that Floyd had told his counsel that he had. The trial court's concern that Floyd was simply trying to manipulate the court into declaring a mistrial was well founded, given Floyd's repeated misconduct while awaiting trial and during the trial. See Part II of this opinion. Finally, whether Floyd actually tampered with a witness or simply told his counsel that he had in order to provoke a mistrial, it is probable that new counsel would be confronted with the same alleged "conflict."

Under the circumstances in this case, we find no abuse of discretion on the part of the trial court in denying defense counsel's motion to withdraw.

X.

Floyd contends that the trial court erred in refusing to allow him to cross-examine Tramescka Peavy regarding whether her relationship with Jones's daughter, Ky'Toria, was romantic. (Issue XIII in Floyd's brief.) Specifically, Floyd argues that a romantic relationship between Peavy and Ky'Toria would have established that Peavy was biased against him and had a motive to testify against him.

> "It is well settled that '[a] party is entitled to a thorough and sifting cross-examination of the witnesses against him,' McMillian v. State, 594 So.2d 1253, 1261 (Ala. Crim. App. 1991), remanded on other grounds, 594 So.2d 1288 (Ala. 1992), opinion after remand, 616 So.2d 933 (Ala. Crim. App. 1993), citing Perry v. Brakefield, 534 So.2d 602 (Ala. 1988), and § 12–21–137, Ala. Code 1975, and that a party should be given 'wide latitude on cross-examination to test a witness's partiality, bias, intent, credibility, or prejudice, or to impeach, illustrate, or test the accuracy of the witness's testimony or recollection as well as the extent of his knowledge.' Williams v. State, 710 So.2d 1276, 1327 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998). It is equally well established, however, 'that the latitude and extent of cross-examination are matters which of necessity rest largely within the sound discretion of the trial court, and rulings with respect thereto will not be revised on appeal except in extreme cases of abuse.' Long v. State, 621 So.2d 383, 388 (Ala. Crim. App. 1993), cert. denied, 510 U.S. 932, 114 S.Ct. 345, 126 L.Ed.2d 310 (1993), quoting Beavers v. State, 565 So.2d 688, 689 (Ala. Crim. App. 1990). 'The trial judge may reasonably limit the range of cross-examination on matters that are repetitious, argumentative, collateral, irrelevant, harassing, annoying, or humiliating.' Newsome v. State, 570 So.2d 703, 714 (Ala. Crim. App. 1989). 'On appeal, the party claiming an abuse of such discretion bears the burden of persuasion.' Ross v. State, 555 So.2d 1179, 1180 (Ala. Crim. App. 1989), quoting Hembree v. City of Birmingham, 381 So.2d 664, 666 (Ala. Crim. App. 1980)."

***26** Reeves v. State, 807 So.2d 18, 38 (Ala. Crim. App. 2000).

Rule 616, Ala. R. Evid., provides that "[a] party may attack the credibility of a witness by presenting evidence that the witness has a bias or prejudice for or against a party to the case or that the witness has an interest in the case." "This rule retains the preexisting Alabama practice allowing one to impeach a witness with evidence of acts, statements, or relationships indicating bias." Rule 616, Ala. R. Evid., Advisory Committee's Notes (emphasis added). "It is always permissible to cross-examine a witness to ascertain his or her interest, bias, prejudice, or partiality concerning matters about which he or she is testifying, and generally anything that tends to show the witness's bias, unfriendliness, enmity, or inclination to swear against a party, is admissible." Williams v. State, 710 So.2d 1276, 1298 (Ala. Crim. App. 1996), aff'd,

710 So.2d 1350 (Ala. 1997). "[W]itnesses are subject to impeachment on the basis of bias, and any relationship which tends to show bias in favor of one side or the other is the proper subject of cross-examination." Jones v. Pizza Boy, Oxford, Inc., 387 So.2d 819, 820 (Ala. 1980). See also Davis v. State, 23 Ala.App. 419, 420, 126 So. 414, 415 (1930) ("[B]ias, interest, prejudice may be shown on cross-examination of a witness by the propounding of questions touching relationship to the parties, or their families.").

Assuming, without deciding, that the trial court erred in prohibiting Floyd from cross-examining Peavy regarding her relationship with the victim's daughter in order to show bias, it is well settled that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to [the] Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824 (1967),] harmless-error analysis." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). See also Peoples v. State, 951 So.2d 755, 762 (Ala. Crim. App. 2006) ("[The denial of a defendant's opportunity to impeach a witness for bias is subject to a harmless-error analysis."). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Ex parte Baker, 906 So.2d 277, 287 (Ala. 2004) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). In making this determination, this Court must look at "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684, 106 S.Ct. 1431.

After thoroughly reviewing the record, we conclude that any error in the trial court's limitation on Floyd's cross-examination of Peavy was harmless beyond a reasonable doubt. Although Peavy's testimony was certainly beneficial to the State's case, it was not critical, and it was cumulative to, and corroborated by, Ky'Toria's testimony. Moreover, the trial court placed no other limits on Floyd's cross-examination of Peavy, and Floyd was permitted to cross-examine Ky'Toria regarding how she had saved Peavy's contact information in her cellular telephone. Specifically, Floyd elicited testimony from Ky'Toria that she did not use Peavy's name, but used the term "my one and only." This testimony raised the same inference that Floyd was attempting to make in his cross-examination of Peavy—that Peavy and Ky'Toria were involved in a romantic relationship. Finally, the State's case against Floyd was overwhelming. Not only did Floyd confess to killing Jones, the State presented evidence that Floyd's blood was found at the scene, that Floyd and Jones had a history of domestic violence, that Floyd had broken into Jones's house the night before the murder, that Floyd had threatened Jones the day of the murder, and that Ky'Toria had seen Floyd in the house only moments before Jones's body was discovered. Based on the whole of the record, we are convinced beyond a reasonable doubt that any error in the trial court's limitation on Floyd's cross-examination of Peavy did not contribute to the jury's verdict.

***27** Therefore, Floyd is entitled to no relief on this claim.

XI.

Floyd contends that the trial court erred in denying his motion to suppress the two statements he made to the police shortly after the murder. (Issue XII in Floyd's brief.) Before trial, Floyd filed a motion to suppress his statements, arguing that his first statement was involuntary because, he said, he was too intoxicated to understand and to voluntarily waive his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that his second statement was involuntary because, he said, he had not been readvised of his Miranda rights before he gave that statement. After a hearing, the trial court denied the motion.

At the suppression hearing and at trial, Inv. Brooks testified that in the early morning hours of January 2, 2011, after Floyd had turned himself in to police, he and Chief Dean interviewed Floyd. The interview began at 2:20 a.m. and ended at 2:40 a.m. Inv. Brooks testified that he advised Floyd of his rights under Miranda, that Floyd indicated that he understood his rights, and that Floyd signed a waiver-of-rights form. According to Inv. Brooks, Floyd did not appear to be under the influence of alcohol or drugs—his speech was not slurred, he was coherent, and he answered questions appropriately. When asked during the interview if he was under the influence, Floyd stated: "No, I shouldn't be." (R. 3282.) Inv. Brooks also said that neither he nor Chief Dean threatened Floyd or coerced

Floyd to make a statement, nor did they offer Floyd any reward for making a statement, indicate to Floyd that he would be better off if he made a statement, or promise any leniency if he made a statement.

Glenn Carlee testified that after Inv. Brooks and Chief Dean briefed him on Floyd's confession, he had additional questions, so he went to Floyd's cell and spoke with him at approximately 3:45 a.m. Floyd was asleep when Carlee arrived and Carlee woke Floyd up and told Floyd that he wanted to know how Floyd had gotten to and from Jones's house that morning. Carlee said that he did not readvise Floyd of his Miranda rights nor did he obtain another waiver from Floyd, and that Floyd did not request a lawyer. Carlee said that Floyd did not appear to be under the influence of alcohol or drugs and that he did not threaten or coerce Floyd into making another statement, did not offer Floyd any reward for making a statement, and did not make any promises of leniency.

Floyd presented testimony at the suppression hearing from several witnesses. Ernest Dean Rolin, Jr., testified at the suppression hearing that around dusk on January 1, 2011, he saw Floyd; that Floyd appeared to be intoxicated; that he gave Floyd crystal methamphetamine, and that Floyd ingested the methamphetamine. At trial, however, Rolin testified that Floyd did not appear to be intoxicated when he saw Floyd on January 1, 2011, and that he did not see Floyd ingest the methamphetamine. Rolin admitted on cross-examination at the suppression hearing that he was not sure if the day he gave Floyd the methamphetamine was, in fact, January 1, 2011, because Rolin was a drug addict and often under the influence of methamphetamine.

***28** Stephanie Kendrick, Rolin's girlfriend, testified that she saw Floyd at her residence "around the time" of January 1, 2011. (R. 785.) Kendrick said that she did not know whether Floyd was intoxicated when she saw him, although he appeared to have "something on his mind." (R. 786.) Kendrick admitted that she had told law enforcement that Floyd may have been under the influence of alcohol or drugs, but she asserted that she said that only because Floyd appeared to be "deep into thought." (R. 787.)

Wayne Saunders, Floyd's employer, testified that he saw Floyd around 8:00 or 9:00 p.m. on January 1, 2011, and that Floyd appeared intoxicated. According to Saunders, Floyd had come to his home and asked him for money. Saunders said that Floyd was wearing his work clothes from that day and that he was upset that Floyd had asked for money because he had paid Floyd that day. Nonetheless, Saunders said, he gave Floyd a few dollars. On cross-examination, Saunders admitted that Floyd did not work on January 1, 2011. Saunders initially said that he must have misstated that Floyd had worked that day and was in his work clothes, but when asked if he had seen Floyd on New Year's Day, Saunders answered in the negative.

Rick Roberts, a community-corrections officer with Escambia County Community Corrections, testified that he supervised Floyd in the community-corrections program. Roberts stated that on October 11, 2010, October 19, 2010, November 5, 2010, November 8, 2010, November 17, 2010, November 19, 2010, November 30, 2010, December 6, 2010, and December 22, 2010, Floyd tested positive for cocaine. On October 29, 2010, November 10, 2010, November 12, 2010, and November 15, 2010, Floyd tested positive for alcohol and cocaine. On November 22, 2010, Floyd tested positive for alcohol. On cross-examination, Roberts said that Floyd tested negative for alcohol and controlled substances on September 22, 2010, September 25, 2010, September 27, 2010, October, 4, 2010, and December 3, 2010. Roberts said that he did not test Floyd between December 22, 2010, and January 2, 2011.

"The trial court's finding on a motion to suppress a confession is given great deference, and will not be overturned on appeal unless that finding is palpably contrary to the weight of the evidence." Baird v. State, 849 So.2d 223, 233 (Ala. Crim. App. 2002). See also McLeod v. State, 718 So.2d 727, 729 (Ala. 1998) ("The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong."). " ' "In reviewing the correctness of the trial court's ruling on a motion to suppress, this Court makes all the reasonable inferences and credibility choices supportive of the decision of the trial court." ' " Minor v. State, 914 So.2d 372, 388 (Ala. Crim. App. 2004) (quoting Kennedy v. State, 640 So.2d 22, 26 (Ala. Crim. App. 1993), quoting in turn, Bradley v. State, 494 So.2d 750, 760–61 (Ala. Crim. App. 1985), aff'd, 494 So.2d 772 (Ala. 1986)).

> " 'It has long been the law that a confession is prima facie involuntary and inadmissible, and that before a confession may be admitted into evidence, the burden is

upon the State to establish voluntariness and a Miranda predicate.' Waldrop v. State, 859 So.2d 1138, 1155 (Ala. Crim. App. 2000), aff'd, 859 So.2d 1181 (Ala. 2002). To establish a proper Miranda predicate, the State must prove that 'the accused was informed of his Miranda rights before he made the statement' and that 'the accused voluntarily and knowingly waived his Miranda rights before making his statement.' Jones v. State, 987 So.2d 1156, 1164 (Ala. Crim. App. 2006). 'Whether a waiver of Miranda rights is voluntarily, knowingly, and intelligently made depends on the facts of each case, considering the totality of the circumstances surrounding the interrogation, including the characteristics of the accused, the conditions of the interrogation, and the conduct of the law-enforcement officials in conducting the interrogation.' Foldi v. State, 861 So.2d 414, 421 (Ala. Crim. App. 2002). 'To prove [the] voluntariness [of the confession], the State must establish that the defendant "made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him." ' Eggers v. State, 914 So.2d 883, 898–99 (Ala. Crim. App. 2004) (quoting Lewis v. State, 535 So.2d 228, 235 (Ala. Crim. App. 1988)). As with the Miranda predicate, 'when determining whether a confession is voluntary, a court must consider the totality of the circumstances surrounding the confession.' Maxwell v. State, 828 So.2d 347, 354 (Ala. Crim. App. 2000). The State must prove the Miranda predicate and voluntariness of the confession only by a preponderance of the evidence. See, e.g., McLeod v. State, 718 So.2d 727 (Ala. 1998) (State must prove voluntariness of confession by a preponderance of the evidence), and Smith v. State, 795 So.2d 788, 808 (Ala. Crim. App. 2000) (State must prove Miranda predicate by a preponderance of the evidence)."

***29** Wilkerson v. State, 70 So.3d 442, 460 (Ala. Crim. App. 2011).

A.

Floyd first argues, as he did in his motion to suppress, that his first statement to Chief Dean and Inv. Brooks was involuntary because, he says, he was too intoxicated to understand and to voluntarily waive his Miranda rights. Relying on testimony he presented during the sentencing hearing before the trial court, Floyd also argues for the first time on appeal that his IQ dropped from 109 when he was a young boy to 82 when he was an adult, thus indicating that he suffered from prefrontal lobe damage that, combined with his intoxication, made it impossible for him to understand and to voluntarily waive his Miranda rights.

" '[U]nless intoxication, in and of itself, so impairs a defendant's mind that he is "unconscious of the meaning of his words," the fact that the defendant was intoxicated at the time he confessed is simply one factor to be considered when reviewing the totality of the circumstances surrounding the confession.' Carr v. State, 545 So.2d 820, 824 (Ala. Cr. App. 1989). 'The intoxicated condition of an accused when he makes a confession, unless it goes to the extent of mania, does not affect the admissibility in evidence of the confession, but may affect its weight and credibility.' Callahan v. State, 557 So.2d 1292, 1300 (Ala. Cr. App.), affirmed, 557 So.2d 1311 (Ala. 1989)."

White v. State, 587 So.2d 1218, 1227–28 (Ala. Crim. App. 1990), aff'd, 587 So.2d 1236 (Ala. 1991). See also Merrill v. State, 741 So.2d 1099, 1108 (Ala. Crim. App. 1997) ("[U]nless the accused is intoxicated to the extent of mania, intoxication affects the weight and credibility of a statement rather than its admissibility.") Hubbard v. State, 500 So.2d 1204, 1218 (Ala. Crim. App.), aff'd, 500 So.2d 1231 (Ala. 1986) (" 'Intoxication, short of mania or such impairment of the will and mind as to make an individual unconscious of the meaning of his words, will not render a statement or confession inadmissible.' " (quoting Tice v. State, 386 So.2d 1180, 1185 (Ala. Crim. App. 1980))).

Moreover:

" 'The fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary.' Baker v. State, 557 So.2d 851, 853 (Ala. Crim. App. 1990). ' "A defendant's mental impairment, even if it exists, is merely one factor affecting the validity of his waiver of rights and the voluntariness of his confession." ' Dobyne v. State, 672 So.2d 1319, 1337 (Ala. Crim. App. 1994), aff'd, 672 So. 2d 1354 (Ala. 1995) (quoting Whittle v. State, 518 So.2d 793, 796–97 (Ala. Crim. App. 1987)). As this Court explained in addressing a

similar issue in Byrd v. State, 78 So.3d 445 (Ala. Crim. App. 2009):

> " 'A defendant's low IQ is only one factor that must be considered when reviewing the totality of the circumstances. See Dobyne v. State, 672 So.2d 1319, 1337 (Ala. Crim. App. 1994); Beckworth v. State, 946 So.2d 490, 517 (Ala. Crim. App. 2005). "While an accused's intelligence and literacy are important factors, ... weak intellect or illiteracy alone will not render a confession inadmissible." Hobbs v. State, 401 So.2d 276, 282 (Ala. Crim. App. 1981); see also Hodges v. State, 926 So.2d 1060, 1073 (Ala. Crim. App. 2005) (same); cf. Colorado v. Connelly, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (holding that mental defects alone are insufficient to establish that a confession was involuntary under the Due Process Clause). As this court stated in Beckworth: "[A] defendant's low IQ does not preclude a finding that a Miranda waiver was voluntary unless the defendant is so mentally impaired that he did not understand his Miranda rights.' 946 So.2d at 517 (citing Dobyne, 672 So.2d at 1337); see Moore v. Dugger, 856 F.2d 129, 132 (11th Cir. 1988) (mental deficiencies, in the absence of police coercion, are not sufficient to establish involuntariness, and the fact that the defendant was generally calm and responsive during interrogation, that he did not appear confused, and that he understood the questions put to him established a valid waiver of Miranda rights, despite the defendant's low IQ).'
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> ***30** "78 So.3d at 453–54."

McCray v. State, 88 So.3d 1, 58–59 (Ala. Crim. App. 2010)

Nothing in the record indicates that Floyd was so intoxicated and/or suffered from a mental impairment so great that he was unable to understand and to voluntarily waive his Miranda rights. Inv. Brooks testified that he advised Floyd of his Miranda rights, that Floyd indicated that he understood those rights, and that Floyd voluntarily waived those rights and signed a waiver-of-rights form. Inv. Brooks testified that Floyd did not appear to be under the influence of alcohol or drugs—that Floyd's speech was not slurred, that Floyd was coherent, and that Floyd answered questions appropriately—and, when asked if he was under the influence, Floyd said "No, I shouldn't be." Rolin and Kendrick both indicated at the suppression hearing that they had seen Floyd around dusk on January 1, 2011, several hours before Floyd gave his statement to police, and Rolin testified that Floyd appeared intoxicated at that time. However, Kendrick said that she did not know whether Floyd was intoxicated, and Rolin later testified at trial that Floyd did not appear intoxicated. Although Rolin testified at the suppression hearing that he saw Floyd ingest methamphetamine, at trial Rolin testified that he did not see Floyd ingest any drugs.

Although the evidence indicated that Floyd ingested drugs and alcohol throughout the month before the murder and even the day before the murder, there is simply no evidence in the record indicating that Floyd was intoxicated, much less intoxicated to the point of mania, at 2:20 a.m. on January 2, 2011, when he gave his first statement to police, so as to render the waiver of his Miranda rights involuntary. See, e.g., Woolf v. State, [Ms. CR–10–1082, May 2, 2014] —— So.3d —— (Ala. Crim. App. 2014) (holding that the trial court did not abuse its discretion in determining that the defendant was not intoxicated at the time he waived his Miranda rights where the evidence did not indicate when the defendant had ingested alcohol and drugs or what effect those substances had on the defendant when he made his statement).

Additionally, although Floyd presented testimony during the sentencing hearing that his IQ dropped by over 20 points from childhood to adulthood and that such a significant drop in IQ is an indicator of prefrontal lobe damage, testimony also indicated that Floyd had not undergone any testing to determine if he did, in fact, suffer from prefrontal lobe damage. Even assuming that Floyd did suffer from prefrontal lobe damage, the evidence does not indicate that the damage caused Floyd to be so mentally impaired at the time he gave his statement to police that he was unable to understand and to voluntarily waive his Miranda rights.

Moreover, we have listened to the audio recording of Floyd's first statement, and there is no indication that Floyd was intoxicated or was so mentally impaired that he was unable to understand, or voluntarily waive, his Miranda rights. See, e.g., Cardwell v. State, 544 So.2d 987, 993 (Ala. Crim. App. 1988) (holding that "the presence of diminished mental capacity, [even when] coupled with use of alcohol or drugs, will not warrant a finding that the confessions were involuntary"). Therefore, the trial

court properly denied Floyd's motion to suppress his first statement to police.

B.

***31** Floyd also argues, as he did in his motion to suppress, that Carlee's failure to readvise him of his Miranda rights before his second statement rendered that statement involuntary. We disagree.

In Ex parte Landrum, 57 So.3d 77 (Ala. 2010), the Alabama Supreme Court addressed when Miranda warnings become stale:

> "In Wyrick v. Fields, 459 U.S. 42, 48–49, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982), the United States Supreme Court rejected a per se rule requiring police to readvise a suspect of his Miranda rights before questioning him about results of a polygraph examination, when he had requested the polygraph examination and had waived those rights in writing before taking the examination, in favor of a more flexible approach focusing on the totality of the circumstances. '[T]he circumstances [had not] changed so seriously that his answers no longer were voluntary, or ... he no longer was making a "knowing and intelligent relinquishment" of his rights.' Wyrick, 459 U.S. at 47 (quoting Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). '[T]he questions put to [the defendant] after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before.' Wyrick, 459 U.S. at 49.
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> "The issue in this case is whether the Miranda warnings given to Landrum became stale or were too remote based on the facts of this case.
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> > " 'It is well settled that once Miranda warnings have been given and a waiver made, a failure to repeat the warnings before a subsequent interrogation will not automatically preclude the admission of the inculpatory response. Fagan v. State, 412 So.2d 1282 (Ala. Crim. App. 1982); Smoot v. State, 383 So.2d 605 (Ala. Crim. App. 1980).'
>
> "Hollander v. State, 418 So.2d 970, 972 (Ala. Crim. App. 1982). 'Whether Miranda warnings should be given before each interrogation must depend upon the circumstances of each case. The length of time and the events which occur between interrogations are relevant matters to consider.' Jones v. State, 47 Ala.App. 568, 570, 258 So.2d 910, 912 (1972).
>
> > " ' "Once the mandate of Miranda has been complied with at the threshold of the questioning it is not necessary to repeat the warnings at the beginning of each successive interview." Gibson v. State, 347 So.2d 576, 582 (Ala. Cr. App. 1977). See also Cleckler v. State, 570 So.2d 796 (Ala. Cr. App. 1990).
> >
> > " ' "An accused may be read the Miranda rights prior to one interrogation but not confess until a later interrogation during which there was no rereading of the Miranda warning. As a general rule, it has been held that Miranda warnings are not required to be given before each separate interrogation of a defendant after an original waiver of the accused's rights has been made. However, if such a long period of time has elapsed between the original Miranda warning and the subsequent confession that it can be said that, under the circumstances, the accused was not impressed with the original reading of his rights in making the ultimate confession, then the confession should be held inadmissible."
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> > " 'C. Gamble, McElroy's Alabama Evidence, 201.09 (5th ed. 1997) (footnotes omitted). See Phillips v. State, 668 So.2d 881, 883 (Ala. Cr. App. 1995).'
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> ***32** "Powell v. State, 796 So.2d 404, 414 (Ala. Crim. App. 1999)."

57 So.3d at 81–82.

The record reflects that Floyd was advised of his Miranda rights before he gave his first statement at 2:20 a.m. After the first statement concluded at 2:40 a.m., Floyd was placed in a holding cell at the Atmore Police Department. At approximately 3:45 a.m., Floyd gave his second statement. Less than an hour and a half passed from the time Floyd was advised of his Miranda rights and the time he gave his second statement to police; the only event that occurred during that time was Floyd's being placed in a holding cell. Under the circumstances in this case, there was no need to readvise Floyd of his Miranda rights before he gave his second statement. See, e.g., Hollander v. State, 418 So.2d 970, 972 (Ala. Crim. App. 1982) (holding that between one and one-and-three-quarters-hour time lapse did not render Miranda warnings stale); and Fagan v. State, 412 So.2d 1282, 1283 (holding that three-and-

a-half-hour time lapse did not render Miranda warnings stale). Therefore, the trial court properly denied Floyd's motion to suppress his second statement to police.

XII.

Floyd contends that the trial court erred in permitting the State to present evidence of collateral acts under Rule 404(b), Ala. R. Evid. He argues that the collateral-acts evidence painted him as "a violent criminal who, on the day of the offense, 'act[ed] in conformity therewith.' " (Floyd's brief, p. 54) (quoting Rule 404(a), Ala. R. Evid.). Specifically, Floyd challenges the admission of the following evidence: (1) that there had been altercations between Floyd and Jones during their relationship, and (2) that he had previously turned himself in on outstanding warrants. Floyd also argues that the trial court erred in not giving the jury a curative instruction after sustaining his objection to the testimony of Jones's uncle, James Jones, that James had met Floyd while James was incarcerated. Floyd filed a pretrial motion in limine to preclude the State from presenting evidence of any collateral acts, but the trial court did not rule on the motion.

> " 'The admission or exclusion of evidence is a matter within the sound discretion of the trial court.' Taylor v. State, 808 So.2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So.2d 1215 (Ala. 2001). 'The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion.' Ex parte Loggins, 771 So.2d 1093, 1103 (Ala. 2000). This is equally true with regard to the admission of collateral-bad-acts evidence. See Davis v. State, 740 So.2d 1115, 1130 (Ala. Crim. App. 1998). See also Irvin v. State, 940 So.2d 331, 344–46 (Ala. Crim. App. 2005)."

Windsor v. State, 110 So.3d 876, 880 (Ala. Crim. App. 2012).

In Horton v. State, 217 So.3d 27 (Ala. Crim. App. 2016), this Court explained the exclusionary rule as follows:

> "Generally, '[e]vidence of any offense other than that specifically charged is prima facie inadmissible.' Bush v. State, 695 So.2d 70, 85 (Ala. Crim. App. 1995), aff'd, 695 So.2d 138 (Ala. 1997). '[T]he exclusionary rule prevents the State from using evidence of a defendant's prior [or subsequent] bad acts to prove the defendant's bad character and, thereby, protects the defendant's right to a fair trial.' Ex parte Drinkard, 777 So.2d 295, 302 (Ala. 2000). '[T]he purpose of the rule is to protect the defendant's right to a fair trial by preventing convictions based on the jury's belief that the defendant is a "bad" person or one prone to commit criminal acts.' Ex parte Arthur, 472 So.2d 665, 668 (Ala. 1985). ' "The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors." ' Ex parte Cofer, 440 So.2d 1121, 1123 (Ala. 1983) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01(1) (3d ed. 1977)).
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> ***33** "However, '[t]he State is not prohibited from ever presenting evidence of a defendant's prior [or subsequent] bad acts.' Moore v. State, 49 So.3d 228, 232 (Ala. Crim. App. 2009). '[E]vidence of collateral crimes or bad acts is admissible as part of the prosecutor's case if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty of the charged offense because of his past misdeeds.' Bush, 695 So.2d at 85.
>
> > " ' "In all instances, the question is whether the proposed evidence is primarily to prove the commission of another disconnected crime, or whether it is material to some issue in the case. If it is material and logically relevant to an issue in the case, whether to prove an element of the crime, or to controvert a material contention of defendant, it is not inadmissible because in making the proof the commission of an independent disconnected crime is an inseparable feature of it." '
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> "Bradley v. State, 577 So.2d 541, 547 (Ala. Crim. App. 1990) (quoting Snead v. State, 243 Ala. 23, 24, 8 So.2d 269, 270 (1942)). Rule 404(b), Ala. R. Evid., provides:
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> > " 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial

> if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.'

" ' "Rule 404(b) is a principle of limited admissibility. This means that the offered evidence is inadmissible for one broad, impermissible purpose, but is admissible for one or more other limited purposes." ' Taylor v. State, 808 So.2d 1148, 1165 (Ala. Crim. App. 2000), aff'd, 808 So.2d 1215 (Ala. 2001) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01 (5th ed. 1996)). Moreover:

> " 'Rule 404(b) is a test of relevancy. Rule 401, Ala. R. Evid., defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As this Court noted in Hayes v. State, 717 So.2d 30 (Ala. Crim. App. 1997): "Alabama recognizes a liberal test of relevancy, which states that evidence is admissible 'if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence.' " 717 So.2d at 36, quoting C. Gamble, [McElroy's] Alabama Evidence § 401(b). "[A] fact is admissible against a relevancy challenge if it has any probative value, however[ ] slight, upon a matter in the case." Knotts v. State, 686 So.2d 431, 468 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala. 1996).'

"Draper v. State, 886 So.2d 105, 119 (Ala. Crim. App. 2002). Because the question of the admissibility of collateral-act evidence is whether the evidence is relevant for a limited purpose other than bad character, 'the list of traditionally recognized exceptions [to the exclusionary rule] is not exhaustive and fixed.' Bradley, 577 So.2d at 547. However,

> " '[t]he State has no absolute right to use evidence of prior acts to prove the elements of an offense or to buttress inferences created by other evidence. Evidence of prior bad acts of a criminal defendant is presumptively prejudicial. It interjects a collateral issue into the case which may divert the minds of the jury from the main issue.'

***34** "Ex parte Cofer, 440 So.2d at 1124. Therefore, '[f]or collateral-act evidence to be admissible for one of the "other purposes" in Rule 404(b), there must be a " 'real and open issue as to one or more of those "other purposes." ' " ' Draper, 886 So.2d at 117 (quoting Gillespie v. State, 549 So.2d 640, 645 (Ala. Crim. App. 1989), quoting in turn, Bowden v. State, 538 So.2d 1226, 1227 (Ala. 1988)). When the question of the admissibility of collateral-acts evidence is 'extremely close, we conclude that any doubt about the admissibility of the testimony should, given the highly prejudicial nature of the evidence, be resolved in favor of the accused.' Brewer v. State, 440 So.2d 1155, 1158 (Ala. Crim. App. 1983).

"Furthermore, 'even though evidence of collateral crimes or acts may be relevant to an issue other than the defendant's character, it should be excluded if "it would serve comparatively little or no purpose except to arouse the passion, prejudice, or sympathy of the jury," ... or put another way, "unless its probative value is 'substantially outweighed by its undue prejudice.' " ' Bradley, 577 So.2d at 547–48 (citations omitted) 'Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive.' Bush, 695 So.2d at 85. See also Thompson v. State, 153 So.3d 84, 136 (Ala. Crim. App. 2012) ('The [Alabama Supreme] Court [has] cautioned that Rule 404(b) evidence must be "reasonably necessary to [the State's] case." [Ex parte Jackson,] 33 So.3d [1279,] 1286 [(Ala. 2009)].').

"As this Court explained in Woodard v. State, 846 So.2d 1102 (Ala. Crim. App. 2002):

> " 'Evidence of collateral crimes is "presumptively prejudicial because it could cause the jury to infer that, because the defendant has committed crimes in the past, it is more likely that he committed the particular crime with which he is charged—thus, it draws the jurors' minds away from the main issue." Ex parte Drinkard, 777 So.2d 295, 296 (Ala. 2000). In Robinson v. State, 528 So.2d 343 (Ala. Crim. App. 1986), this Court explained the exclusionary rule as follows:
>
> > " ' " ' "On the trial of a person for the alleged commission of a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative function of such evidence is to show his bad character, inclination or propensity to commit the type of crime for which

he is being tried. This is a general exclusionary rule which prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question." ' Pope v. State, 365 So.2d 369, 371 (Ala. Cr. App. 1978), quoting C. Gamble, McElroy's Alabama Evidence § 69.01 (3d ed. 1977). ' "This exclusionary rule is simply an application of the character rule which forbids the State to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors." ' Ex parte Arthur, 472 So.2d 665, 668 (Ala. 1985), quoting McElroy's supra, § 69.01(1). Thus, the exclusionary rule serves to protect the defendant's right to a fair trial. ' "The jury's determination of guilt or innocence should be based on evidence relevant to the crime charged." ' Ex parte Cofer, 440 So.2d 1121, 1123 (Ala. 1983); Terrell v. State, 397 So.2d 232, 234 (Ala. Cr. App. 1981), cert. denied, 397 So.2d 235 (Ala. 1981); United States v. Turquitt, 557 F.2d 464, 468 (5th Cir. 1977).

***35** " ' " ' 'If the defendant's commission of another crime or misdeed is an element of guilt, or tends to prove his guilt otherwise than by showing of bad character, then proof of such other act is admissible.' Saffold v. State, 494 So.2d 164 (Ala. Cr. App. 1986). The well-established exceptions to the exclusionary rule include: (1) relevancy to prove identity; (2) relevancy to prove res gestae; (3) relevancy to prove scienter; (4) relevancy to prove intent; (5) relevancy to show motive; (6) relevancy to prove system; (7) relevancy to prove malice; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes. Willis v. State, 449 So.2d 1258, 1260 (Ala. Cr. App. 1984); Scott v. State, 353 So.2d 36 (Ala. Cr. App. 1977). However, the fact that evidence of a prior bad act may fit into one of these exceptions will not alone justify its admission. ' "Judicial inquiry does not end with a determination that the evidence of another crime is relevant and probative of a necessary element of the charged offense. It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects." ' Averette v. State, 469 So.2d 1371, 1374 (Ala. Cr. App. 1985), quoting United States v. Turquitt, supra at 468–69,. ' " 'Prejudicial' is used in this phrase to limit the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial." [Citation omitted.] "Of course, 'prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contention; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.' " ' Averette v. State, supra, at 1374." '

" '528 So. 2d at 347.'

"846 So.2d at 1106–07."

Horton, 217 So.3d at 48.

A.

Floyd first contends that the trial court erred in allowing the State to present evidence of altercations between him and Jones during their relationship.

The State presented evidence that in November 2009, Jones and her cousin, Demond Dirden, drove to a friend's house to meet Floyd. Floyd telephoned Jones several times during the drive, but Jones did not answer because she had been stopped at a roadblock. After clearing the roadblock, Jones returned Floyd's calls and explained why they were running late. However, when Jones and Dirden arrived at the friend's house, Floyd was not there. Jones then telephoned Floyd and told him that she was going to drop off Dirden and return home. Dirden testified that when Jones stopped at a four-way stop, Floyd came up behind them in his automobile and "bumped" the rear of Jones's vehicle. (R. 3216.) Dirden testified that Floyd then passed Jones's vehicle, drove up the road a short distance, turned around, and drove back toward him and Jones as they were sitting in Jones's vehicle attempting to telephone police. Dirden said that Floyd then rammed

his vehicle into the side of Jones's vehicle with such force that it knocked one of the doors off Jones's vehicle and displaced the front grill of Floyd's vehicle. Floyd then sped away. [13]

The State also presented evidence that in the spring of 2010, police were summoned to Jones's house on a domestic-disturbance call after Floyd and Jones had gotten into an argument. Inv. Walden testified that he had responded to that call and that he spoke with both Floyd and Jones. Inv. Walden stated that Floyd appeared intoxicated and that he advised Floyd to leave the premises and "let things cool down." (R. 3186.) Inv. Walden stated that Jones told him that she was afraid of Floyd but that she was scared to have him arrested because she did not know what he would do when he was released. Inv. Walden advised Jones that there were steps that could be taken to obtain a protection order. Floyd was not arrested in relation to this incident. [14]

***36** Finally, the State presented evidence that in November 2010, police were again summoned to Jones's house on a domestic-disturbance call after Floyd and Jones had gotten into an argument. When Rickey Van Hughes, Jr., a patrol officer with the Atmore Police Department, arrived at the scene, he saw that Floyd had blood on his shirt and on his fingers and that Jones's lip was bleeding. Jones informed Officer Hughes that she and Floyd had been arguing and that Floyd had punched her in the mouth. Floyd was arrested for domestic violence, but Jones later dropped the charge against him.

Floyd argues that evidence of his prior altercations with Jones was more prejudicial than probative. In a footnote in his brief, Floyd also makes a single-sentence argument that the incidents were too remote to be relevant for the purposes for which the State offered the evidence—intent and motive. Other than remoteness, however, Floyd makes no argument that the incidents were not admissible as evidence of his intent and motive. The record reflects that Floyd did not object to the evidence of the incident that occurred in November 2009. Therefore, we review the admissibility of that incident under the plain-error rule. See Rule 45A, Ala. R. App. P.

As for Floyd's argument that the incidents were too remote to be relevant, it is well settled "that remoteness generally affects the weight and probative value of the evidence rather than its admissibility." McClendon v. State, 813 So.2d 936, 944 (Ala. Crim. App. 2001). "Neither the Alabama Rules of Evidence nor Alabama case law sets a specific time limit for when a collateral act is considered too remote, other than a conviction for impeachment purposes." Id. "[T]he determination of whether a prior bad act is too remote is made on a case-by-case basis and is left to the sound discretion of the trial judge, and the judge's determination will not be disturbed on appeal unless the judge has abused his discretion." Bedsole v. State, 974 So.2d 1034, 1040 (Ala. Crim. App. 2006). The incidents in this case occurred between November 2009 and November 2010, a span of a little more than a year before Jones's murder to approximately two months before Jones's murder. They were not too remote to be relevant to Floyd's intent and motive.

As for Floyd's argument that the incidents were more prejudicial than probative, we first point out that the evidence was admissible for the purposes proffered by the State—intent and motive. "Alabama has long held that in a murder trial prior acts of violence or cruelty to the victim are admissible to show intent and motive." Boyle v. State, 154 So.3d 171, 211 (Ala. Crim. App. 2013).

> " 'Domestic abuse often has a history highly relevant to the truth-finding process. When an accused has a close relationship with the victim, prior aggression, threats or abusive treatment of the same victim by the same perpetrator are admissible when offered on relevant issues under [state law]. Their rationale for admissibility is that an accused's past conduct in a familial context tends to explain later interactions between the same persons....' "

Baker v. State, 906 So.2d 210, 258 (Ala. Crim. App. 2001), rev'd on other grounds, 906 So.2d 277 (Ala. 2004) (quoting State v. Laible, 594 N.W.2d 328, 335 (S.D. 1999)).

> " ' "In a prosecution for murder, evidence of former acts of hostility between the accused and the victim are admissible as tending to show malice, intent, and ill will on the part of the accused." White v. State, 587 So.2d 1218, 1230 (Ala. Cr. App. 1990), affirmed, 587 So.2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992).' Childers v. State, 607 So.2d 350, 352 (Ala. Cr. App. 1992). 'Acts of hostility, cruelty and abuse by the accused toward his homicide victim may be proved by the State for the purpose of showing motive and intent.... This is "another of the primary exceptions to the general rule excluding

evidence of other crimes." ' Phelps v. State, 435 So.2d 158, 163 (Ala. Cr. App. 1983). See also Baker v. State, 441 So.2d 1061, 1062 (Ala. Cr. App. 1983)."

***37** Hunt v. State, 659 So.2d 933, 939–40 (Ala. Crim. App. 1994), aff'd, 659 So.2d 960 (Ala. 1995). As this Court explained in Burgess v. State, 962 So.2d 272 (Ala. Crim. App. 2005):

" 'Former acts of hostility or cruelty by the accused upon the victim are very commonly the basis for the prosecution's proof that the accused had a motive to commit the charged homicide.' 1 Charles W. Gamble, McElroy's Alabama Evidence § 45.01(8) (5th ed. 1996) (footnote omitted), and cases cited therein.

"Other states have also recognized this evidentiary principle. The New Jersey Superior Court in State v. Engel, 249 N.J.Super. 336, 374–75, 592 A.2d 572, 590 (App. Div. 1991), stated:

" 'We are convinced that evidence of [the defendant's] prior acts of violence and threats against [the victim] was highly relevant with respect to the issue of motive and that its probative value far outweighed its potential for undue prejudice. We note that evidence of arguments or violence between a defendant and a homicide victim has long been admitted. See, e.g., State v. Ramseur, 106 N.J. [123] at 267, 524 A.2d 188 [(1987)]; State v. Mulero, 51 N.J. 224, 228–229, 238 A.2d 682 (1968); State v. Lederman, 112 N.J.L. 366, 372, 170 A. 652 (E. & A. 1934); State v. Schuyler, 75 N.J.L. 487, 488, 68 A. 56 (E. & A. 1907); State v. Donohue, 2 N.J. 381, 388, 67 A.2d 152 (1949); State v. Slobodian, 120 N.J.Super. 68, 75, 293 A.2d 399 (App. Div. 1972), certif. den. 62 N.J. 77, 299 A.2d 75 (1972). The trial court's admission of this evidence was thus in accord with settled case law.'

"Addressing a similar issue, the Tennessee Court of Criminal Appeals stated:

" '[T]here is evidence that the defendant was persistent in abusing and harassing the victim from the time they were separated until the crime was committed .... The relations existing between the [murder] victim and the defendant prior to the commission of the crime are relevant. These relations indicate hostility toward the victim and a settled purpose to harm or injure her. See Ingram v. State, 1 Tenn.Cr.App. 383, 443 S.W.2d 528 (1969); Burnett v. State, 82 Tenn. (14 LEA) 439 (Tenn. 1884).'

"State v. Glebock, 616 S.W.2d 897, 905–06 (Tenn. Crim. App. 1981)."

962 So.2d at 282. See also Chapman v. State, 196 So.3d 322, 330–31 (Ala. Crim. App. 2015); and Hulsey v. State, 866 So.2d 1180, 1188–91 (Ala. Crim. App. 2003).

We recognize that, generally, evidence of collateral acts is not admissible to show intent when intent can be inferred from the criminal act itself, such as when intent to kill can be inferred from the use of a deadly weapon. See Horton, 217 So.3d at 52; Hinkle v. State, 67 So.3d 161, 164 (Ala. Crim. App. 2010); and Brewer v. State, 440 So.2d 1155, 1159 (Ala. Crim. App. 1983). But see Hudson v. State, 85 So.3d 468 (Ala. Crim. App. 2011). However, that general rule does not preclude the admission of collateral acts in all cases in which intent can be inferred from the act itself. When the issue of intent is specifically disputed, as it was in this case when Floyd asserted intoxication, evidence of collateral acts may be admissible as additional evidence of intent. See, e.g., Thompson v. State, 153 So.3d 84, 134–37 (Ala. Crim. App. 2012) (upholding admission of collateral-acts evidence to establish intent despite the use of a deadly weapon when the defendant specifically disputed his intent). Moreover, "testimony offered for the purpose of showing motive is always admissible. It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused which may have led or tempted him to commit the offense." Towles v. State, 168 So.3d 133, 143 (Ala. 2014) (citations omitted). Floyd's intent and motive were both open issues, and the prior altercations between Floyd and Jones were relevant and admissible to show both.

***38** That being said, after thoroughly reviewing the record, we also conclude that the probative value of the evidence outweighed any prejudicial effect. This Court has held that " '[o]ne of the specific criterion to be used, in deciding when prejudicial effect substantially outweighs probative value, is whether or not there exist less prejudicial means of proving the same thing. If such alternative, less prejudicial evidence exists, then such availability argues in favor of excluding the prejudicial evidence.' " R.D.H. v. State, 775 So.2d 248, 254 (Ala. Crim. App. 1997) (quoting Charles W. Gamble, McElroy's Alabama Evidence, § 20.01 (5th ed. 1996)).

> "In making ... a determination [as to whether the prejudicial effect of the collateral-act evidence outweighs its probative value], the court should consider at least the following factors. The first is how necessary the evidence is to the prosecution's case—i.e., whether there are less prejudicial ways of proving the asserted purpose. The availability of such alternate proof would mitigate in the direction of excluding the more prejudicial collateral crimes or acts. A second factor is the weight of relevancy or probative force of the evidence in terms of proving the purpose for which it is offered. Last, the court should consider the effectiveness of a limiting instruction in the sense of whether it would be effective, as a means of avoiding the prejudice of the jury's using the act as a basis from which to infer commission of the charged crime, in limiting the jury's use of the offered evidence to the stated purpose."

Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence § 69.02(1)(c) (6th ed. 2009) (footnotes omitted).

In this case, evidence of the prior altercations was reasonably necessary to the State's case to establish Floyd's intent and motive. As noted above, Floyd placed his intent at issue when he asserted intoxication and evidence of motive is always admissible. Additionally, the evidence of the prior altercations was clear and conclusive and highly relevant to establishing Floyd's intent and motive in killing Jones. Finally, the trial court in this case instructed the jury as to the limited purposes for which it could consider the evidence of the collateral acts. "Jurors are presumed to follow the trial court's instructions," Lewis v. State, 24 So.3d 480, 508 (Ala. Crim. App. 2006), aff'd, 24 So.3d 540 (Ala. 2009); therefore, any potential prejudice in the admission of this evidence "was minimized by the circuit court's limiting instructions to the jury regarding its proper consideration of that evidence." Trimble v. State, 157 So.3d 1001, 1005 (Ala. Crim. App. 2014).

Therefore, we find no error, much less plain error, in the admission of evidence of Floyd's prior altercations with Jones.

B.

Second, Floyd argues that the trial court erred in allowing Isaac Lopez, a patrol officer with the Atmore Police Department who picked Floyd up in Freemanville after the murder, to testify that he knew Floyd because Floyd had "turned himself in to serve some warrants through the City of Atmore, and I'm the one that bonded him out. I don't know what the charges were. I know that he bonded out." (R. 2863.) Floyd did not object to this testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The fact that Floyd had warrants for unspecified charges and had turned himself in on those warrants at some unspecified time before the murder was clearly not admissible under any of the exceptions in Rule 404(b), Ala. R. Crim. P. Nonetheless, we conclude that the admission of this testimony did not rise to the level of plain error, but was, at most, harmless error. " 'Whether the improper admission of evidence of collateral bad acts amounts to prejudicial error or harmless error must be decided on the facts of the particular case.' " Hunter v. State, 802 So.2d 265, 270 (Ala. Crim. App. 2000) (quoting R.D.H. v. State, 775 So.2d 248, 254 (Ala. Crim. App. 1997)). "[T]he harmless error rule excuses the error of admitting inadmissible evidence only [when] the evidence was so innocuous or cumulative that it could not have contributed substantially to the adverse verdict." Ex parte Baker, 906 So.2d 277, 284 (Ala. 2004).

***39** In this case, Officer Lopez's testimony about Floyd's warrants was so innocuous that it could not have contributed substantially to the jury's verdict. The State called 30 witnesses during Floyd's trial, and Officer Lopez was the State's 13th witness. He made only a single statement about Floyd's warrants, and the warrants were never mentioned again during the three-and-a-half-week trial. This Court has held that similar fleeting references to a defendant's collateral crimes are not so egregious to rise to the level of plain error. See, e.g., Brown v. State, 11 So.3d 866, 905 (Ala. Crim. App. 2007), aff'd, 11 So.3d 933 (Ala. 2008) (holding that admission of testimony that defendant was in custody of city police department when he was found was not so egregious to rise to the level of plain error); Barnes v. State, 727 So.2d 839, 842–43 (Ala. Crim. App. 1997) (holding that admission of testimony that the defendant had an outstanding warrant for burglary, although improper, did not rise to the level of plain error); Dill v. State, 600 So.2d 343, 351–52 (Ala. Crim. App. 1991), aff'd, 600 So.2d 372 (Ala. 1992)

(admission of testimony that the defendant had a parole officer was not so egregious to rise to the level of plain error).

Moreover, the evidence in this case was overwhelming. Not only did Floyd confess to the murder, Floyd's blood was found at the scene, two witnesses saw Floyd at the scene just moments before Jones's body was found, and evidence was presented indicating that Floyd and Jones had a history of domestic violence and that Floyd had threatened Jones the day before the murder. See, e.g., Ex parte Crymes, 630 So.2d 125, 126 (Ala. 1993) ("[W]hen, after considering the record as a whole, the reviewing court is convinced that the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper [admission of evidence], the admission of such testimony is harmless error."). After thoroughly reviewing the record, we have no trouble concluding that the jury's verdict was based on the overwhelming evidence of Floyd's guilt and not on Officer Lopez's testimony that Floyd had previously turned himself in on outstanding warrants. The admission of Officer Lopez's testimony, although error, did not affect the outcome of Floyd's trial and did not prejudice Floyd's substantial rights and, therefore, was harmless beyond a reasonable doubt.

C.

Finally, Floyd contends that the trial court erred in not giving the jury a curative instruction after Jones's cousin, James Jones, testified that he had been incarcerated when he met Floyd. The record reflects that James testified that he had two prior felony convictions and that he had served one year in prison. After testifying that he knew Floyd, the following occurred:

"[Prosecutor]: How long had you known the defendant prior to Tina being killed?

"[James]: I haven't had the opportunity to know Mr. Floyd that long. When I first met Mr. Floyd I was incarcerated.

"[Floyd's counsel]: Judge.

"THE COURT: Objection?

"[Floyd's counsel]: Yes, sir. May we approach?

"THE COURT: You may approach.

"(bench conference)

"[Floyd's counsel]: They're now attempting to elicit testimony about how they met, which would be putting a prior conviction or charges or criminal offenses alleged to have been committed by Mr. Floyd into the record.

"THE COURT: Response from the State?

"[Prosecutor]: Judge, I asked this witness not to mention anything about where he met the defendant.

"THE COURT: And so far he really hasn't exactly, but he's on the verge of it. And I think the defense has a valid point because I don't see any relevance about the fact that he may have met him in prison. And I think that's where it's going. I see nothing but prejudice against the defendant. So I'm going to sustain the objection of the defense and I'm going to direct you—

"[Prosecutor]: We'll move on, Judge.

"THE COURT: I'm going to direct you not to—now, you've got to be careful in asking your questions. I'm just telling you, I don't want you to elicit from this witness crossing into that area of the defendant being in prison and they met in prison or anything like that because that's not relevant. I sustain the objection.

***40** "[Floyd's counsel]: Thank you for—at this time we'd move for a mistrial as that evidence would be improper and elicited to—for no other purpose than to inflame the jury and we move for a mistrial.

"THE COURT: Well, [defense counsel,] I don't think that's in front of the jury at this point in time. I deny your motion at this time.

"[Floyd's counsel]: And I respectfully except.

"THE COURT: But I do direct the State to just tread lightly on this area. I don't—there is no relevance as to where they met. He may have been visiting or doing a church ministry when he was—I don't know what was going on.

"[Floyd's counsel]: Yes, sir.

"THE COURT: But I don't want to go any further than that. Okay?

"(end of bench conference)"

(R. 2638–40.) [15]

We see no basis for the trial court to have given a curative instruction in this instance. As the trial court noted, James had testified only that he had been incarcerated when he first met Floyd, not that Floyd had been incarcerated with him. For all we know, James could have met Floyd simply because Floyd accompanied Jones to visit James in prison. In this case, the trial court's sustaining Floyd's objection and prohibiting the State from further questioning James about where or how he met Floyd was sufficient to eradicate any potential prejudice from James's testimony.

Moreover, even assuming that the trial court erred in not giving a curative instruction, that error was harmless. The statement was isolated, was nonresponsive to the question asked by the prosecutor, and was clearly elicited incidentally. Additionally, the prosecutor did not exploit the statement—no further mention was made during the three-and-a-half-week trial that James had been in prison when he met Floyd. Under the circumstances in this case, "[g]iving a curative instruction regarding the fleeting remark may have drawn more unwanted attention to the remark." Wilson v. State, 142 So.3d 732, 815 (Ala. Crim. App. 2010).

Therefore, we find no error in the trial court's not giving a curative instruction in this instance.

XIII.

Floyd also contends that the trial court erred in allowing the admission of statements made by Jones and her father to various law-enforcement personnel. (Issue III in Floyd's brief.)

Floyd complains about the following testimony presented by the State. Inv. Walden testified that in the spring of 2010, when he responded to Jones's house on a domestic-disturbance call, Jones "told me that she was kind of scared of [Floyd], she was afraid to have him arrested because, you know, she didn't know what would happen when he got out." (R. 3187.) Defense counsel's objection to this testimony on the ground that it was hearsay was overruled. Officer Hughes testified that in November 2010, when he responded to Jones's house on a domestic-disturbance call, Jones "said she had been sitting in her car. They had gotten into an argument and [Floyd] punched her in the mouth." (R. 2818.) Floyd did not object to this testimony on hearsay grounds; therefore, we review the admissibility of this statement for plain error. See Rule 45A, Ala. R. App. P.

***41** Officer Stallworth testified that when Jones came to the police department the morning of January 1, 2011, Jones "said that her cell phone had been stolen," (R. 3236); that "her ex-boyfriend, Cedric Floyd, had somehow gotten into her residence and stolen her cell phone" (R. 3237); "that [Floyd] had somehow gotten into the house" (R. 3238); and that she did not want to press charges against Floyd because "she was afraid." (R. 3237.) Floyd did not object to any of this testimony; therefore, we review its admissibility for plain error. See Rule 45A, Ala. R. App. P. Officer Stallworth further testified that Jones's father, Curtis Jones, told him that "he went to his daughter's house and he had also been threatened by Mr. Floyd." (R. 3237.) Floyd initially objected to this testimony on hearsay grounds, but withdrew the objection when the State asserted that it was not offering Curtis Jones's statement for the truth of the matter asserted, but to explain why Jones and her father had gone to the police department. Officer Stallworth also testified that when Jones returned to the police department later that same day, she told him "that Mr. Floyd was now sending threatening messages to her daughter by text." (R. 3240.) Floyd did not object to this testimony; therefore, we review its admissibility for plain error. See Rule 45A, Ala. R. App. P.

Additionally, Officer Stallworth's written narrative regarding his two encounters with Jones on January 1, 2011, was introduced into evidence by the State, and Officer Stallworth read the narrative to the jury. The narrative was substantially similar to Officer's Stallworth's testimony, but reflected additional statements made by Jones. Officer Stallworth's narrative included the following additional statements made to him by Jones during the first encounter: "that [Jones] has had problems before on many different occasions in the past and [Floyd] simply refuses to leave her alone" and that "she did not want to have [Floyd] arrested but wanted to have a restraining order placed on him." (R. 3249.) Officer

Stallworth's narrative included the following additional statements made to him by Jones during the second encounter: "that in the past [Jones] had been afraid. ... she stated that while he was inside the jail, Floyd would somehow manage to call her and in these phone calls he would let her know that he had people watching her and these people would report back to him" (R. 3253); and "that she had received words from her aunt that Floyd stated he was going to kill her and kill himself" (R. 3253–54.) Floyd did not object to Officer Stallworth's written narrative being introduced into evidence or read to the jury; therefore, we review the admissibility of these additional statements by Jones for plain error. See Rule 45A, Ala. R. App. P.

Floyd argues that the statements made by Jones and her father to the police were testimonial and violated his right to confrontation. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The State, on the other hand, argues that the statements were not offered to prove the truth of the matter asserted, see Rule 801(c), Ala. R. Evid. (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"), but were offered to show Floyd's intent and motive to kill Jones and, therefore, that Floyd's right to confrontation was not violated. See, e.g., Crawford, 541 U.S. at 59 n.9, 124 S.Ct. 1354 (noting that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

With respect to the statement made by Jones's father—that Floyd had threatened him—the State is correct. After Floyd objected to this statement, the State indicated that it was not offering the statement to prove its truth, i.e., that Floyd had threatened Jones's father, but to explain why Jones and her father had gone to the police department that morning. Because this statement was not offered for the truth of the matter asserted, its admission did not violate Floyd's right to confrontation.

As for Jones's various statements, however, the State's argument is unavailing. The very fact that the State used Jones's statements as evidence of Floyd's guilt shows that the statements were offered for the truth of the matter asserted. The State used Jones's statements to argue to the jury that Floyd was the person who had killed Jones, that he had the intent to kill Jones, and that he had entered Jones's house unlawfully. (R. 3834–36—arguing that Jones's trips to the police department on January 1, 2011, to complain about Floyd indicated that Floyd was the person who had killed Jones); (R. 3852—arguing that Floyd "told Tina's aunt, or at least Tina's aunt told Tina, that, He's saying he's going to kill you. And he's going to kill himself. So that's evidence of his intent."); (R. 2497 and 3853–54—arguing that Jones's trips to the police department on January 1, 2011, indicated that Floyd was not authorized to be in Jones's house). As Floyd correctly points out, Jones's "statements would only shed light on these questions if the matters asserted in her statements were true." (Floyd's reply brief, p. 22.) Thus, it is clear that the State offered Jones's statements for the truth of the matters asserted therein. See Turner v. State, 115 So.3d 939, 944 (Ala. Crim. App. 2012) ("[D]uring closing arguments, the State used the accomplices' statements to show that Turner had intended to kill Shah. ... The State's use of the accomplices' statements during closing argument leaves no room to doubt that the statements were offered for the truth of the matter asserted.").

***42** The State makes no other argument in its brief on appeal regarding the admissibility of Jones's statements, and at oral argument the State argued only that the admission of Jones's statements was harmless error. Therefore, for purposes of this appeal, we assume that Jones's statements were testimonial in nature and that their admission violated Floyd's right to confrontation. "However, violations of the Confrontation Clause are subject to harmless-error analysis." Smith v. State, 898 So.2d 907, 917 (Ala. Crim. App. 2004). "A denial of the right of confrontation may, in some circumstances, result in harmless error." James v. State, 723 So.2d 776, 781 (Ala. Crim. App. 1998). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Ex parte Baker, 906 So.2d 277, 287 (Ala. 2004) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). " ' "The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." ' " James, 723 So.2d at 781 (quoting Chapman, 386 U.S. at 23, 87 S.Ct. 824, quoting in turn Fahy v. Connecticut, 375 U.S. 85, 86–87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). In determining whether such an error is harmless, this Court must look at "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence

of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

After thoroughly reviewing the record, we conclude that any error in the trial court's admitting Jones's statements was harmless beyond a reasonable doubt. Although Jones's statements certainly strengthened the State's case, they were by no means critical and were cumulative to, and corroborated by, other evidence. For example, when Officer Hughes responded to the domestic-disturbance call in November 2010, Jones told Officer Hughes that Floyd had punched her in the mouth; however, Officer Hughes testified that he had seen that Jones's lip was bleeding and that Floyd had blood on his fingers and his shirt, thus raising the inference, through Officer Hughes's own personal observations, that Floyd had hit Jones. Jones told Officer Stallworth on January 1, 2011, that Floyd had entered her residence and had stolen her cellular telephone; however, Jones's uncle, James, testified that when he got up the morning of January 1, 2011, Floyd was sitting in the living room of Jones's house and that he did not know how Floyd had gotten into the house, and the State presented evidence indicating that when Floyd telephoned emergency 911 shortly after the murder, he had used Jones's cellular telephone.

Additionally, although Jones told Officer Stallworth on January 1, 2011, that Floyd had been sending her daughter threatening text messages and that her aunt had said that Floyd had threatened to kill Jones and then kill himself, the State introduced into evidence all the text messages sent by Floyd, and those messages clearly show Floyd's threats against Jones. [16] Jones also told both Inv. Walden and Officer Stallworth that she was afraid of Floyd. Specifically, Jones said that because of continuing problems with Floyd, including that he had somehow monitored her when he had been in jail previously, she was afraid of what he might do if he was arrested, and, thus, she did not want to have Floyd arrested. However, Sarah Marshall, who lived with Jones, and Lakeshia Finley, Jones's cousin, both testified that Jones was afraid of Floyd. Indeed, Marshall testified that in the five months before her death, Jones was "nervous," appeared "sick," "couldn't eat," "couldn't sleep," and was afraid to stay at her own house. (R. 2689.) "Testimony that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred." Travis v. State, 776 So.2d 819, 861 (Ala. Crim. App. 1997), aff'd, 776 So.2d 874 (Ala. 2000).

Moreover, the State's case against Floyd was overwhelming. As noted previously, not only did Floyd confess to killing Jones, the State also presented evidence that Floyd's blood was found at the scene, that two witnesses had seen Floyd at the scene only moments before Jones's body was found, and, through nonhearsay testimony, that Floyd and Jones had a history of domestic violence, that Floyd had broken into Jones's house the night before the murder, and that Floyd had threatened Jones the day before the murder. Based on the whole of the record, we are convinced beyond a reasonable doubt that any error in the trial court's admission of Jones's various statements to police did not contribute to the jury's verdict, but was harmless beyond a reasonable doubt.

XIV.

***43** Floyd contends the trial court erred in allowing the State to introduce into evidence a data report and to present testimony about some of the contents of that report, which detailed information that had been retrieved from his cellular telephone, including his call log and text messages in the days leading up to the murder and his contacts and photographs. (Issue XXII in Floyd's brief.) Floyd argues that the report and testimony "contained a number of prejudicial messages, calls, and photographs that bore no relevance to the offense and could have easily been redacted." [17] (Floyd's brief, p 95.) Floyd complains primarily about his text messages to and from other women, including messages indicating that another woman was pregnant with his child, and a pornographic photograph saved on his telephone. Floyd did not object to the admission of the testimony or the report; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Michael Trotter, a digital forensic examiner for the State of Alabama's Office of Prosecution Services, testified that he examined and extracted information from Floyd's cellular telephone, from Jones's cellular telephone, and from Ky'Toria's cellular telephone, and that he prepared reports on the information he extracted

from those telephones. All three reports were introduced into evidence without objection. [18] The report on Floyd's telephone indicated that Floyd had made or received 180 telephone calls between December 30, 2010, and January 1, 2011; that Floyd had missed 90 telephone calls between December 27, 2010, and January 1, 2011; that Floyd had sent or received 260 text messages between December 26, 2010, and January 1, 2011; that Floyd had 103 contacts saved in his telephone; and that Floyd had 45 photographs saved in his telephone. In addition to admitting the reports, the State solicited testimony from Trotter about several of Floyd's text messages, focusing primarily on the text messages Floyd had sent to Ky'Toria the day before the murder threatening Jones and her family, but also highlighting certain text messages between Floyd and other women in the days leading up to the murder, and text messages Floyd had sent to Jones's new boyfriend the day before the murder.

"The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So.2d 1093, 1103 (Ala. 2000). "A trial court has wide discretion in determining whether to exclude or to admit evidence, and the trial court's determination on the admissibility of evidence will not be reversed in the absence of an abuse of that discretion." Woodward v. State, 123 So.3d 989, 1014 (Ala. Crim. App. 2011). Additionally, "[t]rial courts are vested with considerable discretion in determining whether evidence is relevant, and such a determination will not be reversed absent plain error or an abuse of discretion." Hayes v. State, 717 So.2d 30, 36 (Ala. Crim. App. 1997).

> "Rule 402, Ala. R. Evid., provides that '[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State.' Rule 401, Ala. R. Evid., defines 'relevant evidence' as 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' 'Alabama recognizes a liberal test of relevancy, which states that evidence is admissible "if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence." ' Hayes[v. State], 717 So.2d [30,] 36 [(Ala. Crim. App. 1997)], quoting C. Gamble, Gamble's Alabama Evidence § 401(b) [(5th ed. 1996)]. '[A] fact is admissible against a relevancy challenge if it has any probative value, however[ ] slight, upon a matter in the case.' Knotts v. State, 686 So.2d 431, 468 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala. 1996). Relevant evidence should be excluded only 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Rule 403, Ala. R. Evid."

***44** Gavin v. State, 891 So.2d 907, 963–64 (Ala. Crim. App. 2003). In Barrow v. State, 494 So.2d 834 (Ala. Crim. App. 1986), this Court explained:

> " 'Where the proffered evidence has a tendency, even though slight, to enlighten the jury as to the culpability of the defendant, then it is relevant and properly admissible.' Waters v. State, 357 So.2d 368, 371 (Ala. Cr. App.), cert. denied, Ex parte Waters, 357 So.2d 373 (Ala. 1978). 'The test of probative value or relevancy of a fact is whether it has any tendency to throw light upon the matter in issue even though such light may be weak and fall short of its intended demonstration.' Tate v. State, 346 So.2d 515, 520 (Ala. Cr. App. 1977). 'It is not necessary that each item of testimony, taken alone, be conclusively shown to prove the guilt of the defendant; but the question is whether each fact, in connection with all others, may be properly considered in forming a chain of circumstantial evidence tending to prove the guilt of the accused.' Russell v. State, 38 So. 291, 296 (Ala. 1905)."

494 So.2d at 835.

In this case, that portion of Floyd's call log reflecting calls to and from Jones and her friends and family members and those text messages to and from Jones and her friends and family members were clearly relevant and admissible as evidence of Floyd's intent and motive in killing Jones. Many of the text messages contained threats against Jones and her relatives and clearly reflect Floyd's state of mind the day before the murder. The same is true for Floyd's text messages to Jones's new boyfriend, and several text messages to and from a person named "Mikia," in which Floyd expressed his anger toward Jones and Mikia cautioned Floyd against doing anything that

would get him in trouble. Therefore, there was no error, much less plain error, in the admission of this evidence and testimony.

We cannot say, however, that the remaining portion of Floyd's call log and text messages, or any of the photographs on Floyd's telephone, had any relevance to any issue in the case, even under Alabama's liberal test of relevancy. Nonetheless, we conclude that their admission was, at most harmless error, and did not rise to the level of plain error. Rule 45, Ala. R. App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

As the Alabama Supreme Court explained in Ex parte Crymes, 630 So.2d 125 (Ala. 1993):

> "In determining whether the admission of improper testimony is reversible error, this Court has stated that the reviewing court must determine whether the 'improper admission of the evidence ... might have adversely affected the defendant's right to a fair trial,' and before the reviewing court can affirm a judgment based upon the 'harmless error' rule, that court must find conclusively that the trial court's error did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

***45** 630 So.2d at 126 (emphasis omitted). "[T]he harmless error rule excuses the error of admitting inadmissible evidence only [when] the evidence was so innocuous or cumulative that it could not have contributed substantially to the adverse verdict." Ex parte Baker, 906 So.2d 277, 284 (Ala. 2004). We have no trouble concluding that the admission of the remaining portion of Floyd's call log and text messages and the photographs did not affect Floyd's substantial rights and did not affect the outcome of the trial.

The vast majority of the call log, text messages, and photographs were innocuous and in no way prejudicial to Floyd. As this Court explained in Kuenzel v. State, 577 So.2d 474 (Ala. Crim. App. 1990), aff'd, 577 So.2d 531 (Ala. 1991):

> "The admission of merely immaterial and not prejudicial evidence is not reversible error. See Gilley v. Denman, 185 Ala. 561, 567, 64 So. 97, 99 (1913). 'It has long been the rule that the erroneous admission of evidence on an immaterial issue is harmless.' Forest Investment Corp. v. Commercial Credit Corp., 271 Ala. 8, 12, 122 So.2d 131 (1960). The admission of irrelevant evidence which could not have affected the verdict is not reversible error. Saunders v. Tuscumbia Roofing & Plumbing Co., 148 Ala. 519, 523, 41 So. 982, 984 (1906)."

577 So.2d at 512. See also Ex parte Scott, 728 So.2d 172, 188 (Ala. 1998) (holding that the admission of an ax and a gun that had nothing to do with the crime was harmless because they added nothing to the State's case).

As for those text messages between Floyd and a person named "Felishia," which indicated that the two were involved in a relationship and that Felishia was pregnant with Floyd's child, those messages were more beneficial than prejudicial to Floyd. The State's theory of the case was that Floyd killed Jones in order to control her and to stop her from dating anyone else, yet the text messages to and from Felishia indicated that Floyd had moved on from his relationship with Jones and was in another relationship. "While the trial judge should not allow the admission of clearly irrelevant evidence, 'this court has long held [that] a party cannot complain of error in his favor.' " Kuenzel, 577 So.2d at 511 (quoting Yeager v. Miller, 286 Ala. 380, 385, 240 So.2d 221, 224 (1970)). Moreover, the fact that Floyd was in a relationship with another woman who was pregnant with his child was also presented by the defense during the testimony of Roy James, who said that Floyd was excited about having a child with his new girlfriend. "It is well settled that 'testimony that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred.' " Jackson v. State, 791 So.2d 979, 1013 (Ala. Crim. App. 2000) (quoting White v. State, 650 So.2d 538, 541 (Ala. Crim. App. 1994), overruled on other grounds, Ex parte Rivers, 669 So.2d 239 (Ala. Crim. App. 1995)).

Finally, as for the pornographic photograph that was on Floyd's telephone, that photograph clearly had no

relevance to the case and, as Floyd argues, should have been redacted from Trotter's report. However, the photograph was only 1 out of 45 photographs on Floyd's telephone and was contained in a report spanning 53 pages, which report was only 1 out of 188 exhibits offered by the State at trial. The photograph was not specifically mentioned during Trotter's testimony or at all during the trial. Under these circumstances, even though the photograph was clearly irrelevant to any issue in the case and inadmissible, we cannot say that its admission was anything other than harmless.

***46** For these reasons, Floyd is entitled to no relief on this claim.

XV.

Floyd also contends that the trial court erred in refusing to qualify defense witness Jack Remus as an expert in crime-scene investigation, blood-spatter analysis, serology, and DNA analysis. (Issue IV in Floyd's brief.) Floyd argues that Remus's education, training, and experience was sufficient for him to be qualified as an expert in all four disciplines under Rule 702, Ala. R. Evid., and that his expert testimony "was essential to defense counsel's strategy of pointing out the inadequacy of the police investigation." (Floyd's brief, p. 31.)

Remus testified that he had both a bachelor's degree and a master's degree in biology. In 1989, he was hired by the Florida Department of Law Enforcement ("FDLE") as a "crime scene analyst." (R. 3531.) While working for the FDLE, Remus received training and certification from the FDLE in serology, DNA analysis, and blood-spatter analysis. Remus said that his early training in crime-scene investigation began when he was training in blood-spatter analysis and had to review cases using the "documents provided" and that he "became very familiar with the process of documenting these scenes." (R. 3538.) Remus testified that he worked for the FDLE for approximately 13 years, after which he went to work for a sheriff's department in Florida, where he "was trained on the job in the process of crime-scene processing, crime-scene analysis and preservation, detection, identification of the evidence." (R. 3532.) Remus said that he had been qualified as an expert in serology and/or DNA analysis over 50 times; that he had been qualified as an expert in blood-spatter analysis 3 or 4 times; and that he had been "called into court a couple of times to give testimony generally in the area of crime scene analysis or crime scene processing for a particular case ... about three to four times." (R. 3534.) Remus said that he was not certified in crime-scene investigation because certification is limited to those employed by law enforcement and that his FDLE certifications in serology, DNA, and blood-spatter analysis lapsed when he left the employment of the FDLE.

Floyd initially proffered Remus as an expert in "crime scene investigation." (R. 3534.) The State objected to Remus's qualifications, and the trial court sustained the objection. After extensive voir dire of Remus outside the presence of the jury, Floyd proffered Remus as an expert in serology, DNA analysis, blood-spatter analysis, and crime-scene investigation, and the State again objected to his qualifications. The trial court sustained the State's objection and declined to declare Remus an expert in any of the four disciplines but informed Floyd that he could ask Remus whatever questions he wished and, if there was an objection by the State, the court would determine at that time whether Remus was qualified to answer the question. Floyd later proffered Remus twice as an expert in "crime scene analysis," and the trial court again sustained the State's objections. (R. 3601; 3610.)

***47** The record reflects that the State lodged only three objections to Remus's testimony, and only one of those was sustained by the trial court. The trial court sustained the State's objection to Floyd's asking Remus, given his review of the photographs of the crime scene and other evidence in this case, "in a hypothetical case like this, was this scene properly done, so far as investigation?" (R. 3647.) Nonetheless, Floyd was then permitted to question Remus extensively, without objection, regarding how he would have processed the crime scene if he had been called there the night of the murder, including what evidence he would have collected and what additional testing he would have ordered on that evidence that had not been done by the Atmore Police Department.

Rule 702, Ala. R. Evid., provides, in relevant part:

> "(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

> "(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
>
> "(1) The testimony is based on sufficient facts or data;
>
> "(2) The testimony is the product of reliable principles and methods; and
>
> "(3) The witness has applied the principles and methods reliably to the facts of the case."

"Whether a witness is qualified to testify as an expert is a question within the sound discretion of the trial court." Payne v. State, [Ms. CR–15–0225, February 10, 2017] — So.3d ——, —— (Ala. Crim. App. 2017). "The determination of whether a person is qualified to testify as an expert is well within the discretion of the trial court; we will not disturb the trial court's ruling on that issue unless there has been an abuse of that discretion." Kennedy v. State, 929 So.2d 515, 518 (Ala. Crim. App. 2005).

Initially, we point out that, although Floyd argued to the trial court and mentions on appeal that Remus was an expert in serology and DNA analysis, the record reflects that Floyd posed no questions to Remus relating to those disciplines. Indeed, when arguing in the trial court that Remus should be qualified as an expert in those disciplines, Floyd admitted that Remus had conducted no serology or DNA testing in this case, that his alleged expertise in serology and DNA would be relevant only as to whether the protocols for DNA testing had been properly followed in this case, and that he did not think that he would delve into that issue during Remus's testimony. Additionally, on appeal, although Floyd mentions Remus's alleged qualifications as an expert in these disciplines, his primary argument is that Remus's testimony about "the 'blood spatter' evidence" and "whether the crime scene was 'properly worked' [was] critical for the jury to evaluate the flaws in the State's evidence." (Floyd's brief, p. 31.) We will not hold a trial court in error for refusing to declare a witness to be an expert in a field about which the witness provides no testimony. Therefore, we find no error on the part of the trial court in refusing to qualify Remus as an expert in serology and DNA analysis.

We also find no error in the trial court's refusal to qualify Remus as an expert in blood-spatter analysis and crime-scene investigation. It is abundantly clear from the record that the purpose of Remus's testimony was not to provide expert testimony on the circumstances of the murder, such as the relative positions of the victim and assailant, see, e.g., Gavin v. State, 891 So.2d 907, 969 (Ala. Crim. App. 2003) (noting that "[b]lood-spatter analysis is typically used to determine the position of the victim and the assailant at the time of the crime"), or the characteristics of the offense, such as the motivation for the crime, see, e.g., Simmons v. State, 797 So.2d 1134, 1150–56 (Ala. Crim. App. 1999) (opinion on return to remand) (noting that crime-scene analysis involves "the gathering and analysis of physical evidence" to determine characteristics about the offense and possible motivation for the offense, and is similar to the field of accident reconstruction). Rather, the purpose of Remus's testimony, as Floyd readily admits, was to attempt to provide an "expert's" opinion that the police investigation of Jones's murder was flawed.

***48** However, we cannot say that such testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702(a), Ala. R. Evid. "[T]he focus of [Rule 702] is not whether the subject matter of the testimony is within the common knowledge or understanding of the jurors, but whether the expert's opinion or testimony will assist the trier of fact in understanding the evidence or deciding an issue of fact." Woodward v. State, 123 So.3d 989, 1011 (Ala. Crim. App. 2011). The purpose for which Remus's testimony was offered—to point out the alleged deficiencies in the police investigation of Jones's murder—is not a proper subject of expert testimony because it would not assist the trier of fact in understanding the evidence or deciding a fact in issue.

Indeed, other courts have held that such testimony is not only not a proper subject of expert testimony, but is inadmissible in its entirety. In Mason v. United States, 719 F.2d 1485 (10th Cir. 1983), "[t]he defendants sought to introduce the testimony of a private detective and offered to have him testify regarding the inadequacy of the investigation techniques employed by the police." 719 F.2d at 1490. The United States Court of Appeals for the Tenth Circuit held that the trial court had properly excluded the testimony, explaining:

> "As we view it, the presentation of expert testimony criticizing the presentation of the other side of the case is not appropriate. It may be a proper subject for comment by the lawyers in their final arguments and seemingly the defendants' attorneys discussed the inadequacies in their final arguments to the jury. We conclude the trial court acted properly in excluding the testimony of defendants' expert."

719 F.2d at 1490. See also People v. Godallah, 132 A.D.3d 1146, 1150, 19 N.Y.S.3d 119, 123–24 (2015) (holding that the trial court did not err in refusing to allow a retired police detective with 24 years of experience to testify as an expert that the investigation of the defendant's case was inadequate, because "such opinion was not outside of the jury's general knowledge"); State v. Martin, 222 N.C.App. 213, 216–18, 729 S.E.2d 717, 720–21 (2012) (holding that the trial court did not err in refusing to allow a forensic scientist and criminal profiler to testify regarding the inconsistencies in the victim's account of the crime and the manner in which the police investigation was conducted because such testimony would have invaded the province of the jury); Proffit v. State, 191 P.3d 974, 979–81 (Wy. 2008) (holding that the trial court did not err in refusing to allow a defense witness to testify as an expert regarding "what he perceived to be deficiencies in the investigation" of the murder for which the defendant was on trial because the testimony was not relevant and would have confused the jury); State v. Mackey, 352 N.C. 650, 654–59, 535 S.E.2d 555, 557–60 (2000) (holding that the trial court did not err in refusing to allow a retired police officer to testify as an expert about proper undercover investigative techniques on the ground that the jury could, on its own, assess the credibility of the undercover police officer and the undercover procedures used in the case and because the proposed testimony would not have assisted the trier of fact to understand the evidence or to determine a fact in issue and would have potentially confused the jury); United States v. Borda, (unpublished disposition), 178 F.3d 1286 (4th Cir. 1999) (holding that the trial court did not err in refusing to allow a former police officer to testify as an expert regarding applying for and executing search warrants, and targeting and apprehending drug traffickers); and State v. Vogler, (No. 89–L–14–105, December 7, 1990) (Ohio Ct. App. 1990) (not reported in N.E. 2d) (holding that the trial court did not err in refusing to allow a criminologist to testify regarding inadequacies of the police in not collecting certain evidence from the crime scene and performing certain tests on that evidence on the ground that the testimony lacked probative value). Therefore, we find no error in the trial court's refusal to find Remus to be an expert in blood-spatter analysis and crime-scene investigation.

***49** Moreover, even assuming that the trial court erred in refusing to find Remus to be an expert in one or more of the four disciplines for which he was proffered as an expert, we have no trouble concluding that the error was harmless. "After finding error, an appellate court may still affirm a conviction on the ground that the error was harmless, if indeed it was." Guthrie v. State, 616 So.2d 914, 931 (Ala. Crim. App. 1993). "The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing." Davis v. State, 718 So.2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So.2d 1166 (Ala. 1998). "In order for a nonconstitutional error to be deemed harmless, the appellate court must determine with 'fair assurance ... that the judgment was not substantially swayed by the error.' " Id. (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "In order for the error to be deemed harmless under Rule 45, [Ala. R. App. P.,] the state must establish that the error did not or probably did not injuriously affect the appellant's substantial rights." Coral v. State, 628 So.2d 954, 973 (Ala. Crim. App.), appeal after remand, 628 So.2d 988 (Ala. Crim. App. 1992), aff'd, 628 So.2d 1004 (Ala. 1993).

This is not a case where the trial court prohibited the defendant from presenting testimony in his defense. See, e.g., Holland v. State, 666 So.2d 547 (Ala. Crim. App. 1995) (holding that trial court committed reversible error in refusing to allow testimony from a defense witness where the witness was qualified as an expert in accident reconstruction). Although Remus was not deemed an expert by the trial court, Floyd was nevertheless permitted to elicit testimony from Remus regarding the alleged deficiencies in the investigation of Jones's murder, the same alleged deficiencies Floyd had also elicited through cross-examination of the various law-enforcement officers involved in the investigation. We recognize that the State, during closing arguments, pointed out that Remus had not been able to qualify as an expert and that, therefore, his testimony should be given little weight. However, the record reflects that Floyd introduced into evidence Remus's curriculum vitae, and three separate times in

front of the jury he elicited lengthy testimony from Remus regarding Remus's qualifications and prior work history in the areas of serology, DNA analysis, blood-spatter analysis, and crime-scene investigation. See, e.g., Felton v. State, 47 Ala.App. 182, 186–87, 252 So.2d 108, 112 (1971) (holding that the trial court did not err in refusing to declare a defense witness an expert where the trial court permitted the witness to testify so "[t]he jury had the full benefit of the testimony of the witness ... [t]he weight and credibility" of which was "for the jury to determine"). Moreover, as noted previously in this opinion, the evidence against Floyd was overwhelming. Not only did Floyd confess to murdering Jones, Floyd's blood was found at the scene, two witnesses testified that they saw Floyd at the scene just moments before Jones's body was discovered, Floyd and Jones had a history of domestic violence, Floyd had broken into Jones's house the night before the murder, and Floyd had threatened Jones the day before the murder.

Under these circumstances, it is clear that any error in the trial court's refusing to qualify Remus as an expert did not affect Floyd's substantial rights or affect the outcome of the trial and, thus, was harmless.

XVI.

Floyd contends that the trial court erred in refusing his request for a jury instruction on voluntary intoxication and on reckless manslaughter as a lesser-included offense of the capital-murder charge because, he says, he was intoxicated at the time of the murder. (Issue II in Floyd's brief.) Floyd argues that the testimony of Roy James, Ernest Rolin, and Tramescka Peavy establish that he was so intoxicated at the time of the murder that he was unable to form the intent to kill. Specifically, he argues that Roy's testimony established that between 11:00 a.m. and 8:00 p.m. on January 1, 2011, he and Roy drank alcohol and ingested approximately seven grams of cocaine between the two of them. He also argues that Rolin's testimony established that he was intoxicated around 8:00 p.m. that day, and that he used methamphetamine at that time. Finally, he argues that Peavy's testimony that she had never seen Floyd act the way he did when she saw him just moments after the murder indicates that, at the time of the murder, he was still suffering the effects of the drugs and alcohol he had ingested earlier.

***50** " 'A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses.' MacEwan v. State, 701 So.2d 66, 69 (Ala. Crim. App. 1997). An accused has the right to have the jury charged on ' "any material hypothesis which the evidence in his favor tends to establish." ' Ex parte Stork, 475 So.2d 623, 624 (Ala. 1985). '[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[ ] weak, insufficient, or doubtful in credibility,' Ex parte Chavers, 361 So.2d 1106, 1107 (Ala. 1978), 'even if the evidence supporting the charge is offered by the State.' Ex parte Myers, 699 So.2d 1285, 1290–91 (Ala. 1997), cert. denied, 522 U.S. 1054, 118 S.Ct. 706, 139 L.Ed.2d 648 (1998). However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A–1–9(b), Ala. Code 1975. 'The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' Broadnax v. State, 825 So.2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So.2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S.Ct. 2675, 153 L.Ed.2d 847 (2002). ' "A court may properly refuse to charge on a lesser included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury." ' Williams v. State, 675 So.2d 537, 540–41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So.2d 580, 582 (Ala. Crim. App. 1987)."

Clark v. State, 896 So.2d 584, 641 (Ala. Crim. App. 2003).

" 'Voluntary drunkenness neither excuses nor palliates crime.' ... 'However, drunkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime.' " Fletcher v. State, 621 So.2d 1010, 1019 (Ala. Crim. App. 1993) (citations and footnote omitted). "While voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent essential to a malicious killing and reduce it to manslaughter." McConnico v. State, 551 So.2d 424, 426 (Ala. Crim. App. 1988). " '[T]o negate the specific

intent required for a murder conviction, the degree of the accused's intoxication must amount to insanity.' " Whitehead v. State, 777 So.2d 781, 832 (Ala. Crim. App. 1999), aff'd, 777 So.2d 854 (Ala. 2000) (quoting Smith v. State, 756 So.2d 892, 906 (Ala. Crim. App. 1998), aff'd, 756 So.2d 957 (Ala. 2000)).

> "It is not merely, though, the consumption of intoxicating liquors or drugs that justifies an instruction on intoxication and the relevant lesser-included offenses. Pilley v. State, 930 So.2d 550, 562 (Ala. Crim. App. 2005). Instead, there must be evidence of 'a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.' § 13A–3–2(e)(1), Ala. Code 1975. ' "The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill." ' McGowan v. State, 990 So.2d 931, 985 (Ala. Crim. App. 2003) (quoting Ex parte Bankhead, 585 So.2d 112, 121 (Ala. 1991)). Stated differently, 'the level of intoxication needed to negate intent must rise "to the level of statutory insanity." ' Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (quoting Ware v. State, 584 So.2d 939, 946 (Ala. Crim. App. 1991))."

Smith v. State, [Ms. CR–13–0055, March 17, 2017] —— So.3d ——, —— (Ala. Crim. App. 2017). "[T]he court should charge on voluntary intoxication only where there is a sufficient evidentiary foundation in the record for a jury to entertain a reasonable doubt as to the element of intent." Harris v. State, 2 So.3d 880, 911 (Ala. Crim. App. 2007). "[E]vidence that the defendant ingested alcohol or drugs, standing alone, does not warrant a charge on intoxication." Pilley v. State, 930 So.2d 550, 562 (Ala. Crim. App. 2005). "In order to determine whether the evidence is sufficient to necessitate an instruction and to allow the jury to consider the defense, we must view the testimony most favorably to the defendant." Ex parte Pettway, 594 So.2d 1196, 1200 (Ala. 1991). See also Ex parte McGriff, 908 So.2d 1024, 1036 (Ala. 2004).

***51** In Smith, supra, evidence was presented that the defendant had consumed beer and morphine pills over the course of several hours leading up to the murder, and in his statement to police, the defendant said that he had been " 'smoking and drinking all day.' " —— So.3d at ——. Nonetheless, this Court upheld the trial court's refusal to instruct the jury on voluntary intoxication and reckless manslaughter because "the evidence was rarely specific as to the quantities consumed," "much of the evidence ... involved the consumption of alcohol and drugs hours before the kidnapping and murder" and, in his statement to police, the defendant "consistently minimized his consumption of alcohol." —— So.3d at ——.

In Spencer v. State, 58 So.3d 215 (Ala. Crim. App. 2008), evidence was presented that the defendant had consumed alcohol and narcotics over the course of several hours leading up to the murders and the defendant testified that he had a "cocaine habit of 'about six to seven grams a day.' " 58 So.3d at 232. Nonetheless, this Court held that the trial court did not err in not instructing the jury on voluntary intoxication and reckless manslaughter because the defendant's consumption of alcohol and narcotics in the hours before the murders did not, alone, indicate that the defendant was intoxicated at the time of the murders and because "[t]here was no evidence concerning the effects, if any, that the amounts of cocaine and other substances ingested the night before and morning of the shootings had on [the defendant] at the time of the shootings." Id.

Similarly, here, we find no error on the part of the trial court in refusing to instruct the jury on voluntary intoxication and reckless manslaughter. There was evidence indicating that Floyd drank alcohol and shared with Roy James approximately seven grams of cocaine; however, that evidence indicated that Floyd's consumption of alcohol and cocaine began around 11:00 a.m. on January 1, 2011, over 12 hours before the murder, and ended almost 5 hours before the murder, around 8:00 p.m. on January 1, 2011. There was no evidence presented as to how much alcohol Floyd drank, how much of the seven grams of cocaine Floyd ingested, what effects the alcohol and the cocaine had on Floyd, or how long those effects lasted. There was also evidence indicating that Floyd appeared intoxicated at around 8:00 p.m. on January 1, 2011, and that he used methamphetamine at that time. However, no evidence was presented as to how much methamphetamine Floyd ingested, what effects the methamphetamine had on him, or how long those effects lasted. Additionally, although Roy James testified that he purchased a bottle of alcohol when he was with Floyd at around 10:00 p.m. on January 1, 2011, no evidence was presented indicating that Floyd drank any of that alcohol and there was no other evidence presented indicating that

Floyd ingested any drugs or alcohol after 8:00 p.m. on January 1, 2011, almost five hours before the murder. Compare Hammond v. State, 776 So.2d 884, 886–89 (Ala. Crim. App. 1998) (holding that the trial court erred in not instructing the jury on intoxication where the evidence indicated that the defendant had "smoked from six to eight pieces of crack cocaine in the three to four hours before" the murder); Fletcher v. State, 621 So.2d 1010, 1018–21 (Ala. Crim. App. 1993) (holding that the trial court erred in not instructing the jury on intoxication where the physical evidence indicated that the murder was committed by someone who was under the influence of stimulating drugs and testimony was presented that the defendant had smoked five or six rocks of crack cocaine within two to three hours of the murder); and Owen v. State, 611 So.2d 1126, 1128–29 (Ala. Crim. App. 1992) (holding that the trial court erred in not instructing the jury on intoxication where the evidence indicated that the defendant had consumed as many as eight beers in the two hours before the murder). The fact that Tramescka Peavy testified that she had never seen Floyd act the way he acted just moments after the murder fails to establish that Floyd was acting that way because he was intoxicated. A person does not have to be intoxicated to act in an unusual manner. Finally, the evidence established that Floyd did not appear to be intoxicated when he gave his statement to police less than two hours after the murder, and that when asked if he was under the influence, Floyd stated: "No, I shouldn't be." (R. 3282.)

Even when viewing the evidence in the light most favorable to Floyd, as we must, Floyd failed to establish the evidentiary foundation necessary to warrant instructions on intoxication and manslaughter. There was no evidence indicating that, at the time of the murder, Floyd was experiencing a disturbance of his mental capacity so great as to amount to insanity as a result of drugs and alcohol. At most, the evidence established that Floyd was under the influence of alcohol and drugs around 8:00 p.m. on January 1, 2011, almost five hours before the murder.

***52** Therefore, the trial court properly denied Floyd's request for jury instructions on voluntary intoxication and reckless manslaughter.

XVII.

Floyd contends that the trial court's jury instruction on reasonable doubt was improper. (Issue XX in Floyd's brief.) Floyd did not object to the court's charge; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

" 'It has long been the law in Alabama that a trial court has broad discretion in formulating jury instructions, provided those instructions are accurate reflections of the law and facts of the case.' " Harbin v. State, 14 So.3d 898, 902 (Ala. Crim. App. 2008) (quoting Culpepper v. State, 827 So.2d 883, 885 (Ala. Crim. App. 2001)). "A trial court's oral charge to the jury must be construed as a whole, and must be given a reasonable—not a strained—construction." Pressley v. State, 770 So.2d 115, 139 (Ala. Crim. App. 1999), aff'd, 770 So.2d 143 (Ala. 2000).

The trial court instructed the jury, in relevant part, as follows:

> "The defendant—and we mentioned this some before—the defendant has no burden of proof whatsoever. He does not have to prove that he's innocent. He comes into this court with the presumption of innocence. And it surrounds him throughout the trial of this case and even attends him in the jury room until each and every member of the jury, after considering all of the evidence in this case, are convinced beyond a reasonable doubt that he's guilty as charged. And then, and at that time only, would he shed the presumption of innocence; sometimes the law calls it the cloak of innocence. And the presumption of innocence is to be regarded by you as evidence in favor of the defendant.
>
> "Now we talked, and you've heard reasonable doubt. Reasonable doubt. In order to find the defendant guilty, the State must prove guilt beyond a reasonable doubt. Now what do I mean by reasonable doubt? Reasonable doubt, and the words I use are words that the law has, but I think it will—I want to try to make this as straightforward and as clear as we can.
>
> "A reasonable doubt is not a fanciful doubt or a conjectural doubt, but is a doubt which appeals to your reason after considering all of the evidence in the case. Maybe I can express it maybe a little better. In connection with reasonable doubt, you cannot establish guilt to a mathematical certainty. You can only do it to that certainty as you weigh the everyday affairs of life that you come into contact with.

> "A reasonable doubt does not mean a capricious doubt. It is not a doubt based on conjecture, speculation, or guesswork. It does not mean beyond all doubt. A reasonable doubt means a real doubt or a substantial doubt growing out of the evidence. It is a doubt for which a reason can be given."

(R. 3887–89.) Floyd argues that this instruction "lessened the State's burden of proof because it limited a finding of reasonable doubt on the evidence, rather than the lack of evidence." (Floyd's brief, p. 93.)

In Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), the United States Supreme Court explained:

> "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. Hopt v. Utah, 120 U.S. 430, 440–441, 7 S.Ct. 614, 618–20, 30 L.Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. Taylor v. Kentucky, 436 U.S. 478, 485–486, 98 S.Ct. 1930, 1934–1935, 56 L.Ed.2d 468 (1978). Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)."

***53** 511 U.S. at 5, 114 S.Ct. 1239.

Floyd has cited no authority that requires a trial court to instruct the jury specifically that reasonable doubt may arise not only from the evidence presented at trial but also from the lack of evidence presented at trial. It is true that the reasonable-doubt instructions contained in the Alabama Pattern Jury Instructions in effect at the time of Floyd's trial included such language. See Alabama Pattern Jury Instructions—Criminal (3d ed. 1994) (Instruction I.4: A reasonable doubt "is a doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof" and Instruction I.5: A reasonable doubt "is a doubt which arises from all or part of the evidence, or from the lack of evidence or from contradictory evidence."). [19] "However, Alabama courts have not held that a trial court's failure to follow the pattern instruction in its entirety results in reversible error." Hosch v. State, 155 So.3d 1048, 1087 (Ala. Crim. App. 2013).

In Lambeth v. State, 380 So.2d 923 (Ala. 1979), the Alabama Supreme Court upheld the refusal of requested charges that reasonable doubt may arise from "part of the evidence" where the trial court instructed the jury that reasonable doubt could be based on the evidence produced at trial or the lack of evidence produced at trial. 380 So.2d at 924. The Court held that if "the jury is presented a discussion of the reasonable doubt standard as applied to the evidence in its totality, then the failure to give instructions" that reasonable doubt may arise from part of the evidence is not reversible error. Lambeth, 380 So.2d at 925. Subsequently, in Shields v. State, 397 So.2d 184 (Ala. Crim. App. 1981), this Court expanded the scope of Lambeth and upheld the refusal of a requested charge that reasonable doubt may arise from "a want of evidence" when the trial court instructed the jury that reasonable doubt could arise " 'from the evidence.' " 397 So.2d at 187–88. This Court, following Lambeth, held that refusal of the requested instruction was not reversible error because the jury had been instructed on the reasonable-doubt standard as applied to the evidence in its totality. Other jurisdictions have held similarly. See Johnson v. State, 518 N.E.2d 1073, 1076–77 (Ind. 1988) (holding that the trial court did not err in refusing a requested charge that reasonable doubt may arise from the lack of evidence where the trial court's instructions as a whole correctly conveyed the concept of reasonable doubt); and State v. Preston, 122 N.H. 153, 161, 442 A.2d 992, 997 (1982) (same).

In this case, the trial court's charge adequately conveyed the concept of reasonable doubt to the jury. The court correctly instructed the jury that the burden was on the State to prove Floyd's guilt beyond a reasonable doubt and that a reasonable doubt was not a doubt based on conjecture or speculation, but was a doubt grounded in

reason after consideration of all the evidence. In Gonzalez v. State, 511 So.2d 703 (Fla. Dist. Ct. App. 1987), Florida's Third District Court of Appeals rejected a claim identical to Floyd's:

> ***54** "[W]e reject Gonzalez's claim that a new trial is required because the lower court inadvertently omitted a portion of the standard jury instruction which provided in part that a reasonable doubt could arise from a 'lack of evidence'—as the defendant argued to the jury was true of the state's case here. While again, the omission was unfortunate and should not be repeated, it does not entitle the defendant to a reversal. Unlike Simmons v. State, 156 Fla. 353, 22 So.2d 803 (1945), upon which Gonzalez relies, the charge actually given below did not 'affirmatively' state or suggest that a reasonable doubt could not arise from a lack of evidence. Hence, as was directly held in the subsequent and controlling case of Miller v. State, 225 So.2d 409 (Fla. 1969), the lack of evidence qualification was sufficiently implied by the general reasonable doubt instruction so as to render it unnecessary to give (and therefore harmless not to) an explicit charge to the same effect. Accord Vasquez v. State, 54 Fla. 127, 44 So. 739 (1907); Cobb v. State, 214 So.2d 372 (Fla. 2d DCA 1968), cert. denied, 222 So.2d 747 (Fla. 1969); Egantoff v. State, 208 So.2d 843 (Fla. 2d DCA 1968), cert. denied, 218 So.2d 164 (Fla. 1968); see also Barwicks v. State, 82 So.2d 356 (Fla. 1955)."

511 So.2d at 704 (footnote omitted). See also United States v. Ndhlovu, 510 Fed.Appx. 842, 848 (11th Cir. 2013) (holding that pattern instructions on reasonable doubt that "did not state explicitly that reasonable doubt could be found from a lack of evidence" were not deficient) (not selected for publication in the Federal Reporter); People v. Guerrero, 155 Cal.App.4th 1264, 1267–69, 66 Cal.Rptr.3d 701, 702–04 (2007) (holding that the trial court did not err in not specifically instructing the jury that it could find reasonable doubt based on the lack of evidence); Brown v. United States, 881 A.2d 586, 596–97 (D.C. 2005) (holding that the trial court's failure to instruct the jury that reasonable doubt may arise from the lack of evidence was error because it failed to follow the pattern instructions, but nonetheless holding that the error did not render the court's instruction constitutionally deficient and did not rise to the level of plain error); State v. Cohen, 157 Vt. 654, 656, 599 A.2d 330, 332 (1991) (holding that the trial court did not err in instructing the jury that "a reasonable doubt is a doubt 'which arises from consideration of all the evidence' " because the instruction "did not foreclose a reasonable doubt arising from a lack of evidence"); People v. Nazario, 147 Misc.2d 934, 559 N.Y.S.2d 609 (1990) (holding that a trial court is not required to instruct the jury that reasonable doubt may arise from the lack of evidence as long the court properly instructs the jury on the distinction between a reasonable doubt and a doubt based on whim or conjecture); and State v. Lambert, 463 A.2d 1333, 1338–39 (R.I. 1983) (holding that the trial court's instruction that reasonable doubt is a doubt " 'based on the evidence' " was not reversible error even though it would have been "appropriate to inform the jury that a lack of evidence may give rise to a reasonable doubt").

Similarly, here, the trial court did not affirmatively state, or even imply, that a reasonable doubt could not arise from the lack of evidence, and no reasonable juror could have interpreted the court's instructions as saying such. Although we encourage trial courts to follow the pattern instructions if possible, and trial courts should be especially cautious when instructing the jury on reasonable doubt, under the circumstances in this case, language that reasonable doubt may arise from the lack of evidence would have added nothing to the court's charge "that [wa]s not already obvious to people of common sense. That lack of evidence may cause one to have a reasonable doubt is self-evident." United States v. Rogers, 91 F.3d 53, 57 (8th Cir. 1996).

***55** Therefore, we find no error, much less plain error, in the trial court's instructions on reasonable doubt.

Penalty–Phase Issues

XVIII.

Floyd contends that the trial court erred in allowing him to represent himself at the penalty phase of the trial because, he says, he did not knowingly, intelligently, and voluntarily waive his right to counsel. (Issue VI in Floyd's brief.)

After the State's penalty-phase opening statement, defense counsel approached the bench and informed the trial court that Floyd had expressed his desire to terminate their services and to represent himself. Defense counsel indicated that they were prepared to make an opening

statement and to present mitigating evidence but that Floyd had instructed them not to proceed with opening statement and indicated that he wanted to represent himself. The trial court noted that it appeared that defense counsel was about to begin his opening statement when Floyd stopped counsel, and the trial court recessed the proceedings to allow counsel time to speak with Floyd about his request. After the recess, defense counsel informed the court that Floyd still wanted to represent himself.

The trial court then engaged in a lengthy colloquy with Floyd, during which Floyd unequivocally stated that he wanted to represent himself. The court advised Floyd during the colloquy that Floyd had a constitutional right to counsel and that self-representation was "unwise." (R. 4033.) The court cautioned Floyd "against attempting to represent" himself because the "proceedings are very complicated" and "even complicated for an attorney." (R. 4033.) An attorney, the court said, would have "investigated the case ... evaluate[d] what the facts are ... know[n] what the law is [and] stud[ied] the law and determine[d] what objection or motions should be made." (R. 4033–34.) The court noted that Floyd's defense counsel were seasoned attorneys who had been "very deliberate, very thorough" throughout jury selection and the guilt phase of the trial and that it was apparent that defense counsel were prepared for the penalty phase of the trial. (R. 4034.) The court cautioned Floyd that "if you don't have a lawyer you have to do these things." (R. 4034.)

The trial court also emphasized the importance of the penalty phase of a capital trial:

> "We have moved now into what, you've heard me use the word, penalty phase. And this jury will hear evidence in regard to aggravating circumstances which they, the State, alleges against you, and mitigating matters that you'll be able to present. This is very important, Mr. Floyd, because the only two things, as far as punishment, that you can look at, one, life without possibility of parole and, two, the death penalty.
>
> "And this jury is called upon, under our law, to make a recommendation to this Court. They don't, and you have heard me say, they don't make the decision, the judge makes the decision. But they would be called upon to make a recommendation to this Court as to what they would recommend. Very critical. Very important. And very significant to you.
>
> "Now your lawyers appeared, to this Court, to be ready to go forward. Your lawyers appeared, to this Court, to be ready to stand in your behalf to do everything in their professional abilities to try to persuade this jury to come back with a recommendation of life without parole rather then the death sentence. Very critical time."

***56** (R. 4035–36.) The trial court informed Floyd that his counsel had submitted 49 proposed jury instructions for the penalty phase of the trial that were "[v]ery complex [and v]ery complicated." (R. 4037.) The court also informed Floyd that if he represented himself, he would have the responsibility of calling witnesses and questioning them, of responding to any objections made by the State, and of learning and understanding the rules governing the trial.

The trial court further emphasized that Floyd was an "inexperienced layperson" who had not gone to law school, who had no legal training, and who had not had the opportunity to study the law to understand the complexities of a capital-murder trial, that it would be a "grave responsibility" to represent himself, and that he would be at a "tremendous disadvantage" if he did so. (R. 4038.) The court told Floyd that it could not assist Floyd in the trial if Floyd represented himself and that Floyd would be on his own. Finally, the court cautioned Floyd that if he represented himself, he would waive any claim of ineffective assistance of counsel that he may want to pursue on appeal.

Floyd insisted on representing himself, telling the court:

> "I want you to allow me to represent myself, because I ain't about to beg the jury. And I ain't about to beg the Court for my life. What y'all going to do, y'all going to do. And I'm not about to let my attorney drag my family up here on the stand as witnesses going through emotional roller coasters and all this, begging y'all, you

> the Court or the jury, for my life when y'all going to make y'all decision regardless."

(R. 4039.) The trial court then reiterated that the jury would not make the final decision on sentencing, and Floyd responded: "I know you would be making the decision." (R. 4040.) The court continued:

> "They would just simply be making a recommendation, whatever that may be. If they make a recommendation, then there would be another hearing, probably at least two months out, which is a sentencing hearing just before Judge Rice. No jury involved. And at that hearing you would be permitted to present testimony, evidence, and argument.
>
> "So I want you to understand how this works. This is not the end of any of these proceedings, this is the penalty phase where these arguments, et cetera, would be made. And then a jury would make findings. And then those findings would come to me as an advisory finding. And then there would be another hearing."

(R. 4040.)

The trial court then asked Floyd if he still wanted to represent himself, and Floyd stated that he did. When asked if he understood the risks of representing himself, Floyd initially said "I guess so" and then stated: "I don't see any risks." (R. 4041.) The trial court then asked Floyd if he was "confident enough" to handle his own defense and Floyd stated "I don't have no defense from this point forward." (R. 4041.) Floyd then continued:

> "So I'm confident enough to understand that I'm not asking no questions, I'm not calling nobody on the stand or nothing. I'm going to sit right there and let the State put their show on, and then it's going to be over with. Whatever they come up with they come with."

(R. 4041–42.) The trial court reiterated that Floyd was not making a "wise decision," but granted Floyd's request to represent himself. (R. 4042.) The court instructed defense counsel to remain with Floyd as standby counsel in case Floyd needed their assistance.

Floyd waived opening statements, and, after the State presented evidence and rested its case, Floyd rested his case without presenting any evidence. The jury was then recessed for the day, and a charge conference was held. The following morning, the trial court informed Floyd that he had the right to withdraw his request to represent himself at any time and that the court would reappoint his defense counsel if he so chose. The court also informed Floyd that if he had changed his mind about not presenting evidence on his behalf, it would allow Floyd to reopen his case and present whatever evidence he wished. The following occurred:

***57** "[FLOYD]: I'm ready to get it over with so I'll just continue to represent myself. I ain't going to put on no mitigating factors. I'm ready to get this over with. I'm tired.

"THE COURT: Do you understand the importance of what we're doing here, sir?

"[FLOYD]: You make the decision in the end. That what you said. Regardless of what the jury say—

"THE COURT: The jury makes an—

"[FLOYD]: —they advise you.

"THE COURT: —an advisory. You're focused, you're right. They make a recommendation and I am to consider it. I am not bound by it. I make the final decision. But their decision carries weight now. And as a consequence, you know, if you want to present evidence, anything else.

"The trial itself, where we spent days and days with testimony, they can consider what mitigating factors they may perceive out of that trial. So that, they can remember.

"But furthermore, you have the chance now to call witnesses, to present evidence, to further present what are called mitigating factors as to why they should give you life without instead of the death penalty. And I'm saying to you right now, I'll give you that opportunity this morning if you want to pursue that. That is up to you.

"[FLOYD]: I don't want to pursue it. You're going to make the decision regardless in the end anyway, what you're going to make; so ain't no need in me even going through it.

"THE COURT: I want the record to reflect, I presided over this from the get-go. And, Mr. Floyd, you've always been alert and focused in here. You appear to the Court—and, again, of course I never know what any of the lawyers are talking about at these tables because I'm not close enough to hear, and if for some reason I could, I wouldn't. But I can't hear. I'm hard of hearing anyway.

"But furthermore, I've observed that it appears to me that you have been very alert, very focused, very involved from the very beginning. And yesterday even, in our charge conference, you were showing the fact that you were saying, you move to do this and that. It appeared to me that you had a grasp on what you were doing. And we went through all of these various charges.

"And I just wanted again this morning to revisit that and to give you that opportunity, if you wanted, to withdraw your request to represent yourself, that I'll immediately put them back and reopen the case. And you're telling me, again, that is not what you want.

"[FLOYD]: I'm tired. I'm ready to get it over with; so, I want to finish this up this morning so I can go back to prison.

"THE COURT: Do you understand, sir, what you are doing?

"[FLOYD]: I'm letting you make your decision. I ain't putting on no mitigating factors because you're going to make the decision in the end anyway; so, I'm going to let you make your decision.

"THE COURT: Do you understand what you're doing?

"[FLOYD]: I understand that the jury is going to give you an advisory verdict and you're going to make the decision.

"THE COURT: And we will have another—

"[FLOYD]: Which you're going to make.

"THE COURT: —hearing. And at that other hearing, the jury won't be here. And that will be what we classily call a sentencing hearing. And at the final hearing there will be what's called a presentence report that would be prepared by probation and parole. Be background information about you that would be given to me. And of course you'd have a copy of it.

***58** "At that sentencing hearing I would be available —well, I'd preside over it and both sides could present further information, and even testimony and argument, to me at that sentencing hearing. ...

"At that point in time—and I want to reemphasize to you, at any point if you want to withdraw your request to represent yourself, I will reappoint your lawyers to you.

"[FLOYD]: I withdraw my request after this hearing.

"THE COURT: Well, let's get through this hearing and then I'll have to hear from you at that point in time.

"[FLOYD]: All right.

"THE COURT: But you're clearly telling me at this point you're representing yourself?

"[FLOYD]: Yes, sir.

"THE COURT: Well, you have a constitutional right to ask for representation. But at this point you're not asking for representation?

"[FLOYD]: No, Your Honor.

> "THE COURT: If this hearing is concluded, remember, you always have a right to do that. And you would have to let me know that's what you want to do."

(R. 4124–28.) After the jury returned its penalty-phase verdict, Floyd reinvoked his right to counsel. [20]

In Tomlin v. State, 601 So.2d 124 (Ala. 1991), the Alabama Supreme Court explained:

"In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court held that a defendant has a Sixth Amendment right to represent

himself in a criminal case. In order to conduct his own defense, the defendant must 'knowingly' and 'intelligently' waive his right to counsel, because in representing himself he is relinquishing many of the benefits associated with the right to counsel. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541. The defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." ' Faretta, 422 U.S. at 835, 95 S.Ct. at 2541 (other citations omitted).

"The burden of proof in the present case is on the defendant. When a defendant has clearly chosen to relinquish his right to counsel and has asserted his right to self-representation, and on appeal asserts that he was denied the right to counsel, he has the burden of showing, ' "by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." ' Teske v. State, 507 So.2d 569, 571 (Ala. Cr. App. 1987), quoting Moore v. Michigan, 355 U.S. 155, 161–62, 78 S.Ct. 191, 195, 2 L.Ed.2d 167 (1957). The Supreme Court in Carnley v. Cochran, 369 U.S. 506, 516–17, 82 S.Ct. 884, 890–91, 8 L.Ed.2d 70 (1962), held that when the record clearly shows that a defendant has expressly waived his right to counsel, the burden of proving that his waiver was not made knowingly and intelligently is on the defendant. 'A waiver of counsel can only be effectuated when the defendant asserts a "clear and unequivocal" right to self-representation.' Westmoreland v. City of Hartselle, 500 So.2d 1327, 1328 (Ala. Cr. App. 1986), citing Faretta, 422 U.S. 806, 95 S.Ct. 2525. If the record is not clear as to the defendant's waiver and request of self-representation, the burden of proof is on the State. Carnley, 369 U.S. at 517, 82 S.Ct. at 890–91. Presuming a waiver from a silent record is impermissible. Carnley.

***59** ".....

"Although the Supreme Court in Faretta states that a defendant should be made aware of the dangers and disadvantages of self-representation, the Supreme Court does not require a specific colloquy between the trial judge and the defendant. 'The case law reflects that, while a waiver hearing expressly addressing the disadvantage of a pro se defense is much to be preferred, it is not absolutely necessary. The ultimate test is not the trial court's express advice but rather the defendant's understanding.' Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) (citations omitted). In each case the court needs to look to the particular facts and circumstances involved, 'including the background, experience, and conduct of the accused.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

"This court looks to a totality of the circumstances involved in determining whether the defendant knowingly and intelligently waived his right to counsel. Jenkins v. State, 482 So.2d 1315 (Ala. Cr. App. 1985); King v. State, 55 Ala.App. 306, 314 So.2d 908 (Ala. Cr. App. 1975), cert. denied; Ex parte King, 294 Ala. 762, 314 So.2d 912 (1975).

"The Court of Criminal Appeals looked to factors set out in Fitzpatrick, 800 F.2d 1057, to determine if the waiver in this case was made knowingly and intelligently. ... That court relied upon the following factors:

> " '(1) whether the colloquy between the court and the defendant consisted merely of pro forma answers to pro forma questions, United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919, 98 S.Ct. 2267, 56 L.Ed.2d 760 (1978); (2) whether the defendant understood that he would be required to comply with the rules of procedure at trial, Faretta [v. California, 422 U.S.] at 835–36, 95 S.Ct. at 2541–42; Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 197[6]); (3) whether the defendant had had previous involvement in criminal trials, United States v. Hafen, 726 F.2d 21, 25 (1st Cir.), cert. denied, 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984); (4) whether the defendant had knowledge of possible defenses that he might raise, Maynard, supra; (5) whether the defendant was represented by counsel before trial, Hafen, supra; and (6) whether "stand-by counsel" was appointed to assist the defendant with his pro se defense, see Faretta, supra, at 834 n.46, 95 S.Ct. at 2540–41 n.46; Hance v. Zant, 696 F.2d 940, 950 n.6 (11th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), overruled on other grounds, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985).'
>
> "[Tomlin v. State,] 601 So.2d 120[, 123–24 (Ala. Crim. App. 1989)]."

601 So.2d at 128–29. " 'All factors need not point in the same direction.' " Sibley v. State, 775 So.2d 235,

243 (Ala. Crim. App. 1996), aff'd, 775 So.2d 246 (Ala. 2000) (quoting United States v. Cash, 47 F.3d 1083, 1089 (11th Cir. 1995)). "[A]s long as a defendant, given the 'totality of the circumstances,' understand the dangers and disadvantages of waiving the right to counsel and makes a decision to represent himself at trial ' "with eyes open," ' Faretta, 422 U.S. at 835, 95 S.Ct. 2525 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)), he is entitled to represent himself at trial." Kennedy v. State, 186 So.3d 507, 523 (Ala. Crim. App. 2015).

***60** In this case, Floyd clearly and unequivocally waived his right to counsel during the penalty phase of the trial; therefore, the burden is on Floyd to establish by a preponderance of the evidence that his waiver was not knowing and intelligent. Floyd argues that he had "misconceptions regarding the role of the jury in the capital sentencing process and a clear misunderstanding about the risks associated with the waiver of counsel." (Floyd's brief, p. 46.) Specifically, he argues that his statements to the trial court that he did not believe that there were any risks in representing himself at the penalty phase of the trial, that he did not want to present any mitigating evidence, and that it was the trial court, not the jury, that would impose his sentence establish that he did not understand the importance of the jury's role in capital sentencing. He also argues that, when his alleged confusion regarding the penalty phase of the trial became apparent, "the trial court should have clarified the importance of the jury's verdict" (Floyd's brief, p. 49) but that, instead, the trial court "inaccurately downplayed the importance of the jury's verdict" (Floyd's brief, p. 47) and "minimized the jury" (Floyd's brief, p. 50) by informing Floyd that a separate sentencing hearing would be held by the trial court during which Floyd could present evidence.

Contrary to Floyd's belief, the trial court did not minimize the importance of the jury's role in capital sentencing. Rather, the trial court emphasized that the jury's role was "very important," "very critical," and "very significant" and stated that the penalty phase of the trial was a "very critical time." The trial court properly informed Floyd that the jury's penalty-phase verdict was an advisory verdict and that the court would make the final decision as to sentence after conducting a separate sentencing hearing. The colloquy indicates that Floyd was not confused about the jury's role in the capital-sentencing process but that he fully understood it.

The colloquy was also lengthy and consisted of much more than pro forma questions and pro forma answers. The trial court admonished Floyd against representing himself, explaining that Floyd was unlearned in the law and would be at a "tremendous disadvantage" if he attempted to navigate the complexities of a capital trial without the assistance of counsel. The court told Floyd that it would be "unwise" to represent himself and cautioned Floyd that he would taking on a "grave responsibility" if he did so. The trial court further informed Floyd of what would be expected of him if he represented himself, including that he would have to abide by the rules of court, and, throughout the penalty phase, Floyd demonstrated that he had a sufficient understanding of the proceedings to represent himself. Although he waived opening and closing arguments and presented no evidence on his own behalf, Floyd participated in the lengthy charge conference, held after the conclusion of the State's evidence, and was knowledgeable enough to expressly withdraw several of the requested jury instructions that had been submitted by his counsel on the ground that they were not applicable in light of his decision not to present evidence, to argue in support of other requested charges, to request changes in the wording of yet other requested charges, and to object to one of the State's requested charges and state grounds in support of that objection.

In addition to explaining the capital-sentencing process, the trial court also explained Floyd's right to present mitigating evidence during the penalty phase and, after Floyd rested his case without presenting any evidence, the trial court continued the colloquy, strongly recommending that Floyd present mitigating evidence, emphasizing the importance of mitigating evidence, and repeatedly offering to allow Floyd to reopen his case to present mitigating evidence and/or to withdraw his waiver of his right to counsel. Floyd indicated that he understood his right to present mitigating evidence but that he did not want to "drag" his family to the witness stand and put them through an "emotional roller coaster."

Furthermore, the record reflects that this was not Floyd's first foray into the criminal justice system. Floyd had previously pleaded guilty in 2007 to first-degree rape and attempted first-degree sodomy, had pleaded guilty in 2010 to criminal mischief, and only a few months before his

capital trial, had been convicted for promoting prison contraband. Floyd had been represented by counsel during all of those previous proceedings, and he had been represented by counsel on the capital charge from its inception through the conclusion of the guilt phase of the trial. The trial court also instructed the two attorneys who had represented Floyd during the guilt phase of the trial to remain as stand-by counsel and to assist Floyd during the penalty phase of the trial.

***61** Considering the totality of the circumstances, including the circumstances set forth in Tomlin, supra, we conclude that the record as a whole demonstrates that Floyd's waiver of his right to counsel was knowing, intelligent, and voluntary. Therefore, we find no error on the part of the trial court in allowing Floyd to represent himself during the penalty phase of the trial.

XIX.

Floyd contends the trial court and the prosecutor "repeatedly misinformed the jury" that its penalty-phase verdict was a recommendation. (Issue XXIV in Floyd's brief, p. 98.) Floyd did not raise this issue in the trial court; therefore, we review it for plain error. See Rule 45A, Ala. R. App. P. In Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011), this Court rejected an identical argument:

> "First, the circuit court did not misinform the jury that its penalty phase verdict is a recommendation. Under § 13A–5–46, Ala. Code 1975, the jury's role in the penalty phase of a capital case is to render an advisory verdict recommending a sentence to the circuit judge.[21] It is the circuit judge who ultimately decides the capital defendant's sentence, and, '[w]hile the jury's recommendation concerning sentencing shall be given consideration, it is not binding upon the courts.' § 13A–5–47, Ala. Code 1975. Accordingly, the circuit court did not misinform the jury regarding its role in the penalty phase.
>
> "Further, Alabama courts have repeatedly held that 'the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent of its sentencing authority and that its sentence verdict was "advisory" and a "recommendation" and that the trial court would make the final decision as to sentence does not violate Caldwell v. Mississippi[, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)].' Kuenzel v. State, 577 So.2d 474, 502 (Ala. Crim. App. 1990) (quoting Martin v. State, 548 So.2d 488, 494 (Ala. Crim. App. 1988)). See also Ex parte Hays, 518 So.2d 768, 777 (Ala. 1986); White v. State, 587 So.2d 1236 (Ala. Crim. App. 1991); Williams v. State, 601 So.2d 1062, 1082 (Ala. Crim. App. 1991); Deardorff v. State, 6 So.3d 1205, 1233 (Ala. Crim. App. 2004); Brown v. State, 11 So.3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So.3d 880 (Ala. Crim. App. 2007). Such comments, without more, do not minimize the jury's role and responsibility in sentencing and do not violate the United States Supreme Court's holding in Caldwell."

96 So.3d at 210. We find no error, much less plain error, as to this claim.

XX.

Floyd contends that the prosecutor made improper comments during closing argument at the penalty phase of the trial and during closing argument at the sentencing hearing before the court. (Issues XVIII and XIX in Floyd's brief.) Floyd did not object to any of the comments he now challenges on appeal; therefore, we review his claims for plain error. See Rule 45A, Ala. R. App. P.

> "This court has stated that '[i]n reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' Bankhead v. State, 585 So.2d 97, 106 (Ala. Crim. App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991), aff'd on return to remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So.2d 1146 (Ala. 1993). See also Henderson v. State, 583 So.2d 276, 304 (Ala. Crim. App. 1990), aff'd, 583 So.2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). 'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' Bankhead, 585 So.2d at 107, quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). 'A prosecutor's statement must

be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' Roberts v. State, 735 So.2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So.2d 1270 (Ala.), cert. denied, 5[2]8 U.S. 939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead, 585 So.2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, McCullough v. State, 357 So.2d 397, 399 (Ala. Crim. App. 1978), and that court is given broad discretion in determining what is permissible argument.' Bankhead, 585 So.2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. Id."

***62** Ferguson v. State, 814 So.2d 925, 945–46 (Ala. Crim. App. 2000), aff'd, 814 So.2d 970 (Ala. 2001).

A.

Floyd first contends that, during closing argument at the penalty phase of the trial and during closing argument at the sentencing hearing before the court, the prosecutor improperly urged the jury and the trial court to consider Floyd's future dangerousness as a nonstatutory aggravating circumstance supporting a death sentence.

During penalty-phase closing argument, the prosecutor argued that four aggravating circumstances had been proven beyond a reasonable doubt—that the murder had been committed during the course of a burglary, that Floyd had been on probation at the time of the murder, that Floyd had previously been convicted of a crime of violence, and that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses; that the process of weighing the aggravating circumstances and the mitigating circumstances is not about the number of those circumstances; and that the jury's penalty-phase verdict, although only a recommendation, would carry considerable weight with the trial court in determining the proper sentence. The prosecutor then stated:

"I want you to think for a minute about the reasons we have punishment in our criminal system. I submit to you there are three reasons that we have punishment in our criminal system. Number one is rehabilitation. Will this punishment change an individual's behavior and make him a good citizen? Ladies and gentlemen, this man is a woman abuser. He's a rapist. He's now a convicted murderer. He is evil. Is rehabilitation appropriate in this case? I submit to you that it is not."

(R. 4143; emphasis on portion of argument complained of by Floyd.) The prosecutor then argued that the other two reasons for punishment—retribution and deterrence—were applicable in this case, and he urged the jury to recommend a death sentence.

During closing argument at the sentencing hearing before the court, the prosecutor presented a similar argument. The prosecutor argued that four aggravating circumstances had been proven beyond a reasonable doubt and that a sentence of life imprisonment without the possibility of parole was "not punishment enough in this case." (R. 4401.) The prosecutor then stated:

"Cedric Floyd has embarked upon a lifelong journey of violating laws, violating the rights of others, and conducting himself in a way that is contrary to the societal norms that the rest of us try so hard every single day to live by. Even when incarcerated for capital murder he managed to incur an escape and two promoting prison contraband charges. He has shown time after time that he cares nothing about right and wrong or good choices or bad choices. He cares nothing about causing the death of Tina Jones. He cares nothing about the laws that govern his behavior. He only cares about himself.

"If he is sentenced to life without parole, he'll have nothing to lose. He has already said as much. We will never hear the end of Cedric Floyd if he is sentenced to life without parole. He will be in our faces every single day of his life sentence. Why? Because this is his personality. This is who he is.

***63** "We saw his personality on full display every single day of the three-and-a-half week trial. He will spend every waking moment of his life sentence creating problems for prison personnel and inmates. Nothing would be good enough

> for him. He will file every lawsuit possible. He may even kill again while he is in prison on a life without parole sentence. What's to stop him? What does he have to lose?"

(R. 4402–04; emphasis on portion of argument complained of by Floyd.) The prosecutor then argued that "[t]he aggravating circumstances proved beyond a reasonable doubt in this case far outweigh[ ] the mitigating factors that have been asserted by the defense here today" and requested that Floyd be sentenced to death. (R. 4404.)

When viewed in their entirety and in the context of the entire trial, the prosecutor's complained-of remarks did not urge the jury or the trial court to impermissibly consider a nonstatutory aggravating circumstance to support a death sentence. Rather, the remarks were proper argument about Floyd's criminal history and future dangerousness and what weight should be afforded the aggravating circumstances that the State had proven. Although future dangerousness is not an aggravating circumstance under § 13A–5–49, Ala. Code 1975, "future dangerousness [is] a subject of inestimable concern at the penalty phase of the trial" and evidence and argument about future dangerousness are permissible. McGriff v. State, 908 So.2d 961, 1013 (Ala. Crim. App. 2000), rev'd on other grounds, 908 So.2d 1024 (Ala. 2004). See also Whatley v. State, 146 So.3d 437, 481–82 (Ala. Crim. App. 2010) (holding that evidence of a capital defendant's future dangerousness is admissible during the penalty phase of the trial under § 13A–5–45(d), Ala. Code 1975); and Arthur v. State, 575 So.2d 1165, 1185 (Ala. Crim. App. 1990) (holding that prosecutor's remark during penalty phase of capital trial that the defendant would kill again if given the chance was "proper because [it] concerned the valid sentencing factor of [the defendant's] future dangerousness.").

We find no error, much less plain error, in the complained-of remarks by the prosecutor.

B.

Floyd also contends that, during closing argument at sentencing hearing before the court, the prosecutor improperly argued "that Mr. Floyd's assertion of his right not to testify at trial was evidence he lacked remorse." (Floyd's brief, p. 92.) Floyd cites to a single page number in the record in support of this argument. On that page, the prosecutor stated:

> "Cedric Floyd, with three deadly bullets, took a precious life and destroyed an entire family. Yet he sat here in this courtroom for three and a half weeks and never once displayed any remorse for his deadly acts. He was cold and uncaring. His behavior was more about whether he was comfortable, whether he had a pen to write with, whether the handcuffs were too tight or the leg brace was too tight or constricting or whether the stun vest or belt was too tight. He appeared to behave in a manner that would suggest that this was all a game to him of whether he could out-best the sheriff's department rather then conduct himself in a manner that showed remorse or that he appreciated the seriousness of his crime."

(R. 4401.)

It is abundantly clear that the prosecutor was not commenting, either directly or indirectly, on Floyd's failure to testify. Rather, the prosecutor's remarks were proper argument that Floyd's demeanor and behavior throughout the trial reflected no remorse. "[A] prosecutor may properly comment on a capital defendant's lack of remorse." Smith v. State, 112 So.3d 1108, 1145 (Ala. Crim. App. 2012). Moreover, " '[t]he conduct of the accused or the accused's demeanor during the trial is a proper subject of comment.' " Thompson v. State, 153 So.3d 84, 175 (Ala. Crim. App. 2012) (quoting Wherry v. State, 402 So.2d 1130, 1133 (Ala. Crim. App. 1981)). There was no error, much less plain error, in the complained-of remark by the prosecutor.

XXI.

***64** Floyd contends that the trial court erred in refusing several of his requested jury instructions during the penalty phase of the trial. (Issues XV and XVI in Floyd's brief.)[22]

A trial court's denial of requested jury instructions is reviewed for an abuse of discretion. See Scott v. State, 163 So.3d 389, 457–58 (Ala. Crim. App. 2012). "The refusal of a requested written instruction, although a

correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in other charges given at the request of the parties." Rule 21.1, Ala. R. Crim. P. " 'This principle applies even where "the actual language of the requested charge is not employed in the oral charge," and even where the requested charge "may be preferred as a statement of the law over a given charge." ' " Freeman v. State, 722 So.2d 806, 810 (Ala. Crim. App. 1998) (quoting Malphurs v. State, 615 So.2d 1310, 1313 (Ala. Crim. App. 1993)). "The trial court may [also] refuse to give a requested jury charge when the charge is ... confusing, misleading, ungrammatical, not predicated on a consideration of the evidence, argumentative, abstract, or a misstatement of the law." Jones v. State, [Ms. CR–14–1332, April 29, 2016] —— So.3d ——, —— (Ala. Crim. App. 2016).

A.

Floyd contends that the trial court erred in refusing to instruct the jury that he was "presumed innocent of the aggravating circumstances." (Floyd's brief, p. 89.) Floyd submitted two written charges in this regard, both of which included substantially similar language that the jury was required to "presume" that Floyd was "innocent of each aggravating circumstance" and that the presumption of innocence was "sufficient to justify a finding that no aggravating circumstances exist." (C. 2127; 2166.) The trial court denied both requested charges on the ground that the State's burden of proving aggravating circumstances beyond a reasonable doubt would be covered by the court's oral charge, and on the ground that the instructions were not accurate statements of the law and would confuse the jury. The trial court was correct.

In Gaddy v. State, 698 So.2d 1100 (Ala. Crim. App. 1995), aff'd, 698 So.2d 1150 (Ala. 1997), this Court upheld the trial court's refusal of a similar instruction, stating:

> "Under the facts of this case, the requested charge was not a correct statement of the law. The jury had already found the appellant guilty of committing intentional murder during the course of a robbery. '[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.' § 13A–5–45(e), Code of Alabama 1975. Therefore, the jury's verdict had already established beyond a reasonable doubt at least one aggravating circumstance for sentencing purposes, specifically that the murder was committed during the course of robbery as set forth in § 13A–5–49(4), Code of Alabama 1975. 'In obtaining the appellant's conviction, the state proved the aggravating circumstance that the murder was committed during the course of a robbery. See Kuenzel [v. State], 577 So.2d [474,] 486–87 [(Ala. Crim. App. 1990)].' Taylor v. State, 666 So.2d 36, 70 (Ala. Crim. App. 1994). Therefore, because at least one aggravating circumstance was already established by the verdict, the appellant's requested charge was improper."

***65** 698 So.2d at 1140–41.

Similarly, here, the aggravating circumstance that the murder had been committed during the course of a burglary had already been proven beyond a reasonable doubt by virtue of the jury's guilt-phase verdict finding Floyd guilty of the capital charge in the indictment, and, thus, Floyd was not "presumed innocent" of that aggravating circumstance, and the jury was not permitted to find that no aggravating circumstance existed. Moreover, the court's oral charge to the jury accurately and thoroughly explained that the burden of proof was on the State to prove beyond a reasonable doubt the existence of aggravating circumstances.

Because the requested charges were incorrect statements of the law and would have been confusing and misleading to the jury, we find no error in the trial court's refusal of these instructions.

B.

Floyd also contends that the trial court erred in "refus[ing] to limit the jury's discretion to only those aggravating circumstances that were listed in the court's instructions," thereby permitting the jury to consider "invalid aggravators." (Floyd's brief, p. 89.) In support of this argument, Floyd cites three of his requested charges that were refused by the trial court.

First, Floyd requested the following charge:

> "In determining the appropriate punishment to set for Mr. Floyd, the law limits you to considering only those aggravating circumstances (1) that are described to you by the Court and (2) that the prosecution has proved beyond a reasonable doubt. Other than the specific aggravating circumstances given to you by this Court, you may not consider any other facts or circumstances as the basis for deciding that the death penalty would be the appropriate punishment for Mr. Floyd."

(C. 2130.) The trial court refused this charge on the ground that its general substance would be covered by the court's oral charge and that the court's charge would be "simpler and more clear" than the requested charge. (R. 4090.) The trial court was correct. This charge was confusing and was, at least in part, an incorrect statement of the law. The charge prohibits the jury from considering "any other facts or circumstances" other than the aggravating circumstances proffered by the State in reaching its sentencing recommendation. Although a jury is prohibited from finding the existence of any aggravating circumstances not specified by statute and proffered by the State, it is certainly free to consider all the facts and circumstances of the case in determining what weight to afford the aggravating circumstances it finds to exist as well as what weight to afford any mitigating circumstances it finds to exist.

Floyd also requested the following charge:

> "Only those factors that are applicable on the evidence adduced at trial are to be taken into account in the penalty determination. All factors may not be relevant and a factor that is not relevant to the evidence in a particular case should be disregarded. The absence of a statutory mitigating factor does not constitute an aggravating factor."

***66** (C. 2162.) The court refused this charge on the ground that it was "way too confusing" and that the general sentiment underlying the charge would be covered by the court's charge. (R. 4108.) We agree. This charge was confusing and misleading. It is unclear from the charge itself whether the word "factors" referred to aggravating circumstances, to mitigating circumstances, or to the facts and evidence in the case, and, yet, the charge instructs the jury to "disregard" any "factor that is not relevant to the evidence." Moreover, assuming that the word "factors" referred to aggravating circumstances, the instruction in no way limits the jury's consideration of aggravating circumstances to those proffered by the State, as Floyd argues on appeal, but instead appears to arbitrarily instruct the jury to disregard those aggravating circumstances.

Floyd also requested the following charge:

> "The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence that has been presented regarding Mr. Floyd's background may only be considered by you as mitigating evidence."

(C. 2164.) The court refused this charge on the ground that it was confusing and an incorrect statement of the law under the facts in this case. The trial court was correct. This charge instructs the jury to consider Floyd's background solely in mitigation. However, in support of the aggravating circumstances that Floyd had previously been convicted of a felony involving violence or the threat of violence and that he was under a sentence of imprisonment at the time of the murder, the State presented evidence that Floyd had three prior convictions. Floyd's prior convictions were clearly part of his background and supported a finding of two aggravating circumstances. Floyd's background was not solely mitigating.

Moreover, we have thoroughly reviewed the trial court's penalty-phase instructions, and we conclude that the court's instructions on aggravating circumstances properly conveyed to the jury that aggravating circumstances were limited to the four circumstances proffered by the State. The court instructed the jury, in relevant part:

> "Now an aggravating circumstance is a circumstance specified by law that indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole.
>
> "Now the issue at this sentencing hearing concerns the existence of aggravating and mitigating circumstances which you should weigh against each other to determine the punishment that you would recommend.
>
> "Your verdict recommending a sentence should be based upon the evidence that you've heard while

deciding the guilt or innocence of the defendant and the evidence that has been provided in this proceeding.

"I, as a trial judge, must consider your verdict recommending a sentence in making a final decision regarding the defendant's sentence. I must consider it.

"Now the defendant has been convicted of capital murder during a burglary in the first degree. This offense necessarily includes an element of an aggravating circumstance as provided by the law of this State. ...

"The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a burglary.

"By law, the finding that the defendant was guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether to recommend a sentence of life without eligibility for parole or death.

***67** "....

> "The additional aggravating circumstances proffered by the State that you may consider are limited as follows."

(R. 4147–49; emphasis added.) The trial court then explained the three additional aggravating circumstances proffered by the State—that Floyd was under a sentence of imprisonment at the time of the murder; that Floyd had previously been convicted of a felony involving the use or threat of violence; and that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. Thereafter, the trial court instructed the jury:

"Now if, after considering all of the evidence, both from the trial, the guilt phase, the first matter that we concluded the first of this week, and after considering that and this penalty phase, all of this evidence, if you are convinced of the existence of any of the proffered aggravating circumstances beyond a reasonable doubt, it will then be your duty to consider that aggravating circumstance or circumstances during your sentencing deliberations. However, if you have a reasonable doubt about any of the proffered aggravating circumstances, you should not consider those aggravating circumstances during your sentencing deliberations."

(R. 4152–53.)

The trial court's instructions substantially tracked the Alabama Pattern Jury Instructions: Criminal, Capital Murder, Penalty Phase, Appendix A, Capital Offenses Containing an Aggravating Circumstance Established by the Guilt–Phase Verdict, Murder During Burglary in the First or Second Degree (or Attempt Thereof)—Necessary Aggravating Circumstances, §§ 13A–5–40(a)(4), 13A–5–49(4), and 13A–5–50, Ala. Code 1975 (adopted November 9, 2007) (currently found at http://judicial.alabama.gov/library/jury_instructions_cr.cfm), which is the preferred practice, see Issue XXII.A., infra, and, when viewed in their entirety, the instructions properly limited the jury's consideration of aggravating circumstances to those "specified by law" and "proffered" by the State. See, e.g., Phillips v. State, [Ms. CR–12–0197, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

Floyd's requested instructions were confusing, misleading, or incorrect statements of the law, and the general substance of those requested instructions was adequately covered by the court's oral charge. Therefore, we find no error in the trial court's refusal of these requested instructions.

C.

Floyd contends that the trial court erred in refusing the following requested charge:

"I will state for you some of the circumstances of this case that the law recognizes as mitigating factors. You must consider all the factors I state to you as mitigating circumstances. The weight that you give to a particular mitigating circumstance is a matter for your moral and legal judgment. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

> "In other words, if I instruct you that situation 'X' is a mitigating circumstance for you to consider, the weight you give to it is for your moral and factual judgment but you may not refuse to consider 'X' as a mitigating circumstance."

***68** (C. 2133.)

The trial court refused this charge on the ground that it was "too confusing" and that the jury's duty with respect to mitigating circumstances would be covered by the court's oral charge. (R. 4092.) We agree. This charge was not only confusing, it was an incorrect statement of the law because it required the jury to find that all the mitigating circumstances included in the court's charge existed and to give those mitigating circumstances at least some weight. "While Lockett[v.Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority." Bankhead v. State, 585 So.2d 97, 108 (Ala. Crim. App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991), opinion after remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So.2d 1146 (Ala. 1993). We find no error in the trial court's refusal of this charge. See, e.g., Newton v. State, 78 So.3d 458, 479–80 (Ala. Crim. App. 2009) (upholding the refusal of requested instructions that required the jury to find certain evidence to constitute mitigating circumstances).

D.

Floyd contends that the trial court erred in refusing to instruct the jury that it could consider as a mitigating circumstance any circumstance that " 'may stem from any of the diverse frailties of human kind' " and any " 'fact which justifies a sentence less than death based on fairness, compassion, or mercy.' " (Floyd's brief, p. 88; citations omitted.) The trial court refused the requested charges on the ground that the jury's ability to find the existence of mitigating circumstances from any fact or circumstance regarding the crime and Floyd would be covered by the court's oral charge. The trial court was correct.

To the extent that the requested instructions informed the jury that it could consider any fact or circumstance about the crime or Floyd as a mitigating circumstance, the instructions were fairly and substantially covered by the court's oral charge. The trial court charged the jury on the statutory mitigating circumstances in § 13A–5–51, Ala. Code 1975, and then stated:

> "Now mitigating circumstances shall also include any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance or circumstances the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. And you may consider the evidence, and as I say, even back to the beginning of the trial that started this matter as you determine mitigating circumstances.
>
> "Now, let me keep going here a little bit.
>
> > "As I said, the laws of this State provide that mitigating circumstances shall not be limited to—I read out seven of them. And that was in the statute. But there, again, they're not limited to just those but shall include any aspect of the defendant's character or background or any circumstances regarding the—surrounding the offense, and any other relevant mitigating evidence that he offers as support for a sentence of life imprisonment without parole."

***69** (R. 4159.) The trial court's instructions were substantially similar to the Alabama Pattern Jury Instructions: Criminal, Capital Murder, Penalty Phase (adopted November 9, 2007) (currently found at http://judicial.alabama.gov/library/jury_instructions_cr.cfm), which is the preferred practice, see Issue XXII.A., infra, and properly and adequately

informed the jury that it could consider any fact or circumstance regarding the crime and Floyd as mitigating.

To the extent that Floyd is arguing that the trial court should have given his requested charge that the jury could consider as a mitigating circumstance any fact that "in fairness, compassion, or mercy justifies a sentence less than death" (C. 2171), because that charge referenced mercy, his argument is meritless.

> "Mercy, defined as '[c]ompassionate treatment,' is not an aspect of a defendant's character or record or a circumstance of the offense. Black's Law Dictionary 1137 (10th ed. 2014). Rather, mercy is what a capital defendant seeks from the jury, i.e., a sentence recommendation of life in prison without the possibility of parole as opposed to death. For that reason, ' "[m]ercy" is not a mitigating circumstance under Alabama law.' Hosch v. State, 155 So.3d 1048, 1109 (Ala. Crim. App. 2013). Because mercy is not a mitigating circumstance, ' " 'Alabama courts have held that capital defendants are not entitled to jury instructions on mercy[,]' Burgess v. State, 723 So.2d 742, 769 (Ala. Crim. App. 1997) [, and] '[a] juror may not arbitrarily consider mercy when deciding whether a defendant should be sentenced to death or life imprisonment without the possibility of parole.' Blackmon v. State, 7 So.3d 397, 438 (Ala. Crim. App. 2005)." ' Hosch, 155 So.3d at 1110 (quoting Albarran v. State, 96 So.3d 131, 210–11 (Ala. Crim. App. 2011))."

Townes v. State, [Ms. CR–10–1892, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

We find no error in the trial court's refusal of these requested charges.

E.

Finally, Floyd contends that the trial court erred in refusing to instruct the jury on residual doubt as a mitigating circumstance. However, both this Court and the Alabama Supreme Court have repeatedly held that residual doubt is not a mitigating circumstance. See, e.g., Ex parte Lewis, 24 So.3d 540, 542–44 (Ala. 2009); Riley v. State, 166 So.3d 705, 746–47 (Ala. Crim. App. 2013); Petric v. State, 157 So.3d 176, 232–35 (Ala. Crim. App. 2013); Gobble v. State, 104 So.3d 920, 981–82 (Ala. Crim. App. 2010); Sharifi v. State, 993 So.2d 907, 945–46 (Ala. Crim. App. 2008); Benjamin v. State, 940 So.2d 371, 382–83 (Ala. Crim. App. 2005); Bryant v. State, 951 So.2d 732, 744–45 (Ala. Crim. App. 2003); and Melson v. State, 775 So.2d 857, 898–99 (Ala. Crim. App. 1999), aff'd, 775 So.2d 904 (Ala. 2000). The trial court did not err in refusing Floyd's requested instruction on residual doubt.

XXII.

Floyd contends that three of the trial court's jury instructions during the penalty phase of the trial were erroneous. (Issues IX and XXIV in Floyd's brief.) Floyd did not object to any of the instructions he now challenges on appeal; therefore, we review these claims for plain error. See Rule 45A, Ala. R. App. P.

"A trial court has broad discretion in formulating its jury instructions, provided those instructions accurately reflect the law and the facts of the case." Pressley v. State, 770 So.2d 115, 139 (Ala. Crim. App. 1999), aff'd, 770 So.2d 143 (Ala. 2000). A "jury charge must be construed as a whole and the language must be construed reasonably." Ingram v. State, 779 So.2d 1225, 1258 (Ala. Crim. App. 1999), aff'd, 779 So.2d 1283 (Ala. 2000). " 'Hypercriticism should not be indulged in construing charges of the court ...; nor fanciful theories based on the vagaries of the imagination advanced in the construction of the court's charge.' " Pressley, 770 So.2d at 139 (quoting Addington v. State, 16 Ala.App. 10, 19, 74 So. 846 (1916)). "[W]e must evaluate instructions like a reasonable juror may have interpreted them." Ingram, 779 So.2d at 1258. A court's charge "must be given a reasonable—not a strained—construction," Williams v. State, 710 So.2d 1276, 1305 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), and " 'must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.' " Self v. State, 620 So.2d 110, 113 (Ala. Crim. App. 1992) (quoting Porter v. State, 520 So.2d 235, 237 (Ala. Crim. App. 1987)). "When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them." Johnson v. State, 820 So.2d 842, 874 (Ala. Crim. App. 2000), aff'd, 820 So.2d 883 (Ala. 2001). Moreover, plain error in jury instructions " 'occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner.' " Williams, 710 So.2d at 1306

(quoting United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993)).

A.

***70** Floyd contends that the trial court's instructions on the aggravating circumstance that the murder was especially heinous, atrocious, or cruel compared to other capital offenses "failed to constitutionally limit the jury's discretion." (Floyd's brief, p. 67.) Floyd makes two arguments in this regard. However, before we address those arguments, we first make two observations that are relevant to our review of Floyd's claims.

First, the bulk of the trial court's instructions on the aggravating circumstance that the murder was especially heinous, atrocious, or cruel were identical to the Alabama Pattern Jury Instructions: Criminal, Capital Murder, Penalty Phase, Appendix B, Aggravating Circumstances, §§ 13A–5–49 and 13A–5–50, Ala. Code 1975 (adopted November 9, 2007) (currently found at http://judicial.alabama.gov/library/jury_instructions_cr.cfm). The trial court instructed the jury:

> "The State has alleged the capital offense—or proffered—was especially heinous, atrocious, or cruel compared to other capital offenses.
>
> "The term heinous means extremely wicked or shockingly evil. The term atrocious means outrageously wicked or violent. The term cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> "For a capital offense to be especially heinous or atrocious, any brutality that is involved in it must exceed that which is normally present in any capital offense.
>
> "For a capital offense to be especially cruel, it must be a pitiless crime that is unnecessarily torturous to the victim, either physically or psychologically.
>
> > "All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness, or cruelty exceeds that which will always exist when a capital offense is committed."

(R. 4150–51.) At the request of the State, the trial court further instructed the jury:

> "One factor that is indicative of especially heinous, atrocious, or cruel aggravating factor for capital murder is the infliction on the victim of physical violence beyond that necessary or sufficient to cause death.
>
> "Factor [sic] that is considered especially indicative of heinous, atrocious, or cruel aggravating circumstance is the infliction of psychological torture, which can be inflicted by leaving the victim in his last moments aware of, but helpless to prevent impending death.
>
> > "Evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel."

(R. 4170–71.)

"It is the preferred practice to use the pattern jury instructions in a capital case." Ex parte Hagood, 777 So.2d 214, 219 (Ala. 1999). "A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error." Price v. State, 725 So.2d 1003, 1058 (Ala. Crim. App. 1997), aff'd, 725 So.2d 1063 (Ala. 1998). "This Court, as well as the Supreme Court, has generally declined to find plain error when the trial court gives an instruction materially identical to the pattern jury instructions." Lewis v. State, 24 So.3d 480, 526 (Ala. Crim. App. 2006), aff'd, 24 So.3d 540 (Ala. 2009). Following an accepted pattern instruction, however, does not preclude a finding of error:

> "While most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those pattern charges

would be misleading or erroneous. In those situations, trial courts should deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case. Similarly, while there will likely be few instances in which the giving of a pattern instruction would be plainly erroneous in a capital case, we do not foreclose that possibility. For that reason, a trial court must diligently scrutinize the jury charges it gives—even pattern charges—on a case-by-case basis to ensure that they properly instruct the jury in accordance with applicable statutes and case law."

***71** Ex parte Wood, 715 So.2d 819, 824 (Ala. 1998). Thus, we review Floyd's claims bearing in mind that the trial court's following the pattern instruction weighs heavily against Floyd.

Second, this Court has upheld instructions virtually identical to the instruction given in this case against a variety of challenges. See, e.g., Luong v. State, 199 So.3d 173, 216 (Ala. Crim. App. 2015) (upholding a nearly identical instruction against a challenge that the instruction "did not sufficiently limit the jury's application of this aggravating circumstance"); Minor v. State, 914 So.2d 372, 437 (Ala. Crim. App. 2004) (upholding a nearly identical instruction against a challenge that the instruction was insufficient to " 'minimize the risk of wholly arbitrary and capricious action' "); Stallworth v. State, 868 So.2d 1128, 1167 (Ala. Crim. App. 2001) (upholding a nearly identical instruction against a challenge that it " 'did not channel the jury's discretion adequately' "); Hall v. State, 820 So.2d 113, 146 (Ala. Crim. App. 1999), aff'd, 820 So.2d 152 (Ala. 2001) (upholding a nearly identical instruction against a challenge that the instruction was overbroad); and McWilliams v. State, 640 So.2d 982, 996 (Ala. Crim. App. 1991), aff'd in pertinent part, remanded on other grounds, 640 So.2d 1015 (Ala. 1993), opinion after remand, 666 So.2d 89 (Ala. Crim. App.), aff'd, 666 So.2d 90 (Ala. 1995) (upholding a nearly identical instruction against a challenge that the instruction was "too vague to adequately guide the jury"). The fact that the court's instructions in this case have been repeatedly upheld by this Court also weighs heavily against Floyd.

1.

Floyd first argues that the trial court's instructions failed to limit the jury's discretion because, he says, the court failed to instruct the jury that the victim had to be " 'conscious or aware' " for " 'an appreciable lapse of time' sufficient to cause prolonged suffering" in order to find that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses. (Floyd's brief, p. 68–9.)

The aggravating circumstance that the murder was especially heinous, atrocious, or cruel "appl[ies] to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1981), abrogated on other grounds by Ex parte Stephens, 982 So.2d 1148 (Ala. 2006). In Norris v. State, 793 So.2d 847, 854–62 (Ala. Crim. App. 1999), this Court recognized three factors that are particularly indicative that a capital offense was especially heinous, atrocious, or cruel: (1) the infliction on the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after the assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim. This Court noted that under all three factors, "the critical inquiry" is whether the victim was "conscious or aware" for "an appreciable lapse of time, sufficient enough to cause prolonged suffering." Norris, 793 So.2d at 854–61.

However, Floyd has cited no authority, and we have found none, that requires a trial court to instruct the jury on the specifics of the factors in Norris, supra, that the victim must be aware or conscious for an appreciable period in order for a murder to be especially heinous, atrocious, or cruel. Although this Court has upheld instructions that included that language, see Albarran v. State, 96 So.3d 131, 207–08 (Ala. Crim. App. 2011), this Court has also found no error in instructions that did not include that language, see Luong v. State, 199 So.3d 173, 216–17 (Ala. Crim. App. 2015). The trial court's instructions here followed the standard set forth in Ex parte Kyzer, supra, and, with the exception of that portion of the instructions requested by the State, were materially identical to the approved pattern instructions. Moreover, the additional instructions requested by the State clearly stated that the victim had to be "aware of" impending death and that the victim's fear was a factor that could be considered, thus indicating that the victim did, in fact, have to be conscious and aware for some period of time for the murder to have

been especially heinous, atrocious or cruel. Therefore, we find no error, much less plain error, as to this claim.

2.

***72** Floyd also contends that the trial court's instructions failed to limit the jury's discretion because the trial court used the disjunctive "or" when defining heinous, atrocious, or cruel. Specifically, Floyd argues that the trial court properly defined the terms heinous, atrocious, and cruel, "but only instructed the jury on the requirement that the killing be 'unnecessarily torturous to the victim' when defining 'cruelty,' " thereby permitting the jury "to find this aggravator merely if the offense was heinous or atrocious, without requiring the 'unnecessarily torturous' finding." (Floyd's brief, p. 70.) Floyd relies on Thomas v. State, 824 So.2d 1 (Ala. Crim. App. 1999), overruled on other grounds by Ex parte Carter, 889 So.2d 528 (Ala. 2004), in support of this claim.

In Thomas, the trial court instructed the jury: " 'In considering the aggravating circumstance that the homicide is heinous, atrocious or cruel when compared to other capital offenses is [sic] confined to those homicides which are consciousless [sic] or pitiless or which are unnecessarily tortuous [sic] to the victim.' " 824 So.2d at 70. This Court held that the instruction improperly "allowed the jury to find this aggravating circumstance under a much broader definition than approved, i.e., without a finding that the murder was unnecessarily torturous." 824 So.2d at 71. The trial court's instruction in this case did not contain the flaw that was contained in the instruction in Thomas. In contrast to the instruction in Thomas, the trial court in this case instructed the jury, when explaining the term "cruel," that the murder "must be a pitiless crime that is unnecessarily torturous to the victim." (R. 4150; emphasis added.) The court's instruction here clearly required the murder to be pitiless and unnecessarily torturous for the aggravating circumstance that the murder was heinous, atrocious or cruel when compared to other capital offenses to apply. See Slaton v. State, 680 So.2d 879, 902–903 (Ala. Crim. App. 1995), aff'd, 680 So.2d 909 (Ala. 1996) (holding that instruction that the jury " 'should not find or consider this aggravating circumstance unless you find that this particular capital offense involved a conscienceless or pitiless crime which was unnecessarily torturous to the victim' " did not impermissibly allow the jury to find that the murder was especially heinous, atrocious, or cruel "without finding that the murder was unnecessarily torturous"). Therefore, Thomas is not controlling.

Rather, this Court's opinion in Kelley v. State, [Ms. CR–10–0642, September 5, 2014] —— So.3d —— (Ala. Crim. App. 2014), rev'd on other grounds, [Ms. 1131451, November 6, 2015] —— So.3d —— (Ala. 2015), controls. In Kelley, this Court upheld a nearly identical jury instruction against the same challenge Floyd now makes. We explained:

> "Kelley first argues that a portion of the circuit court's instructions improperly allowed the jury to find that his crime was especially heinous, atrocious, or cruel without finding that the crime was conscienceless or pitiless and unnecessarily torturous to the victim. To support his argument, Kelley cites the following portion of the circuit court's instructions:
>
> > " 'For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in a capital offense. For a capital offense to be especially cruel it must be conscienceless or a pitiless crime which is unnecessarily torturous to the victim.'
>
> "(R. 963.) Kelley argues that this portion of the circuit court's instructions improperly informed the jury that to find that his crime was ' "especially cruel" [it was] required to find that the offense was also "conscienceless or pitiless" and "unnecessarily torturous to the victim" '; however, the instructions allowed the jury to find that the crime was ' "especially heinous" ' or ' "especially atrocious" ' without finding that the crime was conscienceless or pitiless and unnecessarily torturous to the victim. (Kelley's brief, at 82–85.) According to Kelley, the circuit court's instructions allowed the jury to find that the especially heinous, atrocious, or cruel aggravating circumstance existed under an ' "especially heinous" ' or an ' "especially atrocious" ' theory if the jury determined that the 'brutality which is involved in it [exceeded] that which is normally present in a capital offense,' thus alleviating the necessity that the jury determine that the crime was unnecessarily torturous. (Kelley's brief, at 82–85.)
>
> ***73** "....

> "Here, the circuit court's instruction that 'for a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in a capital offense' was nothing more than another way of explaining that the acts committed during the murder must fall within one of the factors establishing that the murder was unnecessarily torturous, i.e., that the acts resulting in death involved the infliction of violence beyond that necessary to cause death, involved suffering by the victim, or involved psychological torture. For that reason, this Court has held that identical jury 'instructions on this issue were both thorough and accurate.' Stallworth v. State, 868 So.2d 1128, 1168 (Ala. Crim. App. 2001) (approving the circuit court's instruction that '[f]or a capital offense to be especially heinous or atrocious, any brutality involved in it must exceed that which is normally present in any capital offense [and] [f]or a capital offense to be especially cruel, it must be a conscienceless or pitiless crime which is unnecessarily torturous to the victim'); Hall v. State, 820 So.2d 113, 147 (Ala. Crim. App. 1999) ('commend[ing] the trial court for its thorough instruction on the definition of the term "especially heinous, atrocious, or cruel" ' where the trial court instructed the jury that for a capital offense to be especially heinous or atrocious, any brutality that is involved must exceed that which is normally present in any capital offense and for a capital offense to be especially cruel, it must be a conscienceless or a pitiless crime that is unnecessarily torturous to the victim); see also Broadnax v. State, 825 So.2d 134, 210 (Ala. Crim. App. 2000) (approving the same instruction on the especially heinous, atrocious, or cruel aggravating circumstance). Because the circuit court, like the court in Stallworth, properly instructed the jury regarding the definition of the especially heinous, atrocious, or cruel aggravating circumstance, no error, much less plain error, occurred. Rule 45A, Ala. R. App. P."

—— So.3d at ——. We find no error, much less plain error, as to this claim.

B.

Floyd also contends that the trial court erred in instructing the jury pursuant to § 13A–5–45(e), Ala. Code 1975, [23] that the aggravating circumstance that the murder had been committed during the course of a burglary had already been proven beyond a reasonable doubt by virtue of the jury's guilt-phase verdict. While recognizing caselaw to the contrary, Floyd argues that "double counting" burglary as both an element of the offense and as an aggravating circumstance is unconstitutional and that the trial court erred in instructing the jury in this regard.

***74** The practice of "double counting" has been repeatedly upheld against a variety of challenges. See Lowenfield v. Phelps, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Ex parte Windsor, 683 So.2d 1042, 1060 (Ala. 1996); Phillips v. State, [Ms. CR–12–0197, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015); Scott v. State, 163 So.3d 389, 461 (Ala. Crim. App. 2012); Whatley v. State, 146 So.3d 437, 489 (Ala. Crim. App. 2010); Harris v. State, 2 So.3d 880, 926–27 (Ala. Crim. App. 2007); McGowan v. State, 990 So.2d 931, 996 (Ala. Crim. App. 2003); and Clark v. State, 896 So.2d 584, 644–45 (Ala. Crim. App. 2000) (opinion on return to remand and on application for rehearing), and the cases cited therein. A trial court does not err in instructing the jury in accordance with § 13A–5–45(e), Ala. Code 1975, when an aggravating circumstance is also an element of the capital offense. See Luong v. State, 199 So.3d 173, 217–18 (Ala. Crim. App. 2015); Brown v. State, 74 So.3d 984, 1037 (Ala. Crim. App. 2010), aff'd, 74 So.3d 1039 (Ala. 2011); Maples v. State, 758 So.2d 1, 78–80 (Ala. Crim. App.), aff'd, 758 So.2d 81 (Ala. 1999); and Lawhorn v. State, 581 So.2d 1159, 1170 (Ala. Crim. App. 1990), aff'd, 581 So.2d 1179 (Ala. 1991). Therefore, we find no error, much less plain error, in the trial court's instruction in this regard.

C.

Finally, Floyd contends that the trial court erred in instructing the jury, at the State's request, as follows:

> "And I charge you, ladies and gentlemen of the jury, that voluntary intoxication does not constitute the mitigating circumstance that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, where the defendant does not show that he was so intoxicated as to render himself incapable of appreciating the criminality of his conduct."

(R. 4171.) Floyd argues that this instruction "misled the jury on their ability to evaluate evidence of intoxication as mitigating" and conflicts with this Court's opinion in Davis v. State, 740 So.2d 1115 (Ala. Crim. App. 1998), aff'd, 740 So.2d 1135 (Ala. 1999). (Floyd's brief, p. 87.)

In Davis, the appellant argued that the trial court's finding that the murders were committed during the course of a robbery was inconsistent with the trial court's finding that the appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Specifically, the appellant argued that if his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of his intoxication, he necessarily could not form the requisite intent for capital murder during a robbery. In finding no inconsistency between the trial court's two findings, this Court explained that the appellant's "burden of proving, as a mitigating circumstance, the impairment of his capacity to appreciate the criminality of his conduct was substantially lighter" than "his burden of proving that he was so intoxicated that he could not form the intent to kill and that his intoxication rose to the level of insanity." Davis, 740 So.2d at 1129.

Nothing in the trial court's jury instruction in this case conflicts with Davis. The court's instruction did not, as Floyd apparently believes, place on Floyd the burden of establishing that his intoxication amounted to insanity that rendered him unable to form the intent to kill in order for the jury to find the existence of the mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. To the contrary, the instruction was an accurate statement of the law. It is well settled that "[v]oluntary intoxication will not constitute the mitigating circumstance that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, where the defendant did not show that he was so intoxicated as to render himself incapable of appreciating the criminality of his conduct." Williams v. State, 710 So.2d 1276, 1346 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997). See also Luong v. State, 199 So.3d 173, 225 (Ala. Crim. App. 2015), and Ferguson v. State, 814 So.2d 925, 964 (Ala. Crim. App. 2000), aff'd, 814 So.2d 970 (Ala. 2001).

***75** Moreover, in addition to the specific charge requested by the State, the trial court thoroughly instructed the jury on this mitigating circumstance as follows:

> "Six, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know the difference—or to know right from wrong generally, or to know what he is doing at a given time, or to know that what he is doing is wrong. A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he's doing or how wrong it is. Further, that this mitigating circumstance to exist—or for this mitigating circumstance to exist, the defendant's capacity to appreciate does not have to have been totally obliterated. It is enough that it was substantially lessened or substantially diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired, because a person may appreciate that his actions are wrong and still lack the capacity to refrain from doing them."

(R. 4157–58.) This instruction is materially identical to the Alabama Pattern Jury Instructions: Criminal, Capital Murder, Penalty Phase, Appendix C, Mitigating Circumstances, § 13A–5–51, Ala. Code 1975 (adopted November 9, 2007) (currently found at http://judicial.alabama.gov/library/jury_instructions_cr.cfm).

When viewed as whole, the trial court's instructions adequately explained intoxication and the mitigating circumstance that the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and did not mislead the jury. There was no error, much less plain error, in these instructions.

XXIII.

Floyd contends that Alabama's former capital-sentencing scheme, see note 1, supra, and, thus, his sentence of

death, is unconstitutional under Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), for several reasons. (Issue XXIV in Floyd's brief.) All of Floyd's arguments, however, have been addressed and expressly rejected by both this Court and the Alabama Supreme Court. See Ex parte Bohannon, [Ms. 1150640, September 30, 2016] —— So.3d ——, —— (Ala. 2016); and State v. Billups, [Ms. CR–15–0619, June 17, 2016] —— So.3d ——, —— (Ala. Crim. App. 2016). Therefore, Floyd is entitled to no relief on this claim.

XXIV.

Floyd also contends that the trial court's findings regarding the aggravating circumstances and the mitigating circumstances were erroneous in several respects. (Issues IX and X in Floyd's brief.) However, before addressing these issues, we find it necessary to remand this case for the trial court to correct its sentencing order.

In its sentencing order, the trial court, like the jury, found the existence of four aggravating circumstances—that the murder was committed during the course of a burglary, see § 13A–5–49(4), Ala. Code 1975; that the murder was committed while Floyd was under a sentence of imprisonment, see § 13A–5–49(1), Ala. Code 1975; that the murder was committed after Floyd had previously been convicted of a felony involving the use or threat of violence, see § 13A–5–49(2), Ala. Code 1975; and that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A–5–49(8), Ala. Code 1975. Although the trial court made sufficiently specific findings of fact with respect to the first three aggravating circumstances, with respect to the aggravating circumstance that the murder was especially heinous, atrocious, or cruel compared to other capital offenses, the trial court stated only the following:

> ***76** "By Special Verdict returned by the jury during the penalty phase of the trial the State proved, beyond a reasonable doubt, that the capital offense was especially heinous, atrocious, or cruel compared to other offenses. In Section 13A–5–49(8) of the Code of Alabama 1975, if the committing of a capital offense is .... 'especially heinous, atrocious, or cruel compared to other capital offense' then such is determined to be an 'Aggravating Circumstance." Hence, this aggravating circumstance exists."

(C. 2250–51.)

The trial court's findings are insufficient to satisfy the requirements in former § 13A–5–47(d), Ala. Code 1975, [24] which provides:

> "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A–5–49, each mitigating circumstance enumerated in Section 13A–5–51, and any additional mitigating circumstances offered pursuant to Section 13A–5–52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it."

See Callen v. State, [Ms. CR–13–0099, April 28, 2017] —— So.3d ——, —— (Ala. Crim. App. 2017) (holding that trial court's statement that "[a]ggravating circumstance number 8 Section 13A–5–49(8) does apply in that the capital offense was especially heinous, atrocious or cruel when compared to other capital offenses" was insufficient to comply with § 13A–5–47(d)); Gobble v. State, 104 So.3d 920, 983 (Ala. Crim. App. 2010) (holding that trial court's statement that "[t]he jury's verdict establishes the existence of this aggravating circumstance in an unanimous vote and the evidence supports the verdict" was insufficient to comply with § 13A–5–47(d)); and Miller v. State, 913 So.2d 1148, 1152 (Ala. Crim. App. 2004) (holding that the trial court's statement " 'that this capital murder offense committed by the Defendant was especially heinous, atrocious or cruel compared to other capital murder offenses' " was insufficient to comply with § 13A–5–47(d)).

As noted previously in this opinion, in Ex parte Kyzer, 399 So.2d 330 (Ala. 1981), abrogated on other grounds by Ex parte Stephens, 982 So.2d 1148 (Ala. 2006), the Alabama Supreme Court limited the aggravating circumstance that the murder was especially heinous, atrocious, or cruel compared to other capital offenses "to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." 399 So.2d at 334. "[W]hen a circuit court has found this aggravating circumstance to exist, this Court has required the court

to make specific findings of fact explaining why this aggravating circumstance was applicable" under the standard set forth in Ex parte Kyzer. Miller, 913 So.2d at 1152. In this case, the trial court made no findings of fact regarding why it believed that Jones's murder was especially heinous, atrocious, or cruel when compared to other capital offenses, nor did the court even mention the Ex parte Kyzer standard. Therefore, we must remand this case for the circuit court to correct this deficiency in its sentencing order. "By remanding this case to the circuit court, we do not wish to be understood as implying that this murder was not especially heinous, atrocious, or cruel when compared to other capital murders." Gobble, 104 So.3d at 983. Rather, this remand is required only because the court's sentencing order fails to comply with § 13A–5–47(d) and Ex parte Kyzer.

Conclusion

***77** In accordance with Rule 45A, Ala. R. App. P., we have examined the record for any plain error with respect to Floyd's conviction for capital murder, whether or not brought to our attention or to the attention of the trial court, and we find no plain error or defect in the guilt phase of the proceedings. Therefore, we affirm Floyd's conviction for capital murder. However, for the reasons stated in Part XXIV of this opinion, we must remand this case for the trial court to correct its sentencing order to make specific findings of fact regarding the aggravating circumstance that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. After making its additional findings, if the trial court finds it necessary, it may reweigh the aggravating and mitigating circumstances and resentence Floyd. The trial court's amended sentencing order shall be submitted to this Court within 56 days of the date of this opinion. We pretermit review of Floyd's remaining issues and our plain-error review of Floyd's death sentence pending the trial court's return to remand.

AFFIRMED AS TO CONVICTION; REMANDED WITH DIRECTIONS AS TO SENTENCING.

Windom, P.J., and Welch, J., concur; Joiner, J., concurs in part and concurs in the result, with opinion; Burke, J., concurs in the result.

JOINER, Judge, concurring in part and concurring in the result.

I concur in all aspects of the Court's opinion except Parts XII.A. and XX.A.; as to those parts, I concur in the result.

All Citations

--- So.3d ----, 2017 WL 2889566

Footnotes

1 Sections 13A–5–45, 13A–5–46, and 13A–5–47 were amended by Act No. 2017–131, Ala. Acts 2017, to eliminate judicial override and to place the final sentencing decision in the hands of the jury. That Act, however, does not apply retroactively to Floyd. See § 2, Act No. 2017–131, Ala. Acts 2017.

2 Jones's oldest child, who was in his 20s at the time, was in the military and was no longer living with Jones.

3 Dr. McCarver, whom Floyd hired to evaluate him before trial, was deceased at the time of trial. After Dr. McCarver's death, Floyd requested and received additional funds to hire Dr. DeFrancisco to review Dr. McCarver's report, as well as the report prepared by the State's psychologist, Dr. McKeown.

4 As explained below, Floyd was convicted of promoting prison contraband in the spring of 2013; the offense occurred while he was in jail awaiting trial on the capital-murder charge.

5 Floyd argues that he objected to the use of the stun device "a number of times." (Floyd's reply brief, p. 4.) In addition to citing those portions of the record this Court quotes below, which clearly reflect no specific objection by Floyd on the grounds now raised on appeal, Floyd also cites to a pretrial hearing conducted on August 7, 2013, and to the charge conference conducted at the close of all the evidence as times when he objected to the stun device. However, Floyd's objections during the August 7 pretrial hearing and during the charge conference were not to the use of the stun device but to the handcuffs and/or shackles that he was wearing during those hearings. (R. 678: "[O]ur client has asked that his handcuffs be removed such that he can be able to write and take notes during these proceedings." (emphasis added); and R. 3767–68: "The defendant is asserting that due to the shackles that he is unable to write and take notes." (emphasis added)).

6 Issue XXIV in Floyd's brief consists of four different issues. We address the other three issues later in this opinion.

7 The venire was initially questioned in panels, but the trial court also permitted the parties to question prospective jurors individually if they desired.

8 For the most part, retained counsel spoke on behalf of defense counsel during the hearing.

9 We decline to include in this opinion the name of the person Floyd allegedly contacted or the name of the witness, which counsel revealed later in the hearing. As explained below, the record contains no evidence that Floyd, in fact, contacted anyone or that that person spoke with any of the State's subpoenaed witnesses. We also point out that the witness was not called to testify by the State. The record contains no indication as to the reason the State did not call that particular witness. However, based on the assertions at the ex parte hearing regarding what that witness would have testified to, we cannot agree with defense counsel's characterization of that witness as "instrumental" to the State's case. (R. 2972.) To the contrary, the witness's expected testimony would have been cumulative to Floyd's own statement to police.

10 Floyd does not argue on appeal that his counsel never informed him of the grounds for their motion to withdraw and what had transpired during the hearing. Floyd asserts on appeal only that he "was never informed on the record why his lawyers claimed an inability to effectively represent him." (Floyd's brief, p. 39; emphasis added.) As noted above, however, after their motion to withdraw was denied, counsel informed the court that they believed Floyd was entitled to know what had transpired at the hearing, and nothing in the record indicates that counsel did not fully inform Floyd off the record about the hearing and the reasons for their motion to withdraw.

11 To the extent that Floyd argues that his constitutional rights were violated because his counsel's informing the court of his statement that he had tampered with a witness violated the attorney-client privilege, that argument is meritless. The attorney-client privilege is an exclusionary rule of evidence, see Rule 502, Ala. R. Evid. (defining the attorney-client privilege), and "a violation of the attorney-client privilege is not itself a 'violation[ ] of the United States Constitution.' " Sanborn v. Parker, 629 F.3d 554, 575 (6th Cir. 2010) (citations omitted). See also Howell v. Trammell, 728 F.3d 1202, 1222 (10th Cir. 2013) ("But we need not decide whether the privilege was violated, because, 'standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right.' Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992).").

12 The record reflects that defense counsel did not reveal any acts committed by Floyd about which the trial court was not already aware, but, even if counsel had, "[t]his Court entrusts our judges with great discretion. Our trial judges are confronted daily with evidence that would tend to make defendants appear more culpable than not. We presume that our trial judges are aptly equipped to handle these issues and apply the law without fear of undue prejudice." Scott v. State, 8 So.3d 855, 860 (Miss. 2008).

13 This incident formed the basis of Floyd's September 2010 conviction for first-degree criminal mischief.

14 We question whether this incident, as testified to by Inv. Walden, constitutes another crime, wrong, or act as contemplated by Rule 404(b), given that there was no testimony that the argument between Floyd and Jones was anything other than verbal. To say that arguing with one's significant other is, itself, a "bad act" as contemplated by Rule 404(b) is a stretch. Nonetheless, because the fact that the police were summoned raises the inference that something other than a mere "argument" occurred, we address the admissibility of this incident under Rule 404(b).

15 Although Floyd did not specifically request a curative instruction, he did move for a mistrial. A motion for a mistrial preserves for review lesser prayers for relief. See, e.g., Ex parte Frazier, 758 So.2d 611, 614–15 (Ala. 1999); Ex parte Marek, 556 So.2d 375, 378–79 (Ala. 1989); Minor v. State, 914 So.2d 372, 411 n.14 (Ala. Crim. App. 2004); and Harrison v. State, 706 So.2d 1323, 1326–27 (Ala. Crim. App. 1997).

16 See Part XIV of this opinion, wherein we address the admissibility of these messages.

17 In a footnote in his brief, Floyd also argues that admission of the text messages he received from other people violated his right to confrontation because those people, other than Ky'Toria, did not testify at trial. However, those text messages were not offered to prove the truth of the matters asserted therein. Therefore, there was no violation of Floyd's confrontation rights. See Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (noting that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

18 Floyd does not challenge the admission of the reports on Jones's and Ky'Toria's telephones.

19 After Floyd's trial, Instructions I.4 and I.5 were amended and consolidated into a single instruction. See Alabama Pattern Jury Instructions: Criminal, General Jury Instructions, Burden of Proof (adopted November 13, 2014) (currently found at http://judicial.alabama.gov/library/jury_instructions_cr.cfm).

20 At the sentencing hearing before the court, Floyd again requested to represent himself. The trial court attempted to engage in yet another colloquy with Floyd, but when the court informed Floyd that it would not be sentencing Floyd that

day, but that it would be sentencing Floyd at a later date after taking time to consider the evidence presented during the hearing, Floyd interrupted the court and stated that "[i]f I ain't going to get sentenced today, you can go ahead with the process. If I'm going to get sentenced today, then, you can fire them." (R. 4218.) Floyd said that he was ready to be sentenced and "get it over with" but that if his counsel wanted to present mitigation witnesses, which Floyd described as "a waste of time," his counsel could do so. (R. 4218–19.)

21 As explained in note 1, supra, the jury's role in capital sentencing is no longer advisory.

22 Issue XVI in Floyd's brief contains two issues; we address the second issue in Part XXII of this opinion.

23 Section 13A–5–45(e) provides, in relevant part, that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."

24 See note 1, supra.

EXHIBIT B

2018 WL 3407966
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Cedric Jerome FLOYD
v.
STATE of Alabama

CR-13-0623
|
July 13, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Escambia County, No. CC-11-247, of murder made capital because it was committed during the course of a burglary and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 2017 WL 2889566, affirmed the conviction, but remanded with directions as to sentencing. On remand, the Circuit Court, Escambia County, No. CC-11-247, amended its sentencing order to comply with statutory requirements and reimposed a death sentence. Defendant appealed.

Holdings: On return to remand, the Court of Criminal Appeals, Kellum, J., held that:

trial court did not fail to consider certain mitigating evidence before sentencing defendant to death;

sufficient evidence supported determination that murder was especially heinous, atrocious, or cruel; and

death penalty was an appropriate punishment.

Affirmed.

Appeal from Escambia Circuit Court (CC-11-247)

On Return to Remand

KELLUM, Judge.

***1** On July 7, 2017, this Court remanded this case to the trial court for it to correct a deficiency in its order sentencing Cedric Jerome Floyd to death. We held that the trial court had failed to comply with the requirement in former § 13A-5-47(d), Ala. Code 1975, that it "enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49" [1] because it had failed to make findings of fact regarding the aggravating circumstance that the murder of Tina Jones was especially heinous, atrocious, or cruel when compared to other capital offenses. We directed the trial court to correct its sentencing order to include those findings and, if necessary, to reweigh the aggravating circumstances and the mitigating circumstances and to resentence Floyd. On January 29, 2018, the trial court issued an amendment to its sentencing order that complies with the statutory requirements, and we permitted the parties to file supplemental briefs on return to remand.

In our opinion remanding this case to the trial court, we addressed all the issues raised by Floyd regarding the guilt phase of his trial and the penalty phase of his trial, and we reviewed the record of the guilt phase for plain error. We found no plain error or defect in the guilt phase of the proceedings, and we affirmed Floyd's conviction for murder made capital because it was committed during the course of a burglary. See § 13A-5-40(a)(4), Ala. Code 1975. We pretermitted discussion of Floyd's remaining issues and our plain-error review of Floyd's death sentence. We now address those issues, as well as the issues Floyd raises in his supplemental brief on return to remand.

I.

Floyd contends that the trial court's findings in its sentencing order regarding mitigating circumstances were erroneous in three respects. (Issue X in Floyd's initial brief; Issue III in Floyd's brief on return to remand.) Floyd did not present these claims to the trial court; therefore, we review them under the plain-error rule. See Rule 45A, Ala. R. App. P.

First, Floyd argues that the trial court did not mention in its sentencing order the following mitigating evidence he

presented at the sentencing hearing: that he was sexually abused when he was a child; that he suffered multiple head traumas during his life that may have resulted in frontal lobe damage; and that his IQ dropped from 109 as a child to 82 as an adult. According to Floyd, the trial court's failure to mention this evidence in its sentencing order indicates that the court failed to consider the evidence. We disagree.

***2** "A sentencer in a capital case may not refuse to consider or be 'precluded from considering' mitigating factors." Williams v. State, 710 So.2d 1276, 1347 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997) (quoting Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). "[T]he United States Supreme Court has held that a sentencing authority must consider all evidence offered as mitigating, that is, 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " Woodward v. State, 123 So.3d 989, 1033 (Ala. Crim. App. 2011) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). " 'While Lockett[v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.' " Ex parte Slaton, 680 So.2d 909, 924 (Ala. 1996) (quoting Bankhead v. State, 585 So.2d 97, 108 (Ala. Crim. App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991), aff'd on return to remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd, 625 So.2d 1146 (Ala. 1993)). "The fact that the trial court does not list and make findings in its sentencing order as to each alleged nonstatutory mitigating circumstance offered by a defendant indicates that the trial court found some of the offered evidence not to be mitigating, not that the trial court did not consider this evidence." Reeves v. State, 807 So.2d 18, 48 (Ala. Crim. App. 2000). It is "settled law that 'the trial court is not required to specify in its sentencing order each item of proposed nonstatutory mitigating evidence offered that it considered and found not to be mitigating.' " Ex parte Ferguson, 814 So.2d 970, 979 (Ala. 2001) (quoting Williams, supra, at 1347).

In this case, it is clear from the record that the trial court properly considered all the evidence Floyd presented in mitigation. The trial court did not limit or restrict Floyd as to the evidence he presented or the arguments he made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A–5–51, Ala. Code 1975, and it determined that none of those circumstances existed under the evidence presented. The trial court also stated that it had considered the testimony of the four witnesses Floyd called to testify at the sentencing hearing and that it had reviewed the multiple exhibits that Floyd had introduced into evidence, and it concluded that no nonstatutory mitigating circumstances existed under § 13A-5-52, Ala. Code 1975. Although the trial court did not mention each nonstatutory mitigating circumstance offered by Floyd, it was not required to do so, and the trial court's not mentioning each nonstatutory mitigating circumstance offered by Floyd indicates only that the trial court found the offered evidence not to be mitigating, not, as Floyd argues, that the trial court did not consider the evidence.

Second, Floyd argues that the trial court erred in not finding as nonstatutory mitigating circumstances that he had a difficult childhood and that he struggled with substance abuse. According to Floyd, once he interjected his difficult childhood and substance abuse as mitigating circumstances, and those circumstances went unrefuted by the State, the trial court was required to find their existence. We disagree. "[A]lthough a trial court is required to consider all evidence proffered as mitigation, a trial court is not required to find that a mitigating circumstance exists simply because evidence is proffered to the trial court in support of that circumstance." Phillips v. State, [Ms. CR-12-0197, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015) (opinion on return to remand) (emphasis added). As this Court explained in Largin v. State, 233 So.3d 374 (Ala. Crim. App. 2015):

> "Section 13A–5–45(g), Ala. Code 1975, provides that, '[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.' The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), held that a circuit court must consider all evidence offered in mitigation when determining a capital defendant's sentence. However, a defendant's proffer of evidence in support of a mitigating circumstance does not require the trial court to find that the mitigating circumstance exists. Rather, the trial court, after considering all proffered mitigating

evidence, has the discretion to determine whether a particular mitigating circumstance has been proven. E.g., Carroll v. State, 215 So.3d 1135 (Ala. Crim. App. 2015); Albarran v. State, 96 So.3d 131, 213 (Ala. Crim. App. 2011).

***3** 233 So.3d at 424.

In its sentencing order, the trial court thoroughly explained why it found that Floyd's difficult childhood and his struggles with substance abuse were not mitigating:

> "The Court has paid close attention to this allegation that [Floyd] had a bad childhood and the apparent suggestion that such situation should carry weight with this Court's decision. The testimony of [Floyd's] grandmother, Ms. Alma Rose, has given the Court the best understanding about [Floyd's] childhood and upbringing. [Floyd's] mother did not raise him nor did he, until after his arrest in this case, have any contact with his biological father. He was raised by his grandmother who had custody of him after his mother's inability to parent became apparent to the Conecuh County, Alabama, Department of Human Resources. The grandmother was apparently given legal custody of [Floyd] when he was less than a year old. The grandmother testified very strongly. [Floyd] did not grow up rich, as in money. However, [Floyd's] grandmother did not put up with wrongdoing and did her best to provide [Floyd] with a warm and loving Christian home, clothing, and food. [Floyd] was a good student in elementary school and the grandmother even enrolled [Floyd] in piano lessons. As he grew older, she did her best to see that he got an education and even pushed him to get his GED. She was very proactive in trying to get him help in regard to his wrong doing as a teenager. Obviously, there were insecurities in [Floyd's] childhood regarding his looks, etc., but no adult person can ever say that they did not have insecurities as a child. The Court is satisfied that [Floyd's] young life and the insecurities suffered by [him] were not of such a degree that they rise to a level of mitigating [Floyd's] conduct in committing capital murder.
>
> "The issue of substance abuse was raised especially through the testimony of Robert Brewer, who had been drug testing [Floyd] for a little over a month before the murder occurred. [Floyd] was in a phase one outpatient, color coded, drug treatment program through Southwest Alabama Mental Health for whom Mr. Brewer worked. It was very clear from Mr. Brewer's testimony that [Floyd] did abuse cocaine. He did test positive for cocaine on at least two occasions during the month before the murder, but had also tested negative on at least one sampling. However, Mr. Brewer's report and testimony clearly indicated that even though [Floyd] did use cocaine he was nevertheless attentive, focused, and denied that he had a problem with it but that he just liked to get high sometimes. The Court is very satisfied that even given [Floyd's] involvement with the drug culture, he was much in control of himself and that his drug 'dependency' was minor and actually not controlling in the events of this murder. This Court conclude[s] that his drug usage is not a mitigating factor in this case."

(C. 2253-54.) The court's findings regarding Floyd's childhood and substance abuse are supported by the record. As already noted, it is clear that the trial court properly considered all the evidence presented by Floyd in mitigation. Whether that evidence was, in fact, mitigating, was within the discretion of the trial court.

***4** Third, Floyd argues that, in refusing to find his substance abuse to be a mitigating circumstance, the trial court improperly required a causal connection between his substance abuse and the murder. In Stanley v. State, 143 So.3d 230 (Ala. Crim. App. 2011) (opinion after remand by the Alabama Supreme Court), this Court addressed a similar issue:

> "Stanley argues that the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley]

committed' (RTR C. 218) conflicts with Tennard v. Dretke, 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and Smith v. Texas, 543 U.S. 37, 45, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004). We disagree.

"In Tennard, the United States Supreme Court addressed a 'threshold "screening test" ' applied by the United States Court of Appeals for the Fifth Circuit to a claim alleging that a particular capital-sentencing scheme provided an inadequate vehicle to consider mitigating evidence under Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (a 'Penry claim'). Under the Fifth Circuit's test, the court initially determined whether the particular evidence was 'constitutionally relevant'; if the evidence was not 'constitutionally relevant,' the court would not review a Penry claim. The United States Supreme Court held that the Fifth Circuit's 'screening test' was unconstitutional.

"In Stanley's case, the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley] committed' is not in conflict with Tennard or Smith. The trial court's amended sentencing order makes clear that it considered all the evidence offered by Stanley, including his family circumstances, his background, and his behavior since being incarcerated. As discussed above, however, the trial court concluded that this evidence, under the particular circumstances, was not mitigating because (1) Stanley's sisters faced the same difficult family background but went on to live successful lives, and (2) as the mitigation specialist testified, many individuals come from bad family backgrounds but do not commit capital murder. (RTR C. 215.) With that context in mind -- i.e., having already determined that those facts were not mitigating in Stanley's case -- the trial court later noted that Stanley had not offered any 'credible evidence that any of these factors influenced the commission of the crime [Stanley] committed.' Thus, the trial court's statement, even assuming Stanley's reading of Tennard and Smith is correct, does not indicate that the trial court applied a 'relevance' test in conflict with Tennard or Smith."

143 So.3d at 331-32.

Similarly, here, nothing in the trial court's sentencing order indicates that it applied a "relevance" test before considering the evidence offered by Floyd regarding his substance abuse. The court's finding that Floyd's substance abuse "was minor and actually not controlling in the events of this murder" does not indicate, as Floyd apparently believes, that the court placed on him the burden of establishing that his substance abuse caused the murder in order for that evidence to be a relevant consideration in sentencing. This Court has recognized that "drug abuse may or may not be considered a mitigating circumstance, depending on the facts." Luong v. State, 199 So.3d 173, 228 (Ala. Crim. App. 2015) (citations and internal quotation marks omitted). See Riley v. State, 166 So.3d 705, 728-29 (Ala. Crim. App. 2013) (holding that the trial court did not err in refusing to find a defendant's drug addiction to be a mitigating circumstance where the evidence indicated that the defendant was not under the influence of drugs at the time of the murder). The court's findings make clear that it considered the evidence of Floyd's substance abuse but found that it did not rise to the level of a mitigating circumstance under the particular facts and circumstances in this case, because, although Floyd "liked to get high," he did not actually have a problem with substance abuse. As already explained, "[t]he circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance." Calhoun v. State, 932 So.2d 923, 975 (Ala. Crim. App. 2005).

***5** For the reasons stated above, we find no error, much less plain error, in the trial court's findings regarding the mitigating circumstances proffered by Floyd.

II.

Floyd contends that the trial court erred in finding that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses because, he says, the State failed to prove that Jones suffered for any appreciable amount of time after she was shot or that she endured any psychological torture. (Issue IX in Floyd's initial brief; Issues I and II in Floyd's brief on return to remand.) Because Floyd did not present these claims to the trial court, we review them under the plain-error rule. See Rule 45, Ala. R. App. P.

In Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1981), abrogated on other grounds by Ex parte Stephens, 982 So.2d 1148 (Ala. 2006), the Alabama Supreme Court held

that the especially heinous, atrocious, or cruel aggravating circumstance is limited "to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." Subsequently, in Ex parte Clark, 728 So.2d 1126, 1140-41 (Ala. 1998), the Alabama Supreme Court reiterated that "[w]e cannot depart from the established meaning of the words enacted by the Legislature -- 'especially heinous, atrocious or cruel' -- and apply those words to include murders that do not involve the infliction of torture on the victim." In Norris v. State, 793 So.2d 847, 854–62 (Ala. Crim. App. 1999), this Court recognized three factors that are indicative that a capital offense was especially heinous, atrocious, or cruel: (1) the infliction on the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after a swift assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim. Under all three factors, "the critical inquiry" is whether the victim was "conscious or aware" for "an appreciable lapse of time, sufficient enough to cause prolonged suffering." Norris, 793 So.2d at 854–61.

In its sentencing order, the trial court set forth the following pertinent facts regarding the crime and Floyd's participation in it:

> "In the early morning of January 2, 2011, while the victim was in her bed there is convincing evidence that [Floyd], who had come to her house dressed in a dark hoodie, jumped through her bedroom window with a .38 caliber revolver he had just acquired by selling his car, and that he shot the victim in the back as she was trying to escape from him. The victim dropped to her knees and [Floyd], while standing over the victim, shot her ... execution style with the bullet entering in at the bridge of her nose, with the picture of the said wound (which said picture is in evidence) showing the shot to be in the bridge of her nose just below the center of her eyes. This shot knocked out many of her teeth and went through the upper and lower jaw. There was convincing evidence that this shot was at very close range. Evidence indicates that this shot may not have been fatal. The third shot to the victim occurred when the gun was pressed very hard to the back of her head and literally blew out part of her brains with this shot along with the others causing death."

***6** (C. 2247-48.) In the amendment to its sentencing order, the trial court summarized the testimony from trial regarding the domestic abuse that plagued Floyd and Jones's relationship, the testimony from trial regarding threatening text messages Floyd sent to Jones's daughter in the hours before the murder, and the testimony from trial regarding Jones's two trips to the police department in the hours before the murder. The court then concluded:

> "The Court finds that in the days leading up to her death, Jones was already fearful for her life and safety due to a history of domestic violence with Floyd. She had recently broken up with him and wanted him to leave her alone. She was so fearful of Floyd that on December 31, 2010, just two days before her death, she did not stay in her own home. On January 1, 2011, Jones went to the police department to report that Floyd had broken into her home on December 31, 2010, and [had] stole[n] her cell phone. She wanted the police department to issue a restraining order against Floyd. She returned to the police department later in the day on January 1, 2011, just hours before she was killed to report that Floyd had been sending threatening text messages to her daughter. She refused to file charges against Floyd because of fear. She told Officer Stallworth that she had heard that Floyd was going to kill her and then himself. Jones decided to stay in her home after assurance from Officer Stallworth that the police would keep close patrol of her home during the night. The evidence established that Jones was asleep in her bed when Floyd, armed with a pistol, jumped through her bedroom window shortly after midnight on January [2], 2011. Physical and forensic evidence showed that Jones tried to run from Floyd after he jumped through her bedroom window. She was shot in the back and was found lying face down in a pool of blood in the hallway outside of her bedroom. Her blood was found in the hallway, the doorway of the bathroom and not in her bedroom. She was also shot in the bridge of the nose and the back of the head. The medical examiner testified that all three of the wounds were individually survivable. The court finds that the fear endured by Jones at the hands of Floyd raises this capital murder to a conscienceless and pitiless crime that was unnecessarily tortuous to Jones."

(Record on Return to Remand, C. 250-51.)

Relying heavily on Ex parte Clark, supra, which he says is "factually indistinguishable" from this case (Floyd's brief, p. 66), Floyd argues that the trial court's finding that each of the gunshot wounds was individually survivable is contradicted by the testimony at trial, that there was

no evidence presented indicating the order in which the three shots were fired, and that the trial court's finding that Jones was first shot in the back while running away from Floyd in fear, then shot in the face, and then shot in the back of the head is based on pure speculation. According to Floyd, the evidence indicated that each of the gunshot wounds was fatal -- he says that Jones died from "sudden and instantaneously fatal gunshot wounds" -- and that Jones was not conscious and aware for a sufficiently appreciable amount of time to make the murder especially, heinous, atrocious or cruel. (Floyd's brief on return to remand, p. 20.) Floyd also argues that his history of domestic violence toward Jones and the events of the two days leading up to the murder, while "problematic and reproachable," were "relatively minor" and do not support the trial court's finding that Jones feared for her life and endured psychological torture and that the trial court erred in relying on statements Jones made in the hours before the murder about her fear of Floyd to find that Jones suffered psychological torture when, he says, those statements were introduced into evidence in violation of his right to confrontation. (Floyd's brief on return to remand, pp. 18-19.)

***7** We agree with Floyd that the trial court's statement in the amendment to its sentencing order that each of the three gunshot wounds was individually survivable was erroneous, but not for the reason advanced by Floyd. Floyd argues that the statement was incorrect because, he says, Dr. John Lentz, the emergency-room physician who pronounced Jones dead on arrival at the hospital, testified that all the wounds were individually fatal. Although Floyd is correct that Dr. Lentz initially testified that he believed all the wounds to Jones were individually fatal, he later testified, as did Dr. Eugene Hart, the forensic pathologist who performed the autopsy on Jones, that the wound on Jones's upper left chest was likely survivable. In addition, Dr. Lentz testified that he believed the gunshot wound he saw on Jones's face was the result of a bullet that entered the bridge of her nose and exited through the back of her head, which would have been fatal, had that been the trajectory of the bullet. However, Dr. Hart testified that the shot to the bridge of Jones's nose was downward, that the bullet lodged in Jones's lower jaw, and that the shot was likely survivable. Nonetheless, Dr. Hart did testify that the shot to the back of Jones's head was likely fatal; therefore, the court's statement that all three wounds were individually survivable was incorrect. However, the court's misstatement does not warrant reversal of its judgment because, even though the wound to the back of Jones's head was fatal, the evidence established that the other two wounds were not, and the court's findings regarding the order of those wounds is supported by the evidence.

In Ex parte Clark, supra, the evidence indicated that the defendant and the victim were stopped on the side of the road, and the victim was standing facing away from the defendant's automobile when the defendant got a rifle out of the trunk of the car and shot the victim in the back of the head. The victim immediately fell to the ground and the defendant shot the victim five more times, three times in the back and two times in the head. The Alabama Supreme Court held that the trial court had erred in finding that the murder was especially heinous, atrocious, or cruel. The Court recognized that it had previously upheld the application of the heinous, atrocious, or cruel aggravating circumstance to " 'execution style' murders," but noted that it had only done so when the evidence indicated that "the victims were aware of what was happening to them." 728 So.2d at 1139. Because there was no evidence, and no reasonable inference from the evidence, that the victim was aware of his impending death or that he remained conscious after the first shot, the Court concluded, the murder did not fall within the "narrow interpretation of the phrase 'especially heinous, atrocious or cruel.' " 728 So.2d at 1141.

In this case, unlike in Ex parte Clark, although there was no direct evidence indicating that Jones was conscious or aware during the attack or of the order of the shots, there was evidence from which a reasonable inference could be made that Jones was conscious and aware during the attack and that she was shot first in the back, then in the face, and then in the back of the head. The evidence indicated that at 11:00 p.m. Jones was asleep in her bed and that sometime between then and 12:45 a.m., when Jones's daughter first telephoned emergency 911, Floyd jumped through Jones's bedroom window brandishing a revolver, breaking glass and damaging the blinds in the process. Whether Jones was in bed asleep, or awake and in the hallway outside her bedroom where she was later found, as Floyd posits, there can be no doubt that the noise Floyd made when jumping through the window alerted Jones to his presence. The evidence indicated that Floyd shot Jones three times. One bullet, fired from an indeterminate range, entered Jones's upper left back and exited her left front chest, thus indicating that Jones

was facing away from Floyd at the time of the shot, and a fragment of that bullet was found on the floor in the hallway. Another bullet, fired from within 12 inches of Jones, entered the bridge of Jones's nose, traveled directly downward through Jones's upper jaw and lodged in Jones's lower jaw, thus indicating that the shot was fired from above Jones. The third bullet entered the back of Jones's head and was a "hard contact gunshot wound," meaning that the gun was pressed firmly against the back of Jones's head when it was fired. (R. 2921.) From this evidence, and the other evidence presented at trial as set forth fully in our opinion on original submission, it can reasonably be inferred that Jones, after being alerted to Floyd's presence, was attempting to flee from Floyd as he fired at her, hitting her in the upper left back. After Jones fell from the impact of the shot and was lying helpless on the floor, Floyd approached her, stood over her, and shot her a second time through the bridge of her nose. After Jones collapsed from this second shot, Floyd then pressed the gun firmly against the back of Jones's head and fired one more shot -- the fatal shot -- to ensure Jones's death.

***8** "When a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by [prior] gunshots ..., such extremely wicked or shockingly evil action may be characterized as especially heinous, atrocious, or cruel." Hardy v. State, 804 So.2d 247, 288 (Ala. Crim. App. 1999) (citations and internal quotation marks omitted), aff'd, 804 So.2d 298 (Ala. 2000). "[E]xecution-type slayings, evidencing a cold, calculated design to kill, fall into the category of murders that are 'especially heinous, atrocious or cruel,' " Ex parte Key, 891 So.2d 384, 391 (Ala. 2004), as long as "the victims were aware of what has happening to them." Ex parte Clark, 728 So.2d at 1139. This is so because "evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel." Ex parte Rieber, 663 So.2d 999, 1003 (Ala. 1995). In this case, there was evidence from which it could reasonably be inferred that Jones was conscious and aware during the attack and that she feared for her life.

In addition, there was ample evidence that Jones was afraid of Floyd in the days, and even months, before the attack, and that fear is, contrary to Floyd's apparent belief, highly relevant in determining whether the murder was especially heinous, atrocious, or cruel. As this Court explained in Russell v. State, [Ms. CR-10-1910, May 29, 2015] —— So.3d —— (Ala. Crim. App. 2015), judgment vacated on other grounds by Russell v. Alabama, 580 U.S. ——, 137 S.Ct. 158, 196 L.Ed.2d 6 (2016):

> "To determine whether [the] murder was especially heinous, atrocious, or cruel as compared to other capital murders, we must consider the entire chain of events that led to [the victim's] death. '[A] murder is not rendered especially heinous, atrocious, or cruel merely by the specific method in which a victim is killed, but by the entire set of circumstances surrounding the killing.' State v. Tirado, 358 N.C. 551, 595, 599 S.E.2d 515, 544 (2004). 'In evaluating the brutality and heinousness of a defendant's conduct, the entire spectrum of facts surrounding the given incident must be analyzed and evaluated.' People v. McGee, 121 Ill. App. 3d 1086, 1089, 77 Ill.Dec. 539, 542, 460 N.E.2d 843, 846 (1984)."

—— So.3d at ——.

For example, in Ex parte Key, supra, the defendant stalked the victim, his ex-wife, for almost two years after their divorce, and was convicted of aggravated stalking just one day before he murdered the victim. The evidence indicated that, after a car chase that resulted in the victim's car being driven into a ditch, the defendant approached the car and shot the victim multiple times. The Alabama Supreme Court upheld the trial court's finding that the murder was especially heinous, atrocious, or cruel, relying in part on the fact that the victim suffered psychological torture for an appreciable amount of time, not only because she was aware of the defendant's intent to kill her during and after the car chase and remained conscious after she was shot, but also because she was aware of the defendant's propensity for violence and had been afraid of the defendant and feared for her life even before the car chase.

In Ex parte Rieber, supra, the defendant stalked the victim, a convenience-store clerk, for several days before he walked into the store where she was working and shot her during a robbery. The Alabama Supreme Court upheld the trial court's finding that the murder was especially heinous, atrocious, or cruel, not only because the victim was alive when she was found by a customer shortly after the shooting, but also because the evidence indicated that the victim had been aware of the defendant's presence while he was stalking her and had been afraid of him.

In this case, the evidence indicated that Floyd and Jones had been in a relationship in the year leading up to the murder that was plagued by domestic violence, that Jones had recently ended the relationship, that Floyd would not leave her alone, and that Jones was afraid of Floyd in the days before she was murdered. Assuming, as Floyd argues, that the trial court erred in relying on statements Jones made to police to support its finding that Jones was afraid of Floyd, that error was harmless for the same reason we found the admission of those statements to be harmless in our opinion on original submission -- the statements were largely cumulative to the ample other evidence presented that showed Jones's fear of Floyd.

***9** Given Floyd's history of domestic violence, it can be reasonably inferred that Jones was keenly aware of Floyd's propensity for violence. In addition, both Lakeshia Finley, Jones's cousin, and Sarah Marshall, who lived with Jones, testified that Jones was afraid of Floyd. Marshall testified that Jones was so afraid of Floyd in the five months before her death that Jones appeared "sick," "couldn't eat," "couldn't sleep," and was afraid to stay at her own house, and evidence was presented that only 24 hours before her death, Jones, in fact, took her children and stayed the night at her aunt's house because she was afraid of Floyd. (R. 2689.) There was also evidence indicating that the night Jones stayed with her aunt, the night before her murder, Floyd broke into Jones's house, and that, in the hours leading up to the murder, Floyd sent threatening text messages to Jones's daughter. There can be no doubt that Floyd's actions only intensified Jones's fear. In addition, although Jones twice went to the police department in the hours before her murder to report Floyd, Jones did not file a complaint either time, which also indicates how intensely frightened of Floyd she was. Simply put, the evidence amply supports the trial court's finding that, in the days leading up the her death, Jones feared for her life and safety and suffered psychological torture.

Therefore, we find no error, plain or otherwise, in the trial court's finding that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses.

III.

As noted above, on original submission, we examined the record for any plain error or defect with respect to the guilt phase of Floyd's trial in accordance with Rule 45A, Ala. R. App. P.; we found none and we affirmed Floyd's conviction for murder made capital because it was committed during the course of a burglary.

We now review Floyd's sentence in accordance with § 13A-5-53(a), Ala. Code 1975, which requires that we determine whether any error adversely affecting Floyd's rights occurred in the sentence proceedings; whether the trial court's findings concerning the aggravating circumstances and the mitigating circumstances were supported by the evidence; and whether death is the appropriate sentence. Section 13A-5-53(b) requires that, in determining whether death is the appropriate sentence, we must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether an independent weighing by this Court of the aggravating circumstances and the mitigating circumstances indicates that death is the proper sentence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

After the jury convicted Floyd of the capital offense charged in the indictment, by virtue of which the jury unanimously found the existence of the aggravating circumstance that the murder was committed during the course of a burglary, see § 13A-5-49(4), Ala. Code 1975, the penalty phase of the trial was held before the jury in accordance with §§ 13A-5-45 and -46, Ala. Code 1975, as those sections read before the amendment effective April 11, 2017. See note 1, supra. After hearing evidence, after being properly instructed by the trial court as to the applicable law, and after being correctly advised as to its function in reference to the finding of any aggravating and mitigating circumstances, the weighing of those circumstances, if appropriate, and its responsibility in reference to the return of an advisory verdict, the jury unanimously found beyond a reasonable doubt the existence of three additional aggravating circumstances -- that the murder was committed while Floyd was under a sentence of imprisonment, see § 13A-5-49(1), Ala. Code 1975; that the murder was committed after Floyd had previously been convicted of a felony involving the use or threat of violence, see § 13A-5-49(2), Ala. Code 1975; and that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses, see §

13A-5-49(8), Ala. Code 1975. By a vote of 11-1, the jury recommended that Floyd be sentenced to death for his capital-murder conviction.

Thereafter, the trial court held a sentencing hearing in accordance with § 13A-5-47, Ala. Code 1975, as it read before the amendment effective April 11, 2017 (see note 1, supra), to aid it in determining whether it would sentence Floyd to life imprisonment without the possibility of parole or follow the jury's recommendation and sentence him to death. The trial court ordered and received a written presentence investigation report as required by § 13A-5-47(b), as it read before the amendment effective April 11, 2017 (see note 1, supra), and accepted evidence from Floyd in mitigation. In its sentencing order, as amended on remand, the trial court entered specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in § 13A-5-49, Ala. Code 1975, each mitigating circumstance enumerated in § 13A-5-51, Ala. Code 1975, and any mitigating circumstance found to exist under § 13A-5-52, Ala. Code 1975, as well as written findings of fact summarizing the offense.

***10** The trial court, like the jury, found the existence of four statutory aggravating circumstances: that the murder was committed during the course of a burglary, that the murder was committed while Floyd was under a sentence of imprisonment, that the murder was committed after Floyd had previously been convicted of a felony involving the use or threat of violence, and that the murder was especially heinous, atrocious, or cruel when compared to other capital offenses. The trial court found no statutory mitigating circumstances to exist under § 13A-5-51, and found no nonstatutory mitigating circumstances to exist under § 13A-5-52. After considering all the evidence presented, the arguments of counsel, the presentence report, and the advisory verdict of the jury, and after weighing the aggravating circumstances against the absence of mitigating circumstances, the trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Floyd to death. The trial court's findings concerning the aggravating circumstances and the mitigating circumstances are supported by the evidence, and we find no error adversely affecting Floyd's rights during the penalty phase of the trial or the sentencing proceedings before the court.

Floyd was convicted of murder committed during the course of a burglary, an offense defined by statute as a capital offense. See § 13A-5-40(a)(4), Ala. Code 1975. We take judicial notice that similar crimes have been punished capitally throughout the state. See, e.g., McCray v. State, 88 So.3d 1 (Ala. Crim. App. 2010); Jones v. State, 987 So.2d 1156 (Ala. Crim. App. 2006); Brown v. State, 982 So.2d 565 (Ala. Crim. App. 2006); Beckworth v. State, 946 So.2d 490 (Ala. Crim. App. 2005); Walker v. State, 932 So.2d 140 (Ala. Crim. App. 2004); and Hall v. State, 820 So.2d 113 (Ala. Crim. App. 1999). Considering Floyd and the crime he committed, we find that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases. We have also carefully reviewed the record of the trial and sentencing proceedings, and we find no evidence that the sentence in this case was imposed under the influence of passion, prejudice, or any other arbitrary factor. Finally, we have independently weighed the aggravating circumstances against the absence of statutory and nonstatutory mitigating circumstances, and we concur in the trial court's judgment that the aggravating circumstances outweigh the mitigating circumstances, and that death is the appropriate sentence in this case.

Based on the foregoing, Floyd's sentence of death is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.

All Citations

--- So.3d ----, 2018 WL 3407966

Footnotes

1 Sections 13A-5-45, 13A-5-46, and 13A-5-47 were amended by Act No. 2017-131, Ala. Acts 2017, to eliminate judicial override and to place the final sentencing decision in the hands of the jury. The amendment to § 13A-5-47 removed the requirement that the trial court make written findings. However, that Act does not apply retroactively to Floyd. See § 2, Act No. 2017-131, Ala. Acts 2017, codified at § 13A-5-47.1, Ala. Code 1975.

2018 WL 3407966

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EXHIBIT C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
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Assistant Clerk

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August 24, 2018

CR-13-0623 **Death Penalty**

Cedric Jerome Floyd v. State of Alabama (Appeal from Escambia Circuit Court: CC11-247)

NOTICE

You are hereby notified that on August 24, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Bert W. Rice, Circuit Judge
Hon. John Robert Fountain, Circuit Clerk
Ryan C. Becker, Attorney
Alicia A. D'Addario, Attorney
Glenn L. Davidson, Attorney
Beth Jackson Hughes, Asst. Atty. Gen.

EXHIBIT D

IN THE SUPREME COURT OF ALABAMA

February 22, 2019

1171092

Ex parte Cedric Jerome Floyd. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Cedric Jerome Floyd v. State of Alabama) (Escambia Circuit Court: CC-11-247; Criminal Appeals : CR-13-0623).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on February 22, 2019:

Writ Denied. No Opinion. Bryan, J. - Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of February, 2019.

Julia Jordan Weller

Clerk, Supreme Court of Alabama