APPENDIX A

2018 WL 6011199
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

John Joseph DEBLASE
v.
STATE of Alabama

CR-14-0482
|
Nov. 16, 2018

Synopsis

Background: Defendant was convicted in the Mobile Circuit Court, CC-12-3095, of three counts of capital murder, and was sentenced to death. He appealed.

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

trial court had good cause to remove appointed defense counsel, upon defense counsel's motion to withdraw, and appoint new counsel;

reports prepared by defendant's mitigation experts were not subject to discovery;

defendant failed to prove that he was actually prejudiced by pretrial publicity, so as to warrant a change of venue;

defendant failed to demonstrate presumed prejudice arising from pretrial publicity which would entitle him to change of venue; and

state's reasons for striking black female prospective juror from jury pool were not pretext for discrimination, in violation of *Batson*.

Affirmed.

Welch and Joiner, JJ., concurred in result only.

Appeal from Mobile Circuit Court (CC-12-3095). Roderick P. Stout, Judge.

Attorneys and Law Firms

Alicia A. D'Addario, Carla C. Crowder, and Rachel P. Judge, Montgomery; Glenn L. Davidson, Mobile; and Arthur T. Powell III, Mobile, for appellant.

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

Opinion

KELLUM, Judge.

***1** John Joseph DeBlase was convicted of three counts of capital murder in connection with the murders of his children, four-year-old Natalie Alexis DeBlase ("Natalie") and three-year-old Jonathan Chase DeBlase ("Chase"). The murders were made capital (1) because Natalie was less than 14 years of age, see § 13A-5-40(a)(15), Ala. Code 1975; (2) because Chase was less than 14 years of age, see § 13A-5-40(a)(15), Ala. Code 1975; and (3) because two or more persons were murdered by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. By a vote of 10-2, the jury recommended that DeBlase be sentenced to death for his capital-murder convictions. The trial court followed the jury's recommendation and sentenced DeBlase to death. [1]

In its sentencing order, the trial court set out the facts of the crimes as follows:

> "A. Background Facts
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> "At the time of her death on March 4, 2010, Natalie DeBlase ('Natalie') was age four years and four months. At the time of his death on Father's Day, June 20, 2010, Jonathan Chase DeBlase ('Chase') was age three years and six months. At the time of the children's deaths, DeBlase was twenty-five years old.
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> "DeBlase enjoyed a relatively normal upbringing in the Mobile area, attended public schools and graduated high school in 2003, earning a standard diploma. After high school, DeBlase worked several jobs and began a romantic relationship with Corrine Heathcock. Natalie was born of that relationship on November 4, 2005. In June 2006, DeBlase and Corrine married, and Chase was born on December 29, 2006. The marriage was tumultuous

with intermittent periods of separation. DeBlase became involved with entertainment wrestling as a hobby, and developed a close circle of friends with the same interest. During a separation from Corrine, one of his wrestling friends moved in with DeBlase to defray living expenses. Corrine returned home and began an illicit relationship with the friend. Corrine left, and DeBlase moved in with his parents, Richard and Ann DeBlase. Corrine kept the children until DeBlase filed for divorce in May 2009. The children then lived with DeBlase and his parents. The divorce was final in June 2009 with DeBlase awarded primary physical custody of their children. Corrine's circumstances were such that she could not provide for the children, but for some time she had regular visitation with the children which DeBlase helped facilitate.

"By all accounts, Natalie and Chase were normal happy children. Medical records indicate they were regularly treated for expected childhood illnesses until approximately a year before their deaths. There is no indication the children were mistreated or abused until several months before their deaths. Corrine last had contact with the children on November 17, 2009. At that time, Corrine felt DeBlase was a proper and caring father for Natalie and Chase. She had no concerns about the safety of the children.

***2** "In October 2008, DeBlase met the Co-Defendant, Heather Keaton (hereinafter 'Keaton'), through a social media website. She was then enrolled as an undergraduate student at Springhill College in Mobile, attending on a scholarship. She is visually impaired. In 2009, she became ill and returned to her family's home in Louisville, Kentucky. Upon recovering, she came back to Mobile and moved into the home of Richard and Ann DeBlase, along with DeBlase, Natalie, and Chase. Keaton argued with Ann DeBlase about the proper way to care for the children, asserting superior knowledge on child rearing. She was domineering to the point that Richard DeBlase told her to leave his home. On December 23, 2009, Keaton, DeBlase, and the children left the DeBlase home and moved in with Dana Mullins (now deceased).

"In January 2010, they left Dana Mullins's home and stayed several weeks with a friend DeBlase knew through wrestling, Robin 'Rivers' Rios, his wife Heather Rios, and their children. There, DeBlase and Keaton argued over Keaton's desire to move back to Louisville. She told Heather Rios she did not want to raise DeBlase's children, but DeBlase wanted his children and Keaton to be a family. The arguments became more heated to the point the Rioses asked them to leave their home. Heather Rios called Ann DeBlase to express concern that DeBlase and Keaton would not properly care for Natalie and Chase.

"In early 2010, DeBlase contacted his parents and asked to borrow a car for the purpose of bringing Natalie and Chase back to live with them. When his parents talked to him the next day, he stated that he and the children would stay with Keaton and not return to his parents' home.

"In February, DeBlase, Keaton, and the children returned to the Rioses' home for a birthday party for one of the Rios children. Chase had diarrhea and smelled bad. Heather Rios bathed him. Both Natalie and Chase appeared hungry and ate unusually large quantities of food. The Rioses advised DeBlase and Keaton to get medical attention for Chase. After the birthday party in February, the Rioses never saw Natalie again.

"DeBlase, Keaton, Natalie, and Chase visited Roger Champion and his family in their trailer in the Chunchula area of north Mobile County in late January 2010. The Champions were relocating to north Alabama and agreed for DeBlase to rent the trailer. The night before the Champions departed, DeBlase bought hamburgers for he and Keaton for supper. Only one small salad was shared by Natalie and Chase. The next morning, Champion saw the children sharing one small individual snack-sized box of cereal. As DeBlase and Champion were loading the Champions' furniture into a truck, they heard the children screaming and crying. Upon investigation, Champion's wife told them that she had seen Keaton holding Natalie by the hair while she beat her with a belt and Chase was pushed to the floor. Keaton was enraged because the children had eaten part of a chocolate pie left on the kitchen counter. Champion confronted DeBlase and warned him not to let anything happen to the children. DeBlase responded that Keaton was in charge of disciplining the children and it was only a spanking. The treatment of the children so upset Champion's wife that she left the trailer. Champion knew DeBlase's parents and called them to say he thought Natalie and Chase were at risk of harm. Champion called Creighton Hobbs, a mutual friend with DeBlase, and asked him to check on Natalie and Chase after Champion left the area.

"Hobbs had previously attended a cook-out at the Champions' trailer with DeBlase, Keaton, and the children. On that occasion, Hobbs observed Keaton abusing Natalie and Chase. He saw Keaton screaming and cursing the

children and roughly grabbing Natalie. Keaton said the children were ‘just horrible’ and ‘like demon spawn from Hell.’ Hobbs thought Keaton's conduct was out of line and warned her not to treat the children that way or he would call the police. DeBlase did nothing to stop Keaton's abuse of the children. Based on his interactions with DeBlase and Keaton, Hobbs felt Keaton was dominant and DeBlase the subservient member of their relationship.

***3** “Hobbs visited DeBlase in February 2010 to check on the children at the Champions' trailer. DeBlase was on the floor in pain and Keaton was upset. Keaton claimed DeBlase's parents and his aunt and uncle had forced entry into the trailer, causing injury to DeBlase's ribs in the process and pushing Keaton to the floor. In a very agitated manner, Keaton, while referring to herself, declared, ‘I hope this baby dies.’ This is when Hobbs learned Keaton was pregnant. Hobbs took them to the emergency room for DeBlase to be examined, and then returned them to the trailer. While DeBlase was being examined, Hobbs took Natalie and Chase to supper. The children were extremely hungry. Soon thereafter, DeBlase advised Hobbs they were moving to Peach Place Apartments.

“Richard and Ann DeBlase testified to a different version of events. They had not seen the children since December 23, 2009, and had not given them their Christmas gifts or Chase's birthday gifts. They did not know where DeBlase was living, but by inquiring of his friends, learned they were at the Champions' trailer. In February, along with Richard's sister, Rose Heathcox, and her husband, they took the children's gifts to the trailer. Rose knocked on the door and DeBlase opened the door, expressed surprise at their visit, and allowed them to come in. He did not seem pleased by the unannounced visit, but let Natalie and Chase open their presents. Keaton came from the back of the trailer and became upset, shouting words to the effect of ‘what is that bitch doing here,’ referring to Ann DeBlase. To avoid a confrontation, Ann and Richard left the trailer and waited in the car for Rose and her husband. This was the last time they saw or spoke to their grandchildren. They denied any physical altercation or struggle while at the trailer.

“Later that month, DeBlase, Keaton, and the children moved into Unit 41 of Peach Place Apartments. Nicole Conniff was the manager of Peach Place. Many times she observed the children outside the apartment unattended in the parking area adjacent to a high traffic street. She and occupants of Peach Place were concerned about the safety of the unattended children. Chase often appeared with a dirty ‘sagging’ diaper.

“The rental agreement at Peach Place allowed access to all units by the manager for the purpose of pest control inspections. On one occasion, Conniff accompanied the pest control inspector to DeBlase and Keaton's apartment. After knocking several times without a response, Conniff used her master key to enter. Upon entering, she observed Natalie and Chase sitting on the floor facing different walls of the living room of the small apartment. Keaton came out of the bedroom screaming and cursing the children for letting people into the apartment. The children sat silently facing the wall and were visibly shaking. Conniff explained she used the master key to gain entry, but Keaton remained upset. Later, Keaton and DeBlase came to Conniff complaining about the entry to their apartment. DeBlase was threatening in voicing objection to her entering the apartment. Occasionally, police units came to Peach Place for various reasons. After the police left, DeBlase would often inquire of Conniff why the police were there. He did this to the point that Conniff asked him [if] he had something to hide.

“The first week of March 2010, the Rioses ran into DeBlase at an area Wal-Mart. When told Chase was waiting in the van with Keaton, the Rioses went to see him. Once they got to the van, the Rioses inquired about Natalie and were told she was staying with friends. They were shocked by Chase's appearance. He looked ‘emergency room sick.’ He seemed in a stupor and was very pale. They insisted DeBlase get medical attention for Chase. DeBlase did call an area medical clinic where Natalie and Chase had been treated in the past, and reported Chase had diarrhea. The clinic advised he be given Gatorade and monitored. This was one of the few requests for medical advice for Natalie or Chase in the year before their deaths. This was the last time the Rioses saw Chase.

***4** “DeBlase enrolled in Blue Cliff Career College in Mobile in August 2009, and took classes in massage therapy. There he met another student, Renee Pierce. She gave him rides to school and knew he had children he referred to as ‘my little princess’ and ‘a little flirt.’ DeBlase took a leave of absence from school from January 14th through March 2, 2010. On his return, Pierce noticed he was different. She described him as ‘weird’ and he appeared to be unclean. These conditions continued until he dropped out of Blue Cliff in July 2010.

"On June 20, 2010, Hobbs called DeBlase and asked him about his plans with Natalie and Chase for Father's Day. Hobbs said he had gifts for the children and wanted to bring them over. DeBlase said he would call Hobbs when he got home, but never did. Hobbs tried to call DeBlase after Father's Day, but DeBlase would not answer the calls.

"On June 21, 2010, Keaton accompanied DeBlase to class at Blue Cliff. Renee Pierce asked who was keeping the children. He said they were with a friend. Keaton came to school with DeBlase several more times and had conversations with Pierce. Keaton said she did not want to be a mother to Natalie or Chase, and that someone needed to teach Natalie that she was not a little princess. She called them 'the spawn of Satan,' and referred to her unborn child as 'the chosen one.' She expressed concern that Natalie and Chase would be jealous of her child.

"DeBlase and Keaton were evicted from Peach Place on July 23, 2010. They left Mobile, briefly lived with Keaton's grandmother in Rome, Georgia, and then moved to Louisville, Kentucky, where Keaton's mother, Hellena Keaton, lived with her fiancé Jim Emery. Hellena owned rental property in Louisville where DeBlase and Keaton lived. Next door to the rental property, Emery's friend, Les Wilson, and his wife resided. Les Wilson is a retired Louisville Metro Police officer. On August 25, 2010, Keaton gave birth to a daughter. Hellena and Emery were told DeBlase's children were living with relatives in Las Vegas.

"On November 14, 2010, while leaving his job at the airport, DeBlase was arrested for running a stop sign, no vehicle registration, and other traffic violations. He was jailed overnight, and his van impounded. The next day, Hellena overheard Keaton and DeBlase arguing, and heard her daughter say, 'so, you are going to be like that. You're not with me because you love me, you are with me because...,' and heard DeBlase say, 'I'll tell.' Hellena became alarmed and asked her what was going on. Keaton said the children were no longer with them, and that something happened to Natalie in the spring and to Chase on Father's Day. Hellena told Emery, who called Les Wilson for advice. Emery reported that DeBlase's children may have been killed. Wilson contacted Lt. Kevin Thompson, a Louisville Metro Police Department officer he had worked with in the past. Lt. Thompson arranged for officers to go to the residence for a welfare check to see if Keaton was in danger and remove her if she wished. Officers Krissy Hagan and Shawn Erie conducted the welfare check. They saw no sign of injury to Keaton or signs of a struggle in the residence. Based on their experience, they thought DeBlase and Keaton's reactions to their visit unusual. Keaton said that she wanted to leave with them, but was calm, slow, and deliberate in gathering her belongings. There were no harsh exchanges between Keaton and DeBlase. DeBlase mostly sat quietly and stared out the window. Keaton was taken to meet with Lt. Thompson. Soon after the officers and Keaton left the residence, Les Wilson observed DeBlase leaving the apartment carrying a travel bag.

***5** "That same day, Lt. Thompson interviewed Keaton at his office. Her responses to his questions were long, rambling, and confusing at best. Generally, she portrayed herself as an innocent and handicapped victim of abuse by DeBlase who, because of her blindness, was not sure what happened to Natalie and Chase. She states that Natalie had a toxic odor on her breath, lost control of bodily functions, and threw up 'black stuff.' She stated that on March 4th, DeBlase left for school and Natalie was put on a tarp in the closet. Keaton became concerned and called DeBlase who said he would check on her when he got home. According to Keaton's statement, on his return, Natalie was unresponsive. Keaton said Natalie was dressed in red pajamas, put in the back of their van after dark, and driven to a location Keaton could not describe. She said DeBlase opened the rear of the van and walked to a wooded area, and she assumed disposed of Natalie's body. She stated that on June 20th, Chase displayed the same symptoms as Natalie and became unresponsive. Chase was put in the back of the van and his body was taken to an undisclosed location. Lt. Thompson testified at trial that he believed Keaton was untruthful during the interview, was not as naive as she appeared, and was calculating when it suited her.

"Lt. Thompson contacted law enforcement in Mobile to relay information about the missing children. Donald Boykin, a former lieutenant in the homicide division of the Mobile Police Department, received the information and assigned Sgt. Angela Prine to investigate.

"Lt. Thompson obtained Keaton's cell phone. It was examined by a computer forensic expert in Louisville. He retrieved voicemails left by DeBlase. In the voicemails, DeBlase professes his love for Keaton while crying and saying he is sorry things turned out as they had. He asked her to contact him.

"Upon search of DeBlase's impounded van, law enforcement recovered pictures of Natalie and Chase, children's stuffed animals, a duffle bag, and a container of antifreeze. A second search was conducted using cadaver dogs. Both dogs alerted to the scent of dead body on items in the back of the interior area of the van.

"Sgt. Prine contacted Corrine and was advised she had not had contact with her children in over a year and did not know their whereabouts. Sgt. Prine also contacted several of DeBlase's friends in Mobile. Sgt. Prine traveled to Louisville, and with Lt. Thompson, went to a women's shelter to interview Keaton. She refused to be interviewed and left the shelter upon the officers' departure. Sgt. Prine obtained an arrest warrant for Keaton on charges of child abuse. Keaton's cell phone was traced and she was soon taken into custody.

"Sgt. Prine interviewed Keaton in Louisville on November 30, 2010. Keaton again gave long, rambling, and self-serving responses to questions. She also denied knowing how Natalie or Chase died, and relied on her visual impairment and illness during her pregnancy for her lack of knowledge. When confronted with witness statements that she had abused the children in Mobile, she aggressively responded that DeBlase's friends were conspiring against her for a variety of reasons. After that interview, Keaton was arrested for child abuse and extradited to Mobile.

"After leaving Louisville, DeBlase traveled to Pace, Florida, and stayed with his friend, Randall Melville. Melville received a call on December 2, 2010, informing him a local news program reported the police were looking for DeBlase about missing children. Melville asked DeBlase what was going on. He responded he had not killed his children, and gathered his belongings and left on foot. Melville contacted the Sheriff's office and a short time later, DeBlase was apprehended.

"B. DeBlase Interviews

"Lt. Boykin and Sgt. Prine were promptly notified that DeBlase was in the Santa Rosa County [Florida] Sheriff Department's custody and went there with a warrant for his arrest on the charge of abuse of a corpse. After giving the Miranda warnings,[2] they interviewed DeBlase in the early hours of December 3rd. A second interview took place later that same day, and a third interview was conducted by Lt. Boykin and a Mobile County Assistant District Attorney on December 7th.

"After the first interview, DeBlase was transported to Mobile. In route, he directed Lt. Boykin and Sgt. Prine to an area off Beverly Jeffries Highway near Citronelle in north Mobile County. He indicated the general area where he disposed of Natalie's body. They then proceeded to Highway 57 north of Vancleave, M[ississippi], where DeBlase thought he disposed of Chase's body.

***6** "At the first interview, DeBlase began with an incredible story about the children being kidnapped on Father's Day during broad daylight by two armed men wearing masks. He quickly abandoned this story when told that Keaton had admitted that Natalie died months earlier. DeBlase then related a version of events somewhat consistent with later interviews and discovered evidence. He says before he left for school on March 4th, Keaton had bound Natalie's arms and legs with duct tape. She could not move her hands or legs apart and was placed inside a suitcase. He says the suitcase was open when he left home, and that he had eye contact with Natalie and she was alive. The binding with tape and placement in the suitcase was Keaton's form of discipline for Natalie to change her attitude. She was called 'princess' by family and friends and Keaton felt she must be taught not to act like a princess.

"DeBlase was absent from their Peach Place apartment for twelve to fourteen hours that day. Upon returning, he found the suitcase zipped shut in a closet. Natalie was lifeless and her body cold and stiff with her jaw locked open like something had been stuffed in her mouth. They dressed her in red pajamas and placed her in the back of their van. DeBlase drove with Keaton and Chase to the Citronelle area where Natalie's body was left in a wooded area. When asked why he did not call 911 on finding Natalie dead, he said he loved Keaton and was afraid of losing her, their expected child, and Chase.

"DeBlase also admitted that he saw Keaton duct tape Chase to a broom handle on the evening of June 19th. Keaton was disciplining Chase due to lack of success in his potty training. He was taped rigid to the broom handle and was unable to move his arms or legs, then placed in a corner of the bedroom, and wedged against the wall by a dresser. A tarp was put under his feet. DeBlase took a sleeping pill to help him sleep in the same room where Chase stood. The next morning, Father's Day, DeBlase woke to find Chase still taped to the broom with a sock in his mouth and tape around his face. Chase was dead. Chase's body was put in

a garbage bag. Later, he was transported in the back of the van to Mississippi and left in the woods.

"DeBlase said for days before their respective deaths, Natalie and Chase had a strong odor on their breath and were throwing up 'black stuff.' He never sought medical attention for the children or contacted law enforcement.

"C. DeBlase Letters

"After his arrest and while in Mobile Metro Jail, DeBlase wrote a number of handwritten letters. An FBI handwriting expert authenticated the handwriting as DeBlase's. The letters are dated between December 8, 2010, and January 2, 2011. Several of the letters refer to an ultimatum from Keaton in January 2010 that DeBlase choose to be with her or his children. He stated that he was 'blinded by love' and chose Keaton. He allowed Keaton to treat the children as she wished. He wrote the children were beaten with a belt, made to stand in a corner for extended periods, and given poison in their sippy cups to break their spirits.

"In one letter, DeBlase said he found Natalie taped and gagged and dead in the suitcase on March 4th. Other letters stated she was alive in the suitcase when he found her, and after he asked her why she would not obey Keaton, he held her in the air and choked her to death to stop the torture. Several letters also state he choked Chase to death to stop his being tortured. The letters also describe the disposal of their bodies as described in his statements to the investigators.

"The investigators received these letters in [September] 2011 from Brandon Newburn, an inmate at Fountain Correctional Center. Newburn was housed in the same wedge as DeBlase in Mobile Metro Jail during the time the letters were written. Newburn protected DeBlase from harassment by other inmates. Along with his fellow cellmate, Kinard Henson, Newburn signed many of the letters as a witness. Newburn testified that no agreement existed with the District Attorney's office to have the two consecutive life sentences he is now serving reduced.

***7** "D. Children's Remains

"On December 4, 2010, there was an unsuccessful search of the area identified by DeBlase north of Vancleave, Mississippi, with cadaver dogs. On December 5, 2010, an unsuccessful search was conducted for Natalie's body.

"On December 8th, 'Operation Chase' was undertaken north of Vancleave, Mississippi, on Highway 57, with sixty to seventy people walking in parallel lines in a grid pattern across the search areas. A search member found scattered human remains in the woods not far from the roadway. Along with the human remains, there were multiple pieces of gray duct tape close to where the skull was located, a white sock attached to the duct tape, pieces of garbage bag, training pants for a child, and a diaper. There were blonde hairs found attached to the sticking side of the duct tape. An officer testified at trial that a piece of duct tape was found that when retaped together formed the dimensions of a child's head. The duct tape would cover a child's entire face, with only the nose exposed. The sock attached to the tape aligned with the location of the mouth. Also, the officer testified that there was evidence of animal activity and chew marks on the tape around the area of the eyes.

"The State used DNA from a tooth to prove they [we]re the skeletal remains of Chase. A child Chase's age usually has over two hundred and forty bones, but the investigators only recovered twenty-one bones at the scene, including pieces of the skull. The bones were found during an exhaustive search. A forensic anthropologist, Dr. Alice Curtin, testified at trial that there was evidence of animal activity and gnawing on the bones. Also, she testified that on the roof of Chase's eye orbit, there was porous bone. She stated this is usually diagnosed due to anemia, often the result of malnutrition, and it is a non-specific indicator of poor health.

"On December 11th, there was a search for Natalie's remains with seventy-seven volunteers and four dogs off of Beverly Jeffries Highway. They did a similar grid pattern, and cleared the area. The remains were found close to the road, with part of the skull and lower jaw located underneath a log. Found near the remains were remnants of red clothing. There was a portion of the scalp recovered that was mummified, and too hard for soft tissue DNA analysis. Again, the State used a tooth from the remains to prove they [we]re the remains of Natalie. The search only recovered sixty-eight bones. Dr. Curtin, the forensic anthropologist, testified that Natalie encountered a period of growth disruption before she died. Both the femurs and tibia bones showed Harris lines, which are lines of arrested growth, on x-rays. Although lines of arrested growth are nonspecific as to cause, nutritional deficiencies, poisoning, psychological stress, or high fever can cause them.

"Dr. Staci Turner, the doctor who performed the children's autopsies, could not determine cause of death for either child because of the condition of the remains. The condition of the bones was consistent with bones exposed to the elements for months. She ruled the manner of death of both children to be homicidal violence.

***8** "In 2011, Natalie and Chase's remains were exhumed for testing pursuant to a Court order. The bones were tested for ethylene glycol, an active ingredient in antifreeze. The forensic toxicologist tested washes and debris from both children's craniums, a diaper recovered with Chase's remains, pants recovered with Natalie's remains, and a scalp tissue sample recovered with Natalie's remains, and found no traces of the chemical. The forensic toxicologist gave four reasons for the negative result of the testing: 1) the methods for testing were not sensitive enough to find traces of the chemical; 2) it was never ingested; 3) it was washed away by the elements because ethylene glycol is soluble in water; or 4) it could have metabolized and left no trace in the body."

(C. 59-72.) [3]

DeBlase's defense was that Keaton killed Natalie and Chase. He claimed that he did not actively participate in the abuse or the murder of his children and that, therefore, he was not guilty of capital murder but was, at most, guilty of reckless manslaughter. DeBlase presented evidence indicating that Keaton had admitted to a social worker that she had beaten Natalie and Chase with a belt multiple times and that she believed that it was better for children to die than to suffer abuse. DeBlase also presented evidence that he sought medical treatment for Chase regularly, including the day after Natalie was killed in March 2010. In addition, DeBlase presented evidence indicating that Keaton was the dominant person in their relationship and raised the inference that Keaton was mentally unstable, and he presented evidence that he was a good father before he met Keaton.

At the penalty phase of the trial, DeBlase presented testimony from family and friends about his childhood and difficulties in school and about his character. DeBlase also presented testimony from clinical neuropsychologist Dr. John Goff. Dr. Goff diagnosed DeBlase with "schizotypal personality disorder with dependent features." According to Dr. Goff, a person suffering from this disorder has difficulty forming relationships with other people, has difficulty with his or her own identity and often likes to dress up as other people or characters, is plagued by social anxiety, and is "extremely dependent on other people and ... will go to great lengths in order to avoid being abandoned." (R. 4208.) Dr. Goff described someone suffering from this disorder as "extremely weak, pliable, [and] dependent." (R. 4214.) Dr. Goff also testified that DeBlase had low intellectual functioning with a full-scale IQ of 84, a learning disability, and attention-deficit disorder. Finally, Dr. Goff testified that Keaton had been diagnosed with antisocial personality disorder, which, he said, is characterized by a lack of conscience, cold and calculating behavior, overdramatization, and wild fluctuations in mood. According to Dr. Goff, a person with antisocial personality disorder would take advantage of, and dominate, someone with schizotypal personality disorder.

Standard of Review

On appeal, DeBlase raises numerous issues for our review, many of which he did not raise by objection in the trial court. Because DeBlase 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).

***9** 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.

DeBlase contends that the trial court erred in granting his appointed defense counsel's motion to withdraw and appointing new counsel to represent him seven months before his trial. (Issue II in DeBlase's brief.) Specifically, he argues that "removing prior defense counsel without justification and without consulting or advising Mr. DeBlase regarding the removal" denied him his right to counsel of his choice. (DeBlase's brief, p. 17.) Because DeBlase did not raise this claim in the trial court, we review it for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that DeBlase was originally represented by James Sears and Ashley Cameron. Sears was appointed after DeBlase's arrest in December 2010 and represented DeBlase at the preliminary hearing in January 2011. Cameron was appointed after DeBlase was indicted in August 2011. [4] Over the course of the next two-and-a-half years, the trial was set and continued six times, with a seventh trial date of October 21, 2013. All but one of those continuances were at DeBlase's request [5] and were the result of a combination of factors, such as the loss of one of DeBlase's expert witnesses, defense counsel's dissatisfaction with the first mitigation expert they had retained, and the State's providing additional previously undisclosed discovery on the eve of trial.

***10** In September 2013, DeBlase's second mitigation expert, Cheri Hodson, submitted a mitigation report to the trial court and to the State per the court's order, see Part II of this opinion, infra, and that report was discussed, at the behest of the State, by the parties and the court at a hearing that same month. At the September 2013 hearing, the trial court expressed concern that Hodson had stated in her report that because of time constraints she believed that DeBlase had not received a thorough and effective mitigation investigation. However, the court recognized that there had been no motion to continue the October 21, 2013, trial setting and indicated that it was difficult to believe, given Hodson's report, as well as the report of DeBlase's first mitigation expert, that an adequate mitigation investigation had not been done. The court noted the "substantial" amount of money that it had authorized for the defense to retain expert mitigation assistance, and it further noted that, when dealing with the defense's ex parte motions for funds in that regard, it had "encouraged" defense counsel to monitor the progress of the mitigation investigation and to "stay on top of it." (R. 526.)

The October 2013 trial setting was subsequently continued, at DeBlase's request, to March 24, 2014. [6] Status conferences were held in December 2013 and February 2014, and in early March 2014, the State requested a hearing to again discuss Hodson's September 2013 mitigation report. Hearings were held on March 7, 2014, and on March 10, 2014. Because the trial judge was out of town at the time, the presiding judge of the circuit conducted those hearings. At the March 7 hearing, the State indicated that it was concerned that Hodson had stated in her September 2013 report that DeBlase had not had a thorough and effective mitigation investigation and that it was unaware of any further investigation by the defense since September 2013 that would "eradicate that issue." (R.

645.) The court noted the numerous times the case had been scheduled for trial and continued, and it questioned defense counsel about the mitigation investigation -- asking what Hodson had done since September 2013 and why counsel had filed an ex parte motion for an additional $10,000 for Hodson in February 2014 given that counsel had already requested and received $10,000 for Hodson and had expended almost $20,000 for their first mitigation expert. [7] Counsel explained that they had had "difficulty" with the first mitigation expert and had hired Hodson to replace the previous expert (R. 647); that Hodson's September 2013 report was her final mitigation report, although she had done "additional investigation" (R. 648); that the request for additional funds was to pay Hodson to testify at trial and "to do other things" (R. 646); and that there were "some issues with [Hodson] that ... would not be appropriate to discuss in open court." (R. 646.) Defense counsel also objected to the court discussing the defense's ex parte motions for funds in open court in front of the State and requested that a discussion be held in the judge's chambers. The court denied counsel's request, chastised counsel for providing what the court deemed unsatisfactory answers, and ordered that Hodson appear on March 10, 2014, "to explain to this court what she's been paid for and why she hasn't done what she's been paid to do." (R. 649.)

At the March 10, 2014, hearing, the presiding judge reiterated the numerous times the case had been scheduled for trial and the amount of money that had been authorized for the mitigation investigation. The presiding judge also informed counsel that, although the trial judge typically approves an attorney-fee declaration submitted by an appointed attorney, in this case, as the presiding judge of the circuit, he was going to take over that duty and was going to examine counsel's declarations in minute detail, and the court ordered that defense counsel submit up-to-date fee declarations immediately after the conclusion of the hearing so that he could "see what you've been doing in this case ... how much time you spent with this mitigation expert ... [and] how much preparation you've been giving this case." (R. 657.)

***11** The court then questioned Hodson about her mitigation investigation. The court asked Hodson what she had done since submitting her report in September 2013 and whether she had asked for an additional $10,000 in funds, and defense counsel objected to the court questioning Hodson in front of the State. Counsel stated that the trial judge had "ordered that report that we presented in September be our final report," and that, as a result, counsel were "under the impression" that the September 2013 report was the report they had to use for trial and they had "instructed Ms. Hodson not to do any more work because that was the mitigation report we were stuck with." (R. 665.) When the court questioned counsel further about the trial judge's previous orders, counsel reiterated that the trial judge "told us that was the end, that that was our final mitigation report," and that they "were under the impression that that was what mitigation was supposed to be." (R. 666.) Hodson then interjected and said that counsel had represented to her that September 2013 was the deadline "to submit a final report" and that counsel had represented to her that the trial judge had directed her not to conduct any further investigation. (R. 667.) We note that the record contains no indication whatsoever that the trial judge ordered, or even implied, that the defense could not continue its mitigation investigation after Hodson's September 2013 report had been submitted.

Hodson then answered some general questions in open court, but indicated that she could not provide adequate answers regarding some matters without providing details that she believed would be inappropriate to reveal in open court, and the court agreed to question her about those matters outside the State's presence. Outside the State's presence, Hodson indicated that she could not complete her mitigation investigation in time for the March 24, 2014, trial setting because she had tried repeatedly to have defense counsel subpoena a multitude of records regarding DeBlase and his family but that counsel had failed to get those records for her. Hodson said that she had expended over $8,000 of the original $10,000 authorized by the trial judge and that she had told counsel that she would need additional funds only if counsel got her the records she needed, she amended her September 2013 report, and she testified at trial.

Hodson also indicated that counsel had not communicated with her regarding the case. For example, she said that she had asked counsel in June 2013, one month after she was retained, whether they were going to have a neuropsychologist examine DeBlase, and counsel never responded. According to Hodson, she was unaware that counsel had hired neuropsychologist Dr. John Goff until Dr. Goff telephoned her "out of the blue" in February 2014. (R. 682.) She also stated that she needed the results of Dr. Goff's evaluation to complete her mitigation investigation but that counsel never gave her Dr. Goff's report. [8] Counsel stated that they believed that Hodson had recommended that they have DeBlase evaluated by a neuropsychologist but that she did not need "to get any records back." (R. 674.)

Hodson also said that she had never discussed trial strategy with defense counsel, even though the trial was set to begin in two weeks, and that she had "never seen a case proceed the way this one has" in the 22 years she had been conducting mitigation investigations. (R. 684.) After speaking with Hodson, the court stated that it was going to make a "strong suggestion" to the trial judge, and, over defense counsel's objection, the court directed Hodson to submit her e-mail communications with counsel, under seal, for the court to examine. (R. 686.)

Four days later, on March 15, 2014, Sears and Cameron filed a motion to withdraw from representing DeBlase, arguing that "[d]ue to circumstances unknown to, and beyond the control of [counsel], it would not be in the best interest of ... DeBlase ... that [counsel] continue as the appointed counsel." (C. 263.) On March 17, 2014, the trial judge, who had returned from out of town, held a status hearing. The court indicated that it had read the transcripts of the hearings conducted on March 7, 2014, and March 10, 2014, and that it was apparent that the mitigation expert could not be prepared in time for the March 24, 2014, trial setting, and the court continued the trial. The court also granted defense counsel's motion to withdraw, over the State's objection. The court noted that it was clear from the previous hearings that the performance of defense counsel had been called into question by the presiding judge and by Hodson's testimony and that the questions about counsel's performance were sufficient justification to grant counsel's motion to withdraw. The following day, the trial court appointed new counsel to represent DeBlase and reset the trial for October 14, 2014.

***12** The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." "Comprehended within the Sixth Amendment right to assistance of counsel is the right to the effective assistance of counsel and the right to counsel of one's own choosing." Lane v. State, 80 So.3d 280, 294 (Ala. Crim. App. 2010). See also Ex parte Tegner, 682 So.2d 396, 397 (Ala. 1996) (quoting United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994)) (" '[A] criminal defendant has a presumptive right to counsel of choice.' "). "The right to counsel of choice, in turn, ... 'implies the right to continuous representation by the counsel of one's choice.' " Lane, 80 So.3d at 294 (quoting United States v. Gearhart, 576 F.3d 459, 464 (7th Cir. 2009). "[T]he wrongful deprivation of choice of counsel is 'structural error,' immune from review for harmlessness, because it 'pervades the entire trial.' " Kaley v. United States, 571 U.S. 320, 336-37, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)).

However, the right to counsel of choice is not absolute. To the contrary, "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In Wheat, the United States Supreme Court recognized that a defendant is not entitled to choose counsel (1) who is not a member of the bar; (2) whom the defendant cannot afford; (3) who is unwilling to represent him; or (4) who is laboring under a conflict of interest. In addition, in Lane, supra, this Court recognized:

> "A criminal defendant cannot use the right to counsel of choice 'as a means to delay judicial proceedings.' People v. Espinal, 781 N.Y.S.2d 99, 102, 10 A.D.3d 326, 329 (2004) (quoting People v. Arroyave, 49 N.Y.2d 264, 271, 425 N.Y.S.2d 282, 401 N.E.2d 393 (1980)). Likewise, physical incapacity, gross incompetence, or contumacious conduct may justify a trial court in removing counsel. See, e.g., Burnette v. Terrell, 232 Ill.2d 522, 528, 905 N.E.2d 816, 328 Ill.Dec. 927 (2009); Weaver[v. State], 894 So.2d [178,] 189 [(Fla. 2004)]; [People v.] Johnson, 215 Mich.App. [658,] 665, 547 N.W.2d [65,] 69 [(1996)]; and Harling[v. United States], 387 A.2d [1101,] 1105 [(D.C. Cir. 1978)]. In addition, 'unexpected difficulties in [the] trial calendar that threaten the State's right to a fair trial' may also justify removal of counsel. Weaver, 894 So.2d at 189.

80 So.3d at 299.

Because "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," Wheat, 486 U.S. at 160, 108 S.Ct. 1692, " '[t]here are times when an accused's right to counsel of choice must yield to a greater interest in maintaining high standards of professional responsibility in the courtroom.' " Lane, 80 So.3d at 298-99 (quoting State v. Vanover, 559 N.W.2d 618, 626 (Iowa 1997)). Simply put, "a defendant's right to counsel of his choice must be balanced against the need for the efficient and effective administration of justice." Hamm v. State, 913 So.2d 460, 472 (Ala. Crim. App. 2002). "Thus, a trial court may remove chosen counsel over the defendant's objection for good cause," Lane, 80 So.3d at 299, and "[t]he 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). See also Scott v. State, 937 So.2d 1065, 1080 (Ala. Crim. App. 2005) ("A trial court has broad discretion in considering whether to grant defense counsel's motion to withdraw."). Indeed, a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness ... and against the demands of its calendar." Gonzalez-Lopez, 548 U.S. at 152, 126 S.Ct. 2557.

***13** In this case, we find no error on the part of the trial court in granting Sears and Cameron's motion to withdraw from representing DeBlase. The revelation at the March 7 and 10, 2014, hearings that counsel had not discussed the case with their own mitigation expert, who counsel said they intended to call to testify at trial, other than to instruct her to stop the mitigation investigation, despite the fact that she did not believe that she had completed a thorough and effective investigation, raises serious questions about counsel's representation and preparedness for trial, which, at that time, was scheduled to begin in only two weeks. The fact that counsel had not obtained records regarding DeBlase and his family that Hodson indicated she needed and the fact that counsel was unaware that their mitigation expert would need Dr. Goff's report and, as a result, failed to inform Hodson that DeBlase had been evaluated by Dr. Goff, likewise suggest a lack of preparedness on counsel's part for the penalty phase of the trial.

We note that DeBlase argues that counsel's representation did not rise to the level of gross incompetence which, he claims, is required under this Court's opinion in Lane for removal of counsel. Although this Court recognized in Lane that gross incompetence would be a valid basis for the removal of counsel, this Court did not hold that counsel's performance must rise to the level of gross incompetence in order to justify removal. Defendants have the right to counsel of their choice, but they also have the right to the effective assistance of counsel, and, in this case, whether Sears and Cameron were providing effective assistance with respect to the mitigation investigation was seriously questioned.

Moreover, this is not a case, as was Lane, where the trial court removed counsel at the State's request and over the defendant's objection. In this case, the trial court removed counsel at the defense's request and over the State's objection. We note that DeBlase argues that Lane nonetheless mandates reversal of his convictions and sentence because, he says, the presiding judge forced counsel to move to withdraw by questioning counsel's performance, by ordering counsel to submit their attorney-fee declarations, and by stating that he had a "strong suggestion" for the trial judge when the trial judge returned. We disagree. Contrary to DeBlase's argument, the presiding judge did not order counsel "to prepare final fee statements as though they had already been removed." (DeBlase's reply brief, p. 10.) Rather, the presiding judge stated that he wanted to "see what you've been doing in this case ... how much time you spent with this mitigation expert ... [and] how much preparation you've been giving this case" (R. 657), and he ordered counsel to provide "up-to-date time fee declaration computations in this case," not final fee declarations. (R. 686.) Nor did the presiding judge "impl[y] that he would 'strong[ly]' recommend [counsel's] removal" to the trial judge. (DeBlase's reply brief, p. 10.) Although the presiding judge did state that he was going to give the trial judge "a strong suggestion," the record refutes DeBlase's argument that the suggestion was the removal of counsel. At the hearing on March 17, 2014, the trial judge specifically stated what the presiding judge was suggesting: "[The presiding judge], whether he said it in the transcript, he has certainly let it be known to me that he is strongly of the opinion that the case cannot be tried on the 21st [of March] because of this deficiency with regard to Ms. Hodson's preparation." (R. 693.) Although we have no doubt that counsel felt pressure to withdraw from their representation of DeBlase after their lack of preparation was revealed at the hearings on March 7 and 10, 2014, we do not agree with DeBlase's contention that the presiding judge's comments and actions forced counsel to move to withdraw.

That being said, any pressure counsel may have felt after the March 7 and 10, 2014, hearings does not change the fact that by filing a motion to withdraw, Sears and Cameron clearly and unequivocally indicated that they were no longer willing to represent DeBlase. As already noted, "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." Wheat, 486 U.S. at 159, 108 S.Ct. 1692 (emphasis added). " 'A criminal defendant does not have a categorical right to insist that a retained or assigned attorney continue to represent him.' " Lane, 80 So.3d at 298 (quoting People v. Childs, 670 N.Y.S.2d 4, 9–10, 247 A.D.2d 319, 325 (N.Y. App. Div. 1998). Contrary to DeBlase's belief, the right to counsel of choice did not give him the right to force Sears and Cameron to represent him unwillingly.

***14** Given the severity of the charges against DeBlase and balancing the interests of DeBlase's presumptive or qualified right to counsel of choice and his right to the effective assistance of counsel and the trial court's interest

in maintaining integrity in judicial proceedings and high standards of professional responsibility in the courtroom, we find that the trial court did not err in granting defense counsel's motion to withdraw. Therefore, we find no error, much less plain error, as to this claim.

II.

DeBlase contends that the trial court erred in ordering him to produce to the State the reports prepared by his mitigation experts. (Issue VII in DeBlase's brief.) He argues that the reports were internal documents prepared by the defense and its agents and, therefore, not subject to discovery, see Rule 16.2(d), Ala. R. Crim. P., and that, even if the reports were not internal documents, they were not subject to discovery under Rule 16.2(c), Ala. R. Crim. P., because he did not introduce the reports into evidence and did not call a mitigation expert to testify at trial.

The record reflects that DeBlase hired his first mitigation expert, Janann McInnis, in 2012 and the trial court ordered DeBlase to produce McInnis's report to the State when it was completed. DeBlase filed written objections to the trial court's order, and the issue whether the State was entitled to discovery of the report was discussed at length during pretrial hearings on October 12, 2012, and December 5, 2012. On December 17, 2012, the trial court overruled DeBlase's objections and ordered that DeBlase produce to the State a copy of McInnis's report within five days. Subsequently, DeBlase indicated that he was not satisfied with McInnis, and in May 2013 he requested and received funds to hire a second mitigation expert, Cheri Hodson. At a hearing in August 2013, the trial court ordered DeBlase to produce Hodson's mitigation report to the State, and DeBlase again complied with the court's order. As noted in Part I of this opinion, supra, in March 2014, attorneys James Sears and Ashley Cameron withdrew from representing DeBlase, and the trial court appointed new counsel to represent him. The record reflects that Hodson continued as DeBlase's mitigation expert after the change in representation but that counsel did not introduce Hodson's September 2013 report at trial and did not call Hodson to testify at trial.

Rule 16.2(a), Ala. R. Crim. P., requires a defendant to disclose, upon the State's request, all "books, papers, documents, photographs, tangible objects, buildings, places, or portions of any of these things which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial." In addition, Rule 16.2(c) requires a defendant to disclose, upon the State's request, "any results or reports of physical or mental examinations, and of scientific tests or experiments ... which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial." However, Rule 16.2(d), provides:

> "Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or defendant's agents in connection with the investigation or defense of the case; nor shall this rule authorize discovery or inspection of statements made by the defendant to defendant's attorneys or agents, or statements made by state/municipality or defense witnesses, or prospective state/municipality or defense witnesses, to the defendant, the defendant's attorneys, or agents."

***15** After examining the reports prepared by both DeBlase's mitigation experts, we conclude that those reports were not subject to discovery. The mitigation reports cannot fairly be characterized as medical or scientific reports so as to fall within Rule 16.2(c), although one report did rely in part on medical records relating to DeBlase, and there is no indication in the record that DeBlase intended to introduce those reports into evidence so as to make them discoverable under Rule 16.2(a). The report prepared by McInnis consists primarily of a synopsis of the interviews she conducted with DeBlase, his parents, and several of his friends, i.e., it is little more than a summary of "statements made by the defendant to defendant's attorneys or agents, [and] statements made by state/municipality or defense witnesses, or prospective state/municipality or defense witnesses, to the defendant, the defendant's attorneys, or agents." Rule 16.2(d). The report prepared by Hodson goes only slightly further; it provides a social history of DeBlase and his parents based on statements made by DeBlase, his parents, and several of DeBlase's friends, and includes Hodson's expert opinion as to the impact that history had on DeBlase and a listing of what Hodson believed were relevant mitigating circumstances. Both reports fall squarely within Rule 16.2(d), and the trial court erred in ordering DeBlase to produce the reports to the State. Cf., Knotts v. State, 686 So.2d 431, 473-74 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala. 1996) (holding that the trial court erred in ordering the defendant to provide to the State a summary of the expected testimony of his expert criminologist, who testified at the penalty phase of the trial).

However, our conclusion that the trial court erred in ordering discovery of the reports does not end our analysis. 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."

See Jackson v. State, 623 So.2d 411, 413 (Ala. Crim. App. 1993) (recognizing applicability of the harmless-error rule to discovery issues).

DeBlase has failed to establish that he was prejudiced by disclosure of the reports. DeBlase argues that the reports contained "intimate details" of his life and that he was "[u]ndeniably" prejudiced because, he says, disclosure of the reports to the State "allowed the State unfair access to [his] mitigation evidence, as well as his penalty-phase strategy." (DeBlase's brief, p. 66.) However, DeBlase admits that he presented at trial "only a fraction" of the information that was contained in the reports, and he does not argue, nor does the record reflect, that the information in the reports was not otherwise available to the State or that the State used the information in the reports to his detriment at trial. (DeBlase's brief, p. 60.) Based on the record before us, we have no trouble concluding that the trial court's error in ordering DeBlase to produce the mitigation reports to the State did not injuriously affect his substantial rights and was, at most, harmless error. Therefore, DeBlase is entitled to no relief on this claim.

III.

DeBlase contends that the trial court erred in denying his motion for a change of venue. (Issue VIII in DeBlase's brief.) He argues that the media coverage of the murders was so extensive and prejudicial that he could not receive a fair trial in Mobile County.

In April 2013, DeBlase filed a motion for a change of venue, arguing that "newspapers, broadcast media, and other forms of communication in Mobile County and neighboring counties have given the case such extensive publicity, and in a manner so prejudicial to him, that it is impossible to conduct a fair trial by an impartial and unbiased jury in this county." (C. 110-11.) DeBlase also asserted that comments in response to media reports on the Internet "show the vitriol and bias still present in the residents of Mobile County," and he attached to his motion a printout of comments to one media report that was published on the Internet. (C. 111.) DeBlase also requested and received funds to hire a polling expert.

The trial court held three hearings on the motion in July, August, and September 2013. [9] At those hearings, DeBlase did not present evidence of any media reports about the case. [10] However, he presented testimony from Jerry Ingram about a telephone poll Ingram had conducted of 300 Mobile County residents in February and March 2013. Ingram testified that, of the 300 people polled, roughly two-thirds had heard about the murders. Of those who had heard about the case, Ingram said, roughly 68% indicated that they believed DeBlase was guilty based on what they had heard. We note that those responding to the poll were not asked whether they could set aside their opinions and what they had heard about the case and try the case fairly if they were called as a juror.

***16** In response, the State presented testimony from its own polling expert, Verne Kennedy, who had reviewed Ingram's report. Kennedy testified that, based on the methodology used in the poll and the fact that there was a similar case in Mobile County involving a father killing his children that had also received widespread publicity, see Luong v. State, 199 So.3d 98 (Ala. Crim. App. 2013), rev'd, 199 So.3d 139 (Ala. 2014), opinion after remand, 199 So.3d 173 (Ala. Crim. App. 2015), Ingram had overstated the percentage of people who believed DeBlase was guilty. Kennedy estimated that roughly 40% of those who had heard about the case had formed an opinion that DeBlase was guilty of killing his children, a substantially smaller percentage, Kennedy said, than in the Luong case, in which 71% of those who had heard about the case had formed an opinion that the defendant was guilty.

> " '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.).

> " '[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)."

Floyd v. State, [Ms. CR-13-0623, July 7, 2017] —— So. 3d ——, —— (Ala. Crim. App. 2017).

A.

DeBlase argues that he suffered actual prejudice because, he says, several jurors who sat on his jury had read or heard something about the case through the media, three of those jurors had heard what he describes as "highly prejudicial media reports" that referenced abuse, starvation, and poisoning, and one of those jurors "never indicated she was capable of setting this prejudicial information aside." (DeBlase's brief, pp. 70-71.)

> " '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)).

Floyd, —— So. 3d at ——.

The record reflects that seven jurors who served on DeBlase's jury had heard something about the case through the media. However, none of those jurors indicated, either on the juror questionnaire or during individual voir dire, that he or she had a fixed opinion as to DeBlase's guilt or innocence. Three of those jurors were asked during individual voir dire if they could set aside what they had heard and try the case fairly, and all three indicated that they could. The other four jurors were not asked by either party if they could set aside what they had heard, even though both parties had ample opportunity to do so. As noted above, the burden is on the defendant to prove that a change of venue is warranted. The fact that four jurors were never asked whether they could set aside what they had heard about the case does not establish that those jurors could not do so, much less that they had fixed opinions as to DeBlase's guilt. DeBlase failed to prove that he was actually prejudiced by pretrial publicity so as to warrant a change of venue.

B.

***17** DeBlase also argues that prejudice should be presumed in this case because, he says, the media coverage was sensational and inflammatory and contained information not admitted at trial. Specifically, DeBlase argues that one media report stated that Natalie and Chase may have been poisoned with antifreeze, another stated that DeBlase and Keaton had tested the antifreeze on the family dog to determine how long it would take to poison the children (information that was not presented to the jury), and yet another included an interview with a law-enforcement officer who had stated that "hell is not hot enough for the Defendant in his opinion." (R. 493.)

> "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))."

Floyd, —— So. 3d at ——.

"Mobile County has a large and diverse population" and "[a]ccording to the 2010 census, ... was Alabama's second largest county with a population of over 400,000 citizens," thus "reduc[ing] the likelihood of prejudice" and making "this Court ... reluctant to conclude that 12 impartial jurors could not be empaneled." Luong v. State, 199 So.3d 139, 147 (Ala. 2014). Moreover, although DeBlase presented evidence indicating that roughly two-thirds of Mobile County residents had read or heard something about the case, a percentage consistent with the number of prospective jurors who had read or heard about the case, " '[p]ublicity' and 'prejudice' are not the same thing. Excess publicity does not automatically or necessarily mean that the publicity was prejudicial." Hunt v. State, 642 So.2d 999, 1043 (Ala. Crim. App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994). As noted above, DeBlase presented no evidence of the content, timing, or extent of the media coverage in this case and, although DeBlase references in his brief on appeal three media reports, he admits that two of those reports occurred in February 2011, almost three years before his trial, and the record does not reflect when the other report occurred. Finally, nothing in the record indicates that the media interfered with the trial or influenced the jury's verdict.

***18** DeBlase failed to establish that the media coverage in this case so pervasively saturated the community as to create an emotional tide against DeBlase that rendered the court proceedings nothing more than a hollow formality or that the publicity in this case was 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 DeBlase's motion for a change of venue.

IV.

DeBlase contends that the trial court erred in allowing the venire to be death-qualified. (Issue XXI in DeBlase's brief.) Specifically, DeBlase 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.

V.

DeBlase contends that the trial court erred in its rulings on several challenges for cause. (Issues XIII and XIV in DeBlase's brief.)

"To justify a challenge for cause, there must be a proper statutory ground or ' "some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." ' " Ex parte Davis, 718 So.2d 1166, 1171 (Ala. 1998)

(quoting Clark v. State, 621 So.2d 309, 321 (Ala. Crim. App. 1992), quoting in turn, Nettles v. State, 435 So.2d 146, 149 (Ala. Crim. App.), aff'd, 435 So.2d 151 (Ala. 1983)). "A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within the trial judge's province.' " Martin v. State, 548 So.2d 488, 490 (Ala. Crim. App. 1988), aff'd, 548 So.2d 496 (Ala. 1989) (quoting Wainwright v. Witt, 469 U.S. 412, 429, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). Thus, "[b]road discretion is vested with the trial court in determining whether or not to sustain challenges for cause." Ex parte Nettles, 435 So.2d 151, 154 (Ala. 1983).

A.

First, DeBlase contends that the trial court erred in denying his challenges for cause as to four prospective jurors -- Jurors no. 29, 43, 95, and 102 -- who, he argues, indicated during voir dire that they would automatically vote to impose the death penalty if DeBlase was convicted of capital murder. Although DeBlase admits that Jurors no. 29, 43, 95, and 102 vacillated in their responses to questioning about their views on the death penalty, he argues that their vacillating responses were "not sufficient to overcome probable prejudice" and should be "given little weight" because, he says, the jurors indicated they could follow the law and the trial court's instructions only in response to "leading questions" by the prosecutor. (DeBlase's brief, pp. 83-85.) We disagree.

The record reflects that each prospective juror filled out a questionnaire, agreed upon by the parties, which included several questions regarding their views on the death penalty, and that each prospective juror was questioned individually regarding their views on the death penalty. Many prospective jurors were confused about the process in a capital trial and provided answers during individual voir dire that contradicted their responses on the questionnaire. Adding to the confusion were the leading and ambiguous questions posed by both parties that often resulted in prospective jurors providing contradictory answers during individual voir dire, as if they were trying to answer questions in such a way as to please whichever party's attorney was asking the questions. Much of the questioning by the parties was geared toward eliciting certain responses from certain prospective jurors based on those jurors' responses on the questionnaire.

***19** For example, when questioning a prospective juror who had indicated on the questionnaire that he or she was in favor of the death penalty, defense counsel would phrase their questions in such a manner as to elicit a response indicating that the prospective juror would automatically vote to impose the death penalty in all capital-murder cases or a response indicating that certain mitigating circumstances did not "matter" to the prospective juror, without providing an adequate explanation regarding the law the juror would be required to follow in making a sentencing determination. Likewise, when questioning a prospective juror who had indicated on the questionnaire that he or she was not in favor of the death penalty, the State would phrase its questions in such a manner as to elicit a response indicating that the prospective juror would never vote for the death penalty, again without providing an adequate explanation regarding the law the juror would be required to follow in making a sentencing determination. Recognizing this, the trial court, as individual voir dire progressed, began cautioning prospective jurors to not simply agree with whatever question was asked and to ask for clarification of any question they found confusing and, in many instances, the trial court stepped in and questioned prospective jurors in a more neutral manner after providing an explanation of the law and a juror's duty to follow the law.

Juror no. 29 indicated on his questionnaire that he was in favor of the death penalty and that the death penalty should be imposed in all capital-murder cases. When questioned by the State during individual voir dire, Juror no. 29 indicated that he would listen to both sides during the penalty phase of the trial before determining a sentence and that he would not automatically vote for the death penalty, but when questioned by defense counsel, Juror no. 29 indicated that he would "[p]robably" automatically vote for the death penalty if DeBlase were convicted of capital murder and that mitigating circumstances, such as a defendant's childhood or lack of criminal history, would not "matter" to him in determining the appropriate sentence. (R. 1696.) However, the trial court then questioned Juror no. 29 as follows:

> "THE COURT: So, are you saying that if there's a conviction, if there's a conviction by all the jurors beyond a reasonable doubt voting for a conviction of capital murder, intentional murder and then we go to the second phase and I'm going -- you're going to hear more evidence. Some would indicate why the death penalty should be imposed. Other evidence may indicate or try to indicate why it should not be imposed. It will go both ways.
>
> "[Juror no. 29]: Right.

"THE COURT: And I'll give you more instructions on the law about how you should consider those factors in your deliberations. You feel that you could -- with an open mind, even after you voted to convict, with an open mind, you could listen to both sides of that question and you could listen to my instructions, follow those instructions like your oath will tell you that you must do, and arrive at a fair -- a fair decision about the death penalty or life without parole?

"[Juror no. 29]: Yes, sir.

"THE COURT: You can do that?

"[Juror no. 29]: Yes, sir.

"THE COURT: You have no prior feelings about for or against the death penalty that would override your determination? You would listen to us and listen to the trial, is that right?

"[Juror no. 29]: Yes, sir."

(R. 1698-99.)

Juror no. 43 indicated on her questionnaire that she was in favor of the death penalty; that "if there is evidence to support a person committed a killing then death should be the punishment"; and that she believed that the death penalty was appropriate in some capital-murder cases and she could vote to impose the death penalty. When questioned by the State during voir dire, Juror no. 43 indicated that she would not automatically vote to impose the death penalty but that she would be open-minded and would listen to both sides before making a sentencing decision. When questioned by defense counsel, Juror no. 43 indicated that she believed the death penalty is the appropriate punishment whenever a defendant is found guilty of capital murder and that mitigating circumstances, such as a defendant's childhood or lack of criminal history, would not "matter" to her in determining sentence. Upon further questioning by the State, Juror no. 43 again indicated that she would not automatically vote to impose the death penalty upon a conviction for capital murder but would be open-minded and listen to both sides and, when questioned further by defense counsel, Juror no. 43 clarified that if the defendant's background is "brought up during the sentence phase," she would consider it in making a sentencing decision. (R. 1813.) She also made clear that she did not believe that the death penalty was appropriate in every capital-murder case; that, although she believed in the death penalty, she would still need to be convinced that death is the appropriate punishment in any given case; and that, when she was answering defense counsel's questions previously, she did not mean that she would automatically vote for the death penalty upon a conviction for capital murder.

***20** Juror no. 95 indicated on his questionnaire that he was in favor of the death penalty as a deterrent and that the death penalty should be imposed in all capital-murder cases. When questioned by the State during voir dire, Juror no. 95 indicated that he could vote for the death penalty or for life imprisonment without the possibility of parole and stated that he did not have a fixed opinion that the death penalty should be imposed automatically upon a conviction for capital murder. In response to defense counsel's questioning, Juror no. 95 indicated that he believed the death penalty should be imposed once a defendant is convicted of capital murder and that mitigating circumstances, such as a defendant's childhood or lack of criminal history, would not "matter" to him. However, upon further questioning by the State, Juror no. 95 indicated that, although it would be difficult, he could vote for life imprisonment without the possibility of parole. The trial court then explained the process of a capital trial, after which the following occurred:

"THE COURT: ... So, the question I need to know is, is your feelings, as you understand your feelings to be concerning the imposition of the death penalty, that it would be so strong that you could not back away from those feelings and listen to the instructions on the law fairly, fairly. Give everybody their fair day in court and fairly consider all the evidence, pro death penalty and against death penalty, and then arrive at a fair and impartial determination. The question is can you do that or -- or your sense about the death penalty, that it makes bad people think twice before they do bad in the future, those kind of thoughts, would they be so powerful in your mind that you think you could not be completely fair and impartial? Do you think you could be fair at that stage or do you think your personal feelings about the imposition of the death penalty would be so strong that you've got to tell me now I don't think I can really be fair?

"[Juror no. 95]: I think I could be fair.

"THE COURT: Okay. And your answer -- they read it back to you several times, death penalty, you said, great, makes the bad person think twice before doing it. Well, the sentence in this case, whatever it is, whatever it is, is not about anything other than this case and these facts and John DeBlase. It's not about a public policy statement. It's not

about how it's going to affect other people. It's about this case. It's particularized and customized, the sentence is, just to John DeBlase and this case. You understand that?

"[Juror no. 95]: Yes, sir."

(R. 2230-32.) In denying DeBlase's challenge for cause, the trial court stated:

"I believe that he is -- I've observed him. I've looked him -- as they say, I looked him in the eye when he listened to the questions and responded and I'm satisfied that he does not have an overwhelming or overriding predisposition concerning the imposition of the death penalty that would not make him fair in this case."

(R. 2232.)

Juror no. 102 indicated on her questionnaire that she was in favor of the death penalty; that "if the person is guilty of a crime then he should die"; that she believed the death penalty is an appropriate penalty in some capital-murder cases and she could vote to impose the death penalty; and that the death penalty is appropriate "only if it requires it and [the defendant] is guilty." When questioned by the State during voir dire, Juror no. 102 first indicated that she could never vote for life imprisonment without the possibility of parole. We note that although the State briefly explained to Juror no. 102 the two-part process of a capital-murder trial and the difference between aggravating circumstances and mitigating circumstances, the State did not inform Juror no. 102 about the law, i.e., that if the aggravating circumstances did not outweigh the mitigating circumstances then life imprisonment without the possibility of parole is the appropriate punishment, before asking whether Juror no. 102 could vote for life imprisonment without the possibility of parole.

***21** The State then asked Juror no. 102 generally whether she could "do what the Judge would ask [her] to do," to which Juror no. 102 said that she would do what the trial judge instructed her to do. (R. 2271-72.) Upon further questioning, Juror no. 102 indicated that she could weigh the aggravating and mitigating circumstances as instructed by the trial court and could vote for life imprisonment without the possibility of parole. Juror no. 102 further stated that, if the defendant is found guilty of capital murder, she believed the death penalty would be appropriate and "only if it outweighed could [she] say life." (R. 2272.) When defense counsel asked whether she believed that a person convicted of capital-murder "should get the death penalty," Juror no. 102 explained that "[t]he question was could I impose the death penalty" and reiterated that she "could impose it [upon a conviction for capital murder] but they said it was a second phase to it." (R. 2277.) Upon further questioning by defense counsel, Juror no. 102 stated that mitigating circumstances -- such as a defendant's childhood, lack of criminal history, or mental-health issues -- would be important to her in deciding the appropriate punishment.

" 'A] veniremember's personal feelings as to the law are immaterial unless those feelings are so unyielding as to preclude the veniremember from following the law as given in the court's instructions. "A veniremember who believes that the death penalty should automatically be imposed in every capital case should be excused." Martin v. State, 548 So.2d 488, 491 (Ala. Crim. App. 1988), aff'd, 548 So.2d 496 (Ala.), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). However, veniremembers who favor the death penalty should not be excused for cause where they indicate they can follow the court's instructions. Id.'

"Smith v. State, 698 So.2d 189, 198 (Ala. Crim. App. 1996), aff'd, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) (emphasis added). 'Jurors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the court.' Johnson v. State, 820 So.2d 842 (Ala. Crim. App. 2000), aff'd, 820 So.2d 883 (Ala. 2001).

" 'Even though a prospective juror may initially admit to a potential for bias, the trial court's denial of a motion to strike that person for cause will not be considered error by an appellate court if, upon further questioning, it is ultimately determined that the person can set aside his or her opinions and try the case fairly and impartially, based on the evidence and the law. Knop v. McCain, 561 So.2d 229 (Ala. 1989); Siebert v. State, 562 So.2d 586 (Ala. Crim. App. 1989), affirmed, 562 So.2d 600 (Ala.), cert. denied, 498 U.S. 963, 111 S.Ct. 398, 112 L.Ed.2d 408 (1990); Perryman v. State, 558 So.2d 972 (Ala. Crim. App. 1989). Only when a prospective juror's testimony indicates a bias or prejudice so fixed or deep-seated that that person cannot be impartial and objective must a challenge for cause be granted by the trial court. Knop, supra; Siebert, supra; Perryman, supra."

> "Ex parte Land, 678 So.2d 224, 240 (Ala.), cert. denied, 519 U.S. 933, 117 S.Ct. 308, 136 L.Ed.2d 224 (1996). ' " ' [A] preference [toward imposing the death penalty], where the potential [juror] indicates that he or she could nonetheless consider life imprisonment without parole is not improper and it does not indicate that the juror is biased.' " ' Hagood v. State, 777 So.2d 162, 175 (Ala. Crim. App. 1998), aff'd in pertinent part, rev'd on other grounds, 777 So.2d 214 (Ala. 1999), on remand to, 777 So.2d 221 (Ala. Crim. App. 2000), opinion after remand, 777 So.2d at 223 (Ala. Crim. App. 2000), quoting Price v. State, 725 So.2d 1003, 1024 (Ala. Crim. App. 1997), aff'd, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999), quoting, in turn, Smith v. State, 698 So.2d 189 (Ala. Crim. App. 1996), aff'd, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997)."

McNabb v. State, 887 So.2d 929, 945-46 (Ala. Crim. App. 2001), aff'd, 887 So.2d 998 (Ala. 2004).

After thoroughly reviewing the juror questionnaires and the transcript of voir dire, it is abundantly clear that the trial court was well within its discretion in denying DeBlase's challenges for cause as to Jurors no. 29, 43, 95, and 102. The record reflects that although Jurors no. 29, 43, 95, and 102 favored the death penalty, their personal beliefs were not so fixed and deep-seated as to prevent or substantially impair their duties as jurors. All four provided vacillating answers but ultimately indicated that they could follow the law as instructed by the trial court and fairly consider both sentencing options. Therefore, the trial court did not err in denying DeBlase's challenges for cause as to Jurors no. 29, 43, 95, and 102.

B.

***22** Second, DeBlase contends that the trial court erred in granting the State's challenge for cause as to Juror no. 19. He argues that although Juror no. 19 indicated during voir dire that she had trepidation about imposing the death penalty based on circumstantial evidence, her views did not indicate that she could not follow the court's instructions on the law. We disagree.

On her questionnaire, Juror no. 19 indicated that she was in favor of the death penalty "if guilt of a capital crime can be proven." When asked during voir dire to expound on her views on the death penalty, Juror no. 19 indicated that she had concerns about imposing the death penalty based on the reasonable-doubt standard and in a case involving circumstantial evidence.[11] She said she had "trepidation" about "being absolutely sure" about guilt before imposing the death penalty and stated that, if guilt "could be proven absolutely without a shadow of a doubt," the death penalty could be appropriate. (R. 1599.)

The trial court explained reasonable doubt, explained the difference between direct and circumstantial evidence, and informed Juror no. 19 that the law allows the use of circumstantial evidence to satisfy the State's burden of proof, which Juror no. 19 indicated that she understood, and the court then asked whether it "still bother[s] you," to which Juror no. 19 responded: "No, it does not bother me. It's just that it's a life, and I just -- you know, I have concerns about that." (R. 1601.) When the trial court asked Juror no. 19 if she believed that the State should have a higher burden of proof in a case in which the death penalty is a possible penalty, Juror no. 19 said "Oh, yeah," and, when the trial court asked if her feelings in that regard were so strong that she might be unable to follow the law as instructed, Juror no. 19 indicated that she would want to follow the law but that she would have "issues" doing so. (R. 1601.) Juror no. 19 also indicated, when questioned by the State, that she would "pretty much" need direct evidence before she could decide guilt or innocence on a capital charge or vote to impose the death penalty and, when questioned by defense counsel, indicated that the State's seeking the death penalty would influence her during the guilt phase of the trial because she would be unable to put it out of her mind. (R. 1607.)

In granting the State's challenge for cause, the trial court noted that it had "closely observed" Juror no. 19 and that it was clear that she had problems with the burden of proof and circumstantial evidence in cases in which the death penalty was a possible punishment. (R. 1609.) The court stated that it believed "her views are so strong that she would not be able to -- not likely be able to follow the oath as it regards to the burden of proof -- follow[ ] the law as to the burden of proof." (R. 1609.) DeBlase objected, arguing that, based on all her answers, Juror no. 19 would be able to follow the trial court's instructions on reasonable doubt. The trial court overruled the objection, specifically noting that its ruling was based on Juror no. 19's "hesitation to accept circumstantial evidence by the State in meeting its burden of reasonable doubt" and that it was clear, based on Juror n. 19's answers, "her facial expressions[,] and her hand movements" that "she

had a serious problem" regarding the death penalty in a case based on circumstantial evidence. (R. 1610-11.)

***23** "The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law." Ex parte Davis, 718 So.2d at 1171. "A juror's bias need not be proved with unmistakable clarity because juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Largin v. State, 233 So.3d 374, 429-30 (Ala. Crim. App. 2015) (internal quotation marks and citations omitted). The granting of a challenge for cause is proper "if the trial court, after taking into consideration the veniremember's answers and demeanor, 'is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.' " Williams v. State, 601 So.2d 1062, 1069 (Ala. Crim. App. 1991), aff'd, 662 So.2d 929 (Ala. 1992) (quoting Wainwright, 469 U.S. at 426, 105 S.Ct. 844).

Juror no. 19 made it clear during voir dire that she believed the State should have a higher burden of proof in cases in which the death penalty is a possible punishment, that she would "pretty much" need direct evidence before she could even determine a defendant's guilt or innocence in a capital case much less vote to impose the death penalty, and that her beliefs were so strong that she would have "issues" following the law as instructed by the court. Under these circumstances, we find no abuse of discretion on the part of the trial court in granting the State's challenge for cause as to Juror no. 19.

VI.

DeBlase contends that the trial court erred in denying his motion made pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). (Issue III in DeBlase's brief.)

The record reflects that after excusals and challenges for cause, there were 50 prospective jurors on the venire, of whom 36 were white, 13 were black, and 1 was identified as "other." (C. 2600.) Each party was afforded 19 peremptory strikes, with the last two strikes for each party serving as alternates. The State struck 11 blacks, 7 whites, and the sole prospective juror whose race was identified as "other." DeBlase struck 18 whites and 1 black prospective juror. The jury consisted of 11 white jurors and 1 black juror; all four alternates were white. DeBlase objected to the State's strikes, arguing that the State used 12 of its 19 strikes to remove 12 of 14 minorities from the venire and that the State engaged in disparate treatment, striking black jurors who were similarly situated to white jurors the State did not strike. Although the State argued that DeBlase had failed to establish a prima facie case of discrimination, the State nonetheless, without prompting by the trial court, provided reasons for each of its 19 peremptory strikes. DeBlase then had the opportunity to present evidence and/or argument to the effect that the State's reasons were pretextual, but he did not do so. The trial court denied DeBlase's Batson objection, finding that the State's reasons for its strikes were race-neutral and that there was no disparate treatment of black and white prospective jurors.

On appeal, DeBlase makes several arguments as to why he believes the State's reasons for 9 of its 12 strikes against minorities were pretextual and the result of purposeful discrimination. [12] As these arguments were not presented to the trial court, we review them under the plain-error rule. See Rule 45A, Ala. R. App. P.

***24** In evaluating a Batson claim, a three-step process must be followed. See Foster v. Chatman, 584 U.S. ——, ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016); Snyder v. Louisiana, 552 U.S. 472, 476-77, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); and Batson, 476 U.S. at 96-98, 106 S.Ct. 1712.

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson,] 476 U.S. at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98, 106 S.Ct. 1712."

Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029.

When a trial court does not make an express finding that the defendant has established a prima facie case of discrimination under the first step of the process but the prosecution nonetheless provides reasons for its strikes under the second step of the process, "this Court will review the reasons given and the trial court's ultimate decision on the Batson motion without any determination of whether the moving party met its burden of proving a prima facie case of discrimination."

Ex parte Brooks, 695 So.2d 184, 190 (Ala. 1997). In this case, the trial court did not make a finding that DeBlase had established a prima facie case of discrimination; the State, however, provided reasons for its strikes. Therefore, we need not determine whether DeBlase established a prima facie case of discrimination under the first step of the process; instead, we turn to the second and third steps of the process.

> "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991)."

Allen v. State, 659 So.2d 135, 147 (Ala. Crim. App. 1994) (emphasis added). "The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Although DeBlase does not challenge on appeal the facial neutrality of the State's reasons for its strikes, we note that all of its reasons were facially race-neutral, i.e., based on something other than the race of the juror.

> "Once the prosecutor has articulated a nondiscriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. [People v.] Wheeler, 22 Cal.3d [258] at 282, 583 P.2d [748] at 763–64, 148 Cal.Rptr. [890] at 906 [(1978)]. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:
>
> "1. The reasons given are not related to the facts of the case.
>
> ***25** "2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
>
> "3. Disparate treatment -- persons with the same or similar characteristics as the challenged juror were not struck....
>
> "4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors....
>
> "5. The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire....
>
> "6. '[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.' Slappy [v. State], 503 So.2d [350] at 355 [(Fla. Dist. Ct. App. 1987)]. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror."

Ex parte Branch, 526 So.2d 609, 624 (Ala. 1987). " 'The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and as well, in light of the strength of the prima facie case.' " Ex parte Bird, 594 So.2d 676, 683 (Ala. 1991) (quoting Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987)). In other words, all relevant circumstances must be considered in determining whether purposeful discrimination has been shown. See Snyder, 552 U.S. at 478, 128 S.Ct. 1203 ("[I]n reviewing a ruling claimed to be a Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.").

"[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.' " Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (quoting Purkett, 514 U.S. at 768, 115 S.Ct. 1769). Because " '[t]he trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses,' " Harris v. State, 2 So.3d 880, 899 (Ala. Crim. App. 2007) (quoting Heard v. State, 584 So.2d 556, 561 (Ala. Crim. App. 1991)), an appellate court must give deference to a trial court's findings and " 'reverse the circuit court's ruling on the Batson motion only if it is "clearly erroneous." ' " Johnson v. State, 43 So.3d 7, 12 (Ala. Crim. App. 2009) (quoting Cooper v. State, 611 So.2d 460, 463 (Ala. Crim. App. 1992), quoting in turn Jackson v. State, 549 So.2d 616, 619 (Ala. Crim. App. 1989)).

A.

DeBlase argues that the State's reasons for striking Juror no. 24, a black female, were pretextual because, he says, two of the reasons were unsupported by the record and one of the

reasons was not applied equally to a white juror whom the State did not strike.

The State asserted that it struck Juror no. 24 because she had a niece who had been convicted of child neglect and who, the State asserted, the juror believed was not guilty. Although Juror no. 24 indicated on her questionnaire and during voir dire that her niece, whom she said she was close to, was convicted of child neglect, DeBlase is correct that Juror no. 24 never indicated that she believed that her niece was not guilty of the child-neglect charge. However, "[a] prosecutor can strike based on a mistaken belief." Ex parte Brown, 686 So.2d 409, 420 (Ala. 1996). A mistaken belief does not itself establish pretext.

***26** The State also asserted that it struck Juror no. 24 because of her responses regarding the death penalty in which she indicated that she would have to be sure "without a doubt" of the defendant's guilt before voting for the death penalty. Juror no. 24 indicated on her questionnaire that "the death penalty is justified in some cases but ... that you have to be sure without a doubt." Although during voir dire, after the trial court explained the law on reasonable doubt, Juror no. 24 indicated that what she meant by "without a doubt" was beyond a reasonable doubt, the State's reasons for a peremptory strike "need not rise to the level of a challenge for cause." Ex parte Branch, 526 So.2d at 623. We cannot say that the State's concern about Juror no. 24's ability to apply the proper burden of proof was pretextual, especially in light of the fact the State either successfully challenged for cause or peremptorily struck other jurors, both black and white, who indicated they had reservations about the burden of proof in a death-penalty case.

Finally, the State asserted that it struck Juror no. 24 because she was currently separated from her husband, who was an undercover narcotics officer with the Mobile County Sheriff's Office and several law-enforcement officers would be testifying at trial. The State did not otherwise elaborate on this reason, and DeBlase is correct that the State did not strike Juror no. 10, a white female, who had been divorced from a law-enforcement officer for 14 years and who indicated on her questionnaire that her marriage was a negative experience with law enforcement.[13] However, contrary to DeBlase's contention, merely because Juror no. 10 and Juror no. 24 shared one commonality -- marriage to a law-enforcement officer -- does not make those jurors similarly situated and does not establish disparate treatment on the part of the State. "Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual." Luong v. State, 199 So.3d 173, 191 (Ala. Crim. App. 2015) (internal quotation marks and citations omitted). We must look " 'to the entire record to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers that would, under the facts of this case, justify the prosecutor treating them differently as potential members of the jury.' " Wiggins v. State, 193 So.3d 765, 790 (Ala. Crim. App. 2014) (quoting Leadon v. State, 332 S.W.3d 600, 612 (Tex. App. 2010)). In this case, although both Juror no. 24 and Juror no. 10 had been married to a law-enforcement officer, the record indicates that Juror no. 10 was strongly in favor of the death penalty while Juror no. 24, as noted previously, provided responses that caused the State concern about whether she would hold the State to a higher burden of proof. In addition, Juror no. 24 had a niece who had been convicted of child neglect, while Juror no. 10 did not.

Considering the totality of the circumstances, we conclude that the State's reasons for striking Juror no. 24 were not pretextual.

B.

DeBlase argues that the State's reasons for striking Juror no. 36, a male whose race was identified as "other," were pretextual because, he says, the State mischaracterized Juror no. 36's views on the death penalty and the State did not strike Juror no. 92, who, DeBlase says, expressed similar views.

The State asserted that it struck Juror no. 36 because he expressed reservations about the burden of proof and indicated that he would hold the State to a higher burden of proof in a death-penalty case, stating on his questionnaire that he was in favor of the death penalty "only if evidence is conclusive and incontrovertible." The State also asserted that it struck Juror no. 36 because he indicated that he could not vote for the death penalty based on circumstantial evidence and because he indicated that he could not be responsible for the death of another person. Contrary to DeBlase's belief, the State did not mischaracterize Juror no. 36's responses, and its reasons for striking him are supported by the record.

***27** Although Juror no. 36 indicated that he was in favor of the death penalty, he also indicated on his questionnaire -- in

response to the question whether he had ever held a different view of the death penalty -- that he likened the death penalty to a job interview he once had with a company that produced military weapons. He indicated that he was "repulsed" by the idea that the weapons the company produced could be "used to kill people." During voir dire, when the State asked Juror no. 36 to expound on his answer, he stated that he could not have worked for that company because he could not be responsible for the death of another person. Although Juror no. 36 indicated that his views had changed since that job interview and he stated that he could support the death penalty if a person has "committed a terrible act," he also indicated that he "hope[d] it's not an entirely circumstantial case" and that he was "sure" the State had a "strong case" and that was why it had charged DeBlase. (R. 1750.) As with Juror no. 24, we cannot say that the State's concern about Juror no. 36's ability to apply the proper burden of proof was pretextual, especially in light of the fact the State either successfully challenged for cause or peremptorily struck other jurors, both black and white, who indicated reservations about the burden of proof in a death-penalty case.

Moreover, although DeBlase is correct that Juror no. 92, a white female, also indicated on her questionnaire that she had previously been against the death penalty but that her views had changed, unlike Juror no. 36, Juror no. 92 expressed no reservations about the burden of proof or any concerns about circumstantial evidence in a death-penalty case. In addition, there were several other differences between Juror no. 36 and Juror no. 92. For example, Juror no. 92, unlike Juror no. 36, had had a very positive experience with the criminal-justice system when her daughter was convicted of a drug charge. Juror no. 92 said that her daughter's conviction was the best thing that had ever happened to her daughter, she thanked the assistant district attorney for prosecuting her daughter, and she indicated that the presiding judge of the circuit at the time of DeBlase's trial and the judge who had sentenced her daughter, was one of the people she most respected.

> " ' "[D]isparate treatment" cannot automatically be imputed in every situation where one of the State's bases for striking a venireperson would technically apply to another venireperson whom the State found acceptable. Cantu v. State, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992). The State's use of its peremptory challenges is not subject to rigid quantification. Id. Potential jurors may possess the same objectionable characteristics, yet in varying degrees. Id. The fact that jurors remaining on the panel possess one or more of the same characteristics as a juror that was stricken, does not establish disparate treatment.' "

Wiggins, 193 So.3d at 790 (quoting Barnes v. State, 855 S.W.2d 173, 174 (Tex. App. 1993)).

Considering the totality of the circumstances, we conclude that the State's reasons for striking Juror no. 36 were not pretextual.

C.

DeBlase argues that the State's reasons for striking Juror no. 82, a black male, were pretextual because, he says, they were unsupported by the record, the State did not strike white Jurors no. 47 and no. 66 who, he says, were similarly situated, and the State engaged in disparate questioning.

The State asserted that it struck Juror no. 82 because he indicated hesitation regarding the death penalty. On his questionnaire, Juror no. 82 indicated that he was in favor of the death penalty as a deterrent but, during voir dire, he indicated that there would have to be "overwhelming evidence" before he could vote for the death penalty. (R. 2130.) When questioned further by the State, Juror no. 82 indicated that he was not sure he could vote for the death penalty and that he "would have less of a problem" voting for life imprisonment without the possibility of parole. (R. 2132.) Upon further questioning by the trial court, Juror no. 82 stated that he did not know if he could vote for the death penalty, that he "might be able to and [he] may not be able to," and that "right now, today, I don't think I would be able to vote for death." (R. 2135-36.) Although defense counsel rehabilitated Juror no. 82 to a certain extent and the trial court denied the State's challenge for cause, as already noted, the State's reasons for a peremptory strike "need not rise to the level of a challenge for cause." Ex parte Branch, 526 So.2d at 623.

***28** Moreover, contrary to DeBlase's argument, Juror no. 82 was not similarly situated to Juror no. 47. Although Juror no. 47 did indicate on her questionnaire that she was "not sure" whether or not she was in favor of the death penalty and that she did not know whether she had "the right" to make a life or death decision, during voir dire, she stated unequivocally that she could vote for the death penalty if the aggravating circumstances outweighed the mitigating circumstances, something Juror no. 82 was unable to say. In addition, contrary to DeBlase's contention, the State did not engage in disparate questioning of Jurors no. 82 and 47. The

State extensively questioned both jurors about their views on the death penalty and, although the State may have phrased some of its questions differently with each juror, the different phrasing was clearly in response to the different answers provided by each juror.

The State also asserted that it struck Juror no. 82 because he stated on his questionnaire that he had been "falsely accused" of a crime, specifically, driving away from a gasoline pump without payment, but that the charges had been dropped, which the State believed indicated a negative view of law enforcement. Although DeBlase is correct that Juror no. 82 never specifically indicated that he had a negative view of law enforcement, that alone does not establish that this reason was pretextual. Moreover, contrary to DeBlase's belief, Juror no. 82 was not similarly situated to Juror no. 66, a white male, who was not struck. Juror no. 66 indicated on his questionnaire and during voir dire that he had been arrested when he had tried to break up a fight in his front yard. According to Juror no. 66, when the police arrived, they decided that the best way to break up the fight was to arrest everyone on the scene; the police then released everyone, and no charges were filed. Unlike Juror no. 82, Juror no. 66 never said that he had been falsely accused of a crime. Rather, based on Juror no. 66's description of the incident, he was never accused of anything, he was simply detained temporarily, as everyone at the scene was, so the police could break up a fight. Juror no. 82 is actually more similarly situated to Juror no. 106, whom the State struck, in part, because she indicated she had had a negative experience with law enforcement when she was falsely accused of speeding. See Part VI.E. of this opinion, infra.

Considering the totality of the circumstances, we conclude that the State's reasons for striking Juror no. 82 were not pretextual.

D.

The State asserted that it struck Juror no. 35, a black male, Juror no. 3, a black female, Juror no. 106, a black female, and Juror no. 31, a black female, in part, because they each had experience in social work and/or counseling. [14] DeBlase argues that this reason for striking each of these four jurors was pretextual because, he says, it was based on an assumed group bias not related to the facts of the case and that was not shown through questioning to apply to at least two of the jurors. This argument is meritless.

Initially, we point out that the record reflects that the State successively removed all jurors, both black and white, who had experience with social work and/or counseling. In addition to the above four jurors, the State also struck Juror no. 52, a white female who had a doctorate in psychology, and Juror no. 20, a white female who had worked with two attorneys from the Department of Human Resources. "[C]omparable treatment of similarly situated jurors of both races tends to rebut any inference of discriminatory intent in the prosecutor's strikes against black jurors." Hall v. State, 816 So.2d 80, 86 (Ala. Crim. App. 1999). The record indicates that the State was concerned that jurors who had experience in social work and/or counseling would be more swayed by evidence about DeBlase's mental-health issues, which the State knew DeBlase would be presenting during the penalty phase of the trial. Therefore, contrary to DeBlase's argument, this reason for striking these jurors was grounded in the particular facts of DeBlase's case.

***29** More troubling is DeBlase's argument that this reason was based on an assumed group bias that was not shown through questioning to apply to all four jurors. The State questioned black Jurors no. 3 and 31, as well as white Juror no. 52, regarding whether their experience in social work and/or counseling would influence them during the trial, and all three indicated that, based on their experience, they would afford greater weight to mental-health evidence when making a sentencing decision. However, DeBlase is correct that the State posed no questions to black Jurors no. 35 and 106 regarding whether their experience in social work and/or counseling would influence them at trial, [15] and the record does not otherwise reflect that these jurors shared the group trait of placing greater weight on mental-health evidence as Jurors no. 3, 31, and 52 indicated they would. However, the State also did not question white Juror no. 20, whom the State also struck for this reason, regarding whether her experience working with attorneys from the Department of Human Resources would influence her during the trial. In addition, the State provided other reasons for striking these jurors that were not pretextual. See Part VI.E. of this opinion, infra, and note 14, supra.

An explanation based on group bias, when the group trait has not been shown to apply to the specific juror who was struck, provides evidence indicating that the reason for striking that juror was pretextual. However, we cannot say that group bias, alone, conclusively establishes pretext. As noted previously in this opinion, all relevant circumstances must be

considered in determining whether purposeful discrimination has been shown. Given that the State removed all jurors with experience in social work and/or counseling without regard to race, that the State's lack of questioning on this issue was not confined to the black jurors who were struck, that the State provided other reasons for these strikes that were not pretextual, and that none of the State's reasons for its other strikes were pretextual, we cannot say that the State's striking Jurors no. 3, 31, 35, and 106 based on their experience with social work and/or counseling was pretextual.

E.

DeBlase argues that one of the reasons the State provided for striking Jurors no. 106, 93, and 62 were each pretextual because, he says, they were based on the State's mischaracterization of those jurors' answers during voir dire.

The State asserted that it struck Juror no. 106, in part, because she indicated she had had a negative experience with law enforcement -- she indicated on her questionnaire and during voir dire that she had been falsely accused of speeding -- and had stated that she was afraid of law enforcement. DeBlase argues that Juror no. 106 never said that she was afraid of law enforcement but, instead, said that she was afraid of breaking the law. The record reflects that, when the State asked Juror no. 106 during voir dire if her experience being stopped by police for speeding was positive or negative, Juror no. 106 explained:

> "It was a negative. But, to me, it was just an example how, I guess, maybe, from my point of view, how man can be flawed or machinery can be flawed. It was just a situation. Do I hate every policeman? No, I actually respect law enforcement and what they do. It was just one bad experience with me because I think I was traveling and it was late at night and he was kind of like overzealous and I was just taken back because that was my first time, like, being confronted, you know, by an officer like that.
>
> "You know, I'm pretty much -- I'm scared of the law so -- and I was, like, no, sir, I was going 70. He was like, no, you were going a hundred. And I was, like, no, sir, I wasn't going a hundred. And it was kind of like I was responding to him and he was like, you know, you want to be smart about it, I'll throw your tail in jail or whatever. And I was like, okay, you know. I just -- and I just paid the ticket, you know. But it was a car, like right there beside me and we kind of passed at the same time and I'm the type of person I'm scared to go a hundred miles an hour."

***30** (R. 2314-15.) Juror no. 106's statement, "I'm scared of the law," is subject to differing interpretations, and we cannot say that the State's interpretation was unreasonable. We conclude that this reason for striking Juror no. 106 was not pretextual.

The State asserted that it struck Juror no. 93, in part, because his mother and aunt had been murdered by his uncle, and he indicated that he did not know whether that would affect him as a juror. [16] According to DeBlase, it is "untrue" that Juror no. 93 was unsure whether the murder of his mother and aunt would affect him as a juror, and, in fact, Juror no. 93 made it clear that it would not affect him. (DeBlase's brief, p. 39.) However, the record reflects that, although Juror no. 93 initially indicated during voir dire that "it wouldn't affect me in the least" (R. 2214), after the prosecutor informed him that DeBlase's case may also involve domestic-violence issues, like his mother's and aunt's murders, Juror no. 93 stated: "I can't honestly tell you, if I'm sitting here in this courtroom and hearing some details that I'm not aware of, it won't affect me. I can't tell you it won't. But sitting here right now, I can say it wouldn't, but I don't know." (R. 2215.) The State did not, as DeBlase argues, mischaracterize Juror no. 93's responses. This reason for striking Juror no. 93 was not pretextual.

The State asserted that it struck Juror no. 62, in part, because he indicated that he had never been arrested for or convicted of a crime but the State's records indicated "that he had a 2014 assault third." [17] (R. 2352.) DeBlase argues that there is no evidence in the record that Juror no. 62 had ever been arrested for or convicted of a crime. However, "[t]he fact that a prosecutor's stated reason for striking a juror is not reflected in the record does not necessarily make that reason pretextual." Martin v. State, 62 So.3d 1050, 1060 (Ala. Crim. App. 2010). This Court has held that "[t]here is no requirement that a prosecutor establish evidentiary support for every strike in every case, especially where the defendant has not specifically questioned the validity of the prosecutor's explanations or demanded further proof." Hall, 816 So.2d at

85. As noted above, DeBlase did not question in the trial court the validity of any of the State's reasons for its strikes, including that Juror no. 62 had either a prior arrest or a prior conviction for assault; thus, the State had no reason to present evidence to support this reason for its strike. Under these circumstances, we cannot say that this reason for striking Juror no. 62 was pretextual.

F.

***31** Finally, DeBlase argues that the trial court did not properly evaluate his Batson motion. Specifically, he argues that the trial court failed to evaluate the State's reasons for its strikes "both individually and cumulatively" and that it instead "accepted the State's justifications en masse" without considering all relevant circumstances, such as the strength of the prima facie case [18] and the State's disparate treatment and alleged mischaracterization of the record. (DeBlase's brief, p. 42.) He also argues that the trial court erroneously injected its own recollections about the jurors who were struck "to support the State," instead of allowing the State to " 'stand or fall on the plausibility of the reasons [it] gives.' " (DeBlase's brief, pp. 41-42 (quoting Miller-El v. Dretke, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005))).

Nothing in the record supports DeBlase's assertions. To the contrary, the record reflects that the trial court carefully and properly considered DeBlase's Batson motion, the State's reasons for its strikes, and the relevant circumstances, and concluded that the State's reasons were race-neutral (a finding DeBlase does not challenge on appeal) and were not merely a sham or pretext for purposeful discrimination. Although the trial court did, when the State was proffering reasons for its strikes, note its own recollections regarding some of the jurors, it is clear from the record that in most instances the trial court did so to clarify that its own recollections were accurate and that it was not confused as to which juror the State was addressing. Far from indicating that the trial court was attempting to assist the State, the court's statements during the Batson hearing show thoughtful consideration of the issue before it.

After carefully reviewing the record, we find no error, much less plain error, on the part of the trial court in denying DeBlase's Batson motion.

VII.

DeBlase contends that the trial court erred in refusing to allow him to present evidence during the guilt phase of the trial that he suffered from schizotypal personality disorder, characterized by extreme dependence on other people and fear of abandonment. [19] (Issue XI in DeBlase's brief.) DeBlase argues that he was not offering evidence of his personality disorder as a diminished-capacity defense, a defense he concedes is not recognized in Alabama, but "to explain why he stayed with Keaton and helped her remove the bodies upon learning that his children were dead." (DeBlase's brief, p. 76.) Specifically, DeBlase argues that the obvious inference, and one the State pursued at trial, from his actions in disposing of his children's bodies and remaining in a relationship with Keaton after the murders was that he was involved in the murders and possessed the requisite intent to kill and that evidence of his personality disorder was relevant and admissible to rebut that inference. According to DeBlase, he "had a constitutional right to marshal the most probative evidence available to rebut the State's narrative that his continued involvement with Keaton following his children's deaths supported an intent to kill." (DeBlase's brief, p. 78.)

Before trial, DeBlase moved for a pretrial determination of the admissibility of this evidence. In response, the State filed a motion in limine to prohibit DeBlase from introducing during the guilt phase of the trial evidence indicating that he suffered from a personality disorder on the ground that diminished capacity is not a recognized defense in Alabama. At a pretrial hearing on the motions, DeBlase argued that he was not offering that evidence to show diminished capacity but, rather, to show his motive for disposing of the children's bodies and remaining in a relationship with Keaton after the murders. DeBlase maintained on the one hand that such evidence "has nothing to do with guilt" (R. 1047) but argued on the other hand that it was relevant to the "volitional aspects" (R. 1043) of his actions after the murders in order to rebut the inference that those actions were indicative of his guilt. The State argued that, regardless of how DeBlase characterized its purpose, any evidence of mental impairment not rising to the level of a mental disease or defect to rebut evidence of guilt is quintessentially evidence of diminished capacity. After receiving briefs on the issue from the parties, the trial court denied DeBlase's request to present evidence of his personality disorder and granted the State's motion in limine to preclude that evidence.

***32** "The doctrine of diminished capacity provides that evidence of an abnormal mental condition not amounting to legal insanity but tending to prove that the defendant could not or did not entertain the specific intent or state of mind essential to the offense should be considered in determining whether the offense charged or one of a lesser degree was committed." Williams v. State, 710 So.2d 1276, 1309 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997). Alabama does not recognize diminished capacity as a defense to a criminal charge. See, e.g., Carroll v. State, 215 So.3d 1135, 1167 (Ala. Crim. App. 2015), judgment vacated on other grounds by Carroll v. Alabama, 581 U.S. ——, 137 S.Ct. 2093, 197 L.Ed.2d 893 (2017); Lane v. State, 169 So.3d 1076, 1096 (Ala. Crim. App. 2013), judgment vacated on other grounds by Lane v. Alabama, 577 U.S. ——, 136 S.Ct. 91, 193 L.Ed.2d 7 (2015); Jones v. State, 946 So.2d 903, 927 (Ala. Crim. App. 2006); and Williams, supra.

Although DeBlase couched the evidence of his personality disorder as evidence of motive when arguing this issue before the trial court, it is abundantly clear from the whole of DeBlase's argument that DeBlase was, in fact, offering the evidence to establish diminished capacity. Indeed, DeBlase candidly admits on appeal that he wanted to present evidence of his personality disorder "to rebut the State's narrative that his continued involvement with Keaton following his children's deaths supported an intent to kill." (DeBlase's brief, p. 78.) In other words, DeBlase wanted to present evidence of a mental condition not amounting to insanity to prove that he could not or did not entertain the specific intent necessary for capital murder -- the very definition of diminished capacity. Because diminished capacity is not a defense in Alabama, the trial court properly excluded this evidence. Cf. Carroll, 215 So.3d at 1166-67; and Lane, 169 So.3d at 1095-98.

VIII.

DeBlase contends that the trial court erred in denying his motion to suppress his statements to police. (Issue XVII in DeBlase's brief.) DeBlase argues that the statements he gave on December 3, 2010, should have been suppressed because, he says, he suffers from intellectual impairment and was sleep deprived at the time he made the statements, thus rendering him unable to understand, or voluntarily waive, his Miranda[20] rights. He also argues that the statements he gave on December 7, 2010, should have been suppressed because, he says, he was not re-advised of his Miranda rights.

At the pretrial suppression hearing and at trial, Donald Boykin, a former lieutenant with the homicide division of the Mobile Police Department, testified that on December 2, 2010, he was notified that DeBlase had been located in Florida and had been detained by the Santa Rosa County Sheriff's Department. Lt. Boykin and Detective Angela Prine drove to Florida and interviewed DeBlase at approximately 2:00 a.m. on December 3, 2010. Lt. Boykin testified that he advised DeBlase of his Miranda rights, that DeBlase indicated he understood those rights and was familiar with his rights because he had previously worked as a bounty hunter, and that DeBlase waived his rights and agreed to speak with Lt. Boykin and Det. Prine. Lt. Boykin testified that DeBlase was coherent and indicated that he did not use drugs or alcohol, and that DeBlase was neither threatened nor promised anything for making a statement. After this first statement, DeBlase agreed to show Lt. Boykin and Det. Prine where he had disposed of the children's bodies.

***33** After DeBlase directed Lt. Boykin and Det. Prine to the areas in Alabama and Mississippi where he believed he had disposed of Natalie's and Chase's bodies, DeBlase was taken to police headquarters in Mobile. At approximately 3:30 p.m., he gave a second statement to Lt. Boykin and Det. Prine. Lt. Boykin reminded DeBlase that the Miranda rights he had explained earlier were still in effect and that he had the right to remain silent and did not have to speak with them; DeBlase agreed to speak with them. Lt. Boykin testified that DeBlase was neither threatened nor promised anything for making the second statement. After his second statement, DeBlase was arrested for child abuse and abuse of a corpse and placed in the Mobile Metro jail. The following day, DeBlase accompanied Lt. Boykin to Mississippi in an another attempt to locate Chase's body.

On December 7, 2010, DeBlase was brought from the Metro jail to police headquarters and interviewed by Lt. Boykin a third time. Lt. Boykin reminded DeBlase that the Miranda rights he had explained on December 3, 2010, were still in effect and that DeBlase did not have to speak with him, but DeBlase again agreed to speak with Lt. Boykin. Lt. Boykin testified that DeBlase was coherent and did not appear to be under the influence of alcohol or drugs and that DeBlase was neither threatened nor promised anything for making a statement. After this third statement, Lt. Boykin left DeBlase alone in the interview room, during which time DeBlase, using printer paper that was in the room, drew maps of the locations where he had disposed of the children's bodies and handwrote a fourth statement describing the events the day

Natalie died and the day Chase died. Lt. Boykin testified that no one asked DeBlase to provide a written statement or to draw the maps.

> " '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)).
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> > " ' "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).'
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> ***34** "Wilkerson v. State, 70 So.3d 442, 460 (Ala. Crim. App. 2011)."

Floyd v. State, [Ms. CR-13-0623, July 7, 2017] —— So.3d ——, —— (Ala. Crim. App. 2017).

A.

DeBlase first contends that the two statements he gave on December 3, 2010, should have been suppressed on the ground that he could not have understood, or voluntarily waived, his Miranda rights because, he says, he is intellectually impaired and was suffering from sleep deprivation.

> " '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)).

McCray v. State, 88 So.3d 1, 58 (Ala. Crim. App. 2010). Similarly, fatigue is but one factor to consider in determining the voluntariness of a waiver of Miranda rights and resulting statement. See, e.g., Woolf v. State, 220 So.3d 338, 354-56 (Ala. Crim. App. 2014); Grayson v. State, 824 So.2d 804, 832-34 (Ala. Crim. App. 1999), aff'd, 824 So.2d 844 (Ala. 2001); Russell v. State, 739 So.2d 58, 66-67 (Ala. Crim. App. 1999); Powell v. State, 796 So.2d 404, 416 (Ala. Crim. App. 1999), aff'd, 796 So.2d 434 (Ala. 2001); and Burgess v. State, 811 So.2d 557, 587 (Ala. Crim. App. 1998), aff'd in part, rev'd on other grounds, 811 So.2d 617 (Ala. 2000).

Although DeBlase presented evidence at the penalty phase of the trial that he had low intellectual functioning -- a full-scale IQ of 84 -- and suffered from schizotypal personality disorder, that evidence does not, alone, establish that DeBlase did not understand his Miranda rights. The record indicates that DeBlase graduated high school and was literate, and he indicated to Lt. Boykin that he understood his rights before he gave his first statement. DeBlase also indicated that he was familiar with his rights from his work as a bounty hunter. In addition, although the record indicates that DeBlase did not sleep from the time he first spoke with police in the early morning hours of December 3, 2010, until he gave his second statement to police later that same afternoon, there was no evidence suggesting that DeBlase was exhausted to the point of being unable to voluntarily waive his rights. Moreover, we have watched the video recordings of DeBlase's December 3, 2010, statements to police, and there is no indication that DeBlase was so mentally impaired or exhausted that he was unable to understand, or to voluntarily waive, his Miranda rights.

Therefore, the trial court properly denied DeBlase's motion to suppress his December 3, 2010, statements to police.

B.

DeBlase also contends that his statements on December 7, 2010, should have been suppressed because, he says, he was not re-advised of his Miranda rights before he gave those statements.

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

> " '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).
>
> "....
>
> "With regard to the amount of time elapsed between the Miranda warnings and the interrogation in [Ex parte] J.D.H., [797 So.2d 1130 (Ala. 2001),] this Court stated:
>
> > " 'This Court recognizes that the Court of Criminal Appeals has a line of cases holding that once Miranda warnings have been given and the defendant has made a knowing, intelligent, and voluntary waiver, a failure to repeat the warnings will not automatically preclude the admission of an inculpatory statement. See Hollander v. State, 418 So.2d 970 (Ala. Crim. App. 1982) (between 1 and 1.75 hours passed while police were searching house; no repeat of Miranda warnings); Fagan v. State, 412 So.2d 1282 (Ala. Crim. App. 1982) (lapse of 3 1/2 hours did not require a renewed warning); Smoot v. State, 383 So.2d 605 (Ala. Crim. App. 1980) (lapse of 30 minutes between the warnings and the statement); Burlison v. State, 369 So.2d 844 (Ala. Crim. App. 1979) (lapse of 45 minutes between the reading of Miranda warnings and the taking of a statement did not require a repeat of the warnings); Johnson v. State, 56 Ala. App. 583, 324 So.2d 298 (1975) (three to four days, with a reminder of the warnings); Jones v. State, 47 Ala. App. 568, 258 So.2d 910 (1972) (warning was given one day and statement made the following morning). However, we note that in most of those cases the time lapse was not more than a few hours. In none of those cases did the lapse exceed a few days without at least a reminder of the warnings. See Johnson v. State, supra.'
>
> "797 So.2d at 1131–32."

57 So.3d at 81-83.

In this case, Lt. Boykin advised DeBlase of his Miranda rights on December 3, 2010. Four days later, on December 7, 2010, Lt. Boykin reminded DeBlase that those rights were still in effect and that DeBlase did not have to speak with him, but he did not fully re-advise DeBlase of his rights. Assuming, without deciding, that, under the circumstances in this case, the lapse of four days rendered the Miranda warnings stale, see, e.g., Foye v. State, 153 So.3d 854, 859-60 (Ala. Crim. App. 2013), any error in the admission of DeBlase's December 7, 2010, statements 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), citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). 'The harmless error rule applies in capital cases.' Knotts v. State, 686 So.2d 431, 469 (Ala. Crim. App. 1995), opinion after remand, 686 So.2d 484 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala. 1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997), citing Ex parte Whisenhant, 482 So.2d 1241 (Ala. 1983). 'In order for a constitutional error to be deemed harmless under Chapman, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict. 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 injuriously affect the appellant's substantial rights.' Coral v. State, 628 So.2d 954, 973 (Ala. Crim. App. 1992), opinion after remand, 628 So.2d 988 (Ala. Crim. App. 1992), aff'd, 628 So.2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994). '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. 1997), aff'd, 718 So.2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999)."

***36** McNabb v. State, 887 So.2d 929, 976-77 (Ala. Crim. App. 2001), aff'd, 887 So.2d 998 (Ala. 2004). "[T]he erroneous admission of a defendant's confession may be harmless." Thompson v. State, 153 So.3d 84, 114 (Ala. Crim. App. 2012). "When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Here, we have no trouble concluding that the admission of DeBlase's December 7, 2010, statements, even if erroneous, was harmless beyond a reasonable doubt. The December 7, 2010, statements were substantively identical to the December 3, 2010, statements with respect to his children's deaths. In both his December 3, 2010, and December 7, 2010, statements, DeBlase provided consistent accounts of the events leading up to Natalie and Chase's deaths, [21] claiming each time that Keaton had "punished" Natalie and Chase -- by duct-taping Natalie and putting her in a suitcase and by duct-taping Chase to a broom handle against the wall -- and that it was Keaton's punishments that resulted in their deaths. Although it was in the December 7, 2010, statements that DeBlase first admitted that he had known that Keaton had been abusing his children before their deaths (he had denied knowledge of any abuse in his December 3, 2010, statements), there was ample other evidence presented at trial that DeBlase was well aware of Keaton's abuse of the children. In addition, although DeBlase drew maps on December 7, 2010, showing where he had disposed of Natalie and Chase's bodies, DeBlase had previously shown Lt. Boykin and Det. Prine the areas where he had disposed of the bodies. Thus, even if it was error to admit DeBlase's December 7, 2010, statements, that error was harmless beyond a reasonable doubt and did not injuriously affect DeBlase's substantial rights.

IX.

DeBlase contends that the trial court erred in overruling his objection and allowing the State to redact from his third statement to police, given on December 7, 2010, his offer to take a polygraph examination. (Issue X in DeBlase's brief.) He argues, as he did at trial, that, unlike the results of a polygraph test, which he concedes are inadmissible, his offer to take a polygraph test was relevant and admissible as evidence of "his state of mind and credibility." (DeBlase's brief, p. 76.) He also argues that the doctrine of completeness required that his entire statement be admitted and that redacting his offer to take a polygraph examination "created the misleading impression that [he] offered little resistance in response to the detectives' rigorous accusations that he was lying," and denied him his constitutional right to present a defense. (DeBlase's brief, p. 76.) We disagree.

"In Alabama 'both the results of and the fact that a person did or did not take a polygraph test are generally inadmissible.' " A.G. v. State, 989 So.2d 1167, 1177 (Ala. Crim. App. 2007) (quoting Bostick v. City of Gadsden, 642 So.2d 469, 471 (Ala. Civ. App. 1993), aff'd, 642 So.2d 472 (Ala. 1994)). Although neither this Court nor the Alabama Supreme Court has specifically addressed whether a mere offer to take a polygraph test is admissible, numerous other jurisdictions have addressed the issue and they have almost universally held that a defendant's offer to take a polygraph test is generally inadmissible. See, e.g., United States v. Dinga, 609 F.3d 904, 908-09 (7th Cir. 2010); United States v. Harris, 9

F.3d 493, 501-02 (6th Cir. 1993); State v. Tyler G., 236 W.Va. 152, 163, 778 S.E.2d 601, 612 (2015); State v. Mitchell, 166 N.H. 288, 294, 94 A.3d 859, 865 (2014); Commonwealth v. Elliott, 622 Pa. 236, 292, 80 A.3d 415, 449 (2013); State v. Sexton, 368 S.W.3d 371, 409 (Tenn. 2012); State v. Lavoie, 1 A.3d 408, 412 (Me. 2010); People v. Hinton, 37 Cal.4th 839, 38 Cal.Rptr. 3d 149, 195, 126 P.3d 981, 1019-20 (2006); Commonwealth v. Martinez, 437 Mass. 84, 88, 769 N.E.2d 273, 278-9 (2002); Ramaker v. State, 345 Ark. 225, 234, 46 S.W.3d 519, 525 (2001); State v. Riley, 568 N.W.2d 518, 526-27 (Minn. 1997); State v. Esposito, 235 Conn. 802, 831, 670 A.2d 301, 316 (1996); State v. Webber, 260 Kan. 263, 276, 918 P.2d 609, 620 (1996); State v. Hawkins, 326 Md. 270, 275, 604 A.2d 489, 492 (1992); Kremer v. State, 514 N.E.2d 1068, 1073 (Ind. 1987); Gray v. Graham, 231 Va. 1, 10, 341 S.E.2d 153, 158 (1986); Roberts v. Commonwealth, 657 S.W.2d 943, 944 (Ky. 1983); State v. Britson, 130 Ariz. 380, 384, 636 P.2d 628, 632 (1981); State v. Biddle, 599 S.W.2d 182, 185 (Mo. 1980); State v. Clark, 128 N.J.Super. 120, 126, 319 A.2d 247, 249 (1974), aff'd, 66 N.J. 339, 331 A.2d 257 (1975); State v. Rowe, 77 Wash. 2d 955, 958-59, 468 P.2d 1000, 1003 (1970); State v. Austin, 97 N.E.3d 1266, 1274 (Ohio Ct. App. 2017); Roderick v. State, 494 S.W.3d 868, 879 (Tex. Ct. App. 2016); Folks v. State, 207 P.3d 379, 383 (Okla. Crim. App. 2008); People v. Muniz, 190 P.3d 774, 784-87 (Colo. App. 2008), abrogated on other grounds by People v. Elmarr, 351 P.3d 431 (Colo. 2015); State v. Hunter, 907 So.2d 200, 212 (La. Ct. App. 2005); Holland v. State, 221 Ga. App. 821, 825, 472 S.E.2d 711, 715 (1996); City of Bismarck v. Berger, 465 N.W.2d 480, 481 (N.D. Ct. App. 1991); and People v. Eickhoff, 129 Ill.App.3d 99, 84 Ill.Dec. 300, 303, 471 N.E.2d 1066, 1069 (1984). [22] But see State v. Shomberg, 288 Wis.2d 1, 709 N.W.2d 370, 384 (2006).

***37** The primary rationale for excluding a defendant's offer to take a polygraph test is that such an offer "is so unreliable and self-serving as to be devoid of probative value." United States v. Bursten, 560 F.2d 779, 785 (7th Cir. 1977). As the Massachusetts Supreme Court explained in Martinez, supra:

> "Because in this Commonwealth polygraph evidence is inadmissible for any purpose in a criminal trial, Commonwealth v. Kent K., 427 Mass. 754, 763, 696 N.E.2d 511 (1998); Commonwealth v. Mendes, 406 Mass. 201, 212, 547 N.E.2d 35 (1989), a witness's offer to submit to a polygraph examination as evidence of consciousness of innocence is not admissible. Such an offer is a self-serving act undertaken with no possibility of any risk. If the offer is accepted and the test given, the results cannot be used in evidence whether favorable or unfavorable. In these circumstances, the sincerity of the offer can easily be feigned, making any inference of innocence wholly unreliable. See Ramaker v. State, 345 Ark. 225, 234, 46 S.W.3d 519 (2001); State v. Chang, 46 Haw. 22, 33, 374 P.2d 5 (1962), overruled on other grounds, State v. Okumura, 78 Hawaii 383, 408, 894 P.2d 80 (1995); Commonwealth v. Saunders, 386 Pa. 149, 156–157, 125 A.2d 442 (1956); State v. Rowe, 77 Wash.2d 955, 958, 468 P.2d 1000 (1970)."

437 Mass. at 88, 769 N.E.2d at 278-9. The risk of confusing the issues and misleading the jury has also been cited as a basis for excluding a defendant's offer to take a polygraph test. In Muniz, supra, the Colorado Court of Appeals explained:

> "[A]dmitting such evidence would create a substantial danger of confusing the issues and misleading the jury. A fact finder's assessment of a suspect's offer to take a polygraph test would require consideration of the suspect's subjective state of mind; subjective beliefs of particular law enforcement officers as to the value of such a test under the circumstances; evidence of the behavior and beliefs of hypothetical 'reasonable' suspects and officers in the circumstances of the case (to test the expressed subjective beliefs of testifying defendants and officers); and, if a test were not conducted, hypothetical scenarios concerning what officers would have done with the test results in the event the defendant 'passed' or 'failed' the test. Attempting to untangle this veritable Gordian knot would be an exercise in conjecture."

190 P.3d at 786-87. We agree with the reasoning of the above courts; a defendant's offer to take a polygraph test is inadmissible.

Moreover, the doctrine of completeness does not require a different result. Rule 106, Ala. R. Evid., provides that "[w]hen a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it." The doctrine of completeness "serves the purpose of allowing a party to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary." Ex parte Tucker, 474 So.2d 134, 135 (Ala. 1985). "However, the rule which frowns upon incomplete confessions is designed to cover cases where an accused, after admitting commission of the criminal act, is prevented from going further and saying

anything which might explain or justify his act." King v. State, 355 So.2d 1148, 1151 (Ala. Crim. App. 1978). " '[R]edaction of a confession violates the rule of completeness only if the redacted version "distorts the meaning of the statement or excludes information substantially exculpatory of the defendant." ' " Ex parte Sneed, 783 So.2d 863, 870 (Ala. 2000) (quoting United States v. Washington, 952 F.2d 1402, 1404 (D.C. Cir. 1991), quoting in turn, United States v. Kaminski, 692 F.2d 505, 522 (8th Cir. 1982)). "The rule of completeness ... should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence.' " Ex parte Ray, 52 So.3d 555, 560 n.5 (Ala. 2009) (quoting State v. Eugenio, 219 Wis.2d 391, 412, 579 N.W.2d 642, 651-52 (1998)). "The doctrine of completeness does not require the admission of otherwise inadmissible evidence simply to bolster a defendant's claim of innocence, but rather exists to correct misleading impressions by omission." Mitchell, 166 N.H. at 294, 94 A.3d at 865.

***38** In this case, redaction of DeBlase's offer to take a polygraph did not distort the meaning of DeBlase's statement or exclude relevant exculpatory evidence. As DeBlase points out in his brief, throughout all his statements to police, he continually denied playing an active part in killing his children and blamed their deaths on Keaton. DeBlase's offer to take a polygraph would have added little to his denials because, as already noted, it was entirely self-serving and risk-free.

Finally, the redaction of his statement did not deny DeBlase his constitutional right to present a defense. In United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), the United States Supreme Court held that Military Rule of Evidence 707, which precluded the admission of polygraph-test results or any reference to an offer to take, failure to take, or taking of a polygraph test, did not deny a defendant his right to present a defense. The Court explained:

> "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. See Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's interest in presenting such evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' Rock, supra, at 55, 107 S.Ct. 2704 (quoting Chambers, supra, at 295, 93 S.Ct. 1038); accord, Michigan v. Lucas, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' Rock, supra, at 56, 107 S.Ct. 2704; accord, Lucas, supra, at 151, 111 S.Ct. 1743. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See Rock, supra, at 58, 107 S.Ct. 2704; Chambers, supra, at 302, 93 S.Ct. 1038; Washington v. Texas, 388 U.S. 14, 22–23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).
>
> "Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members' role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial. The Rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents."

523 U.S. at 308-09, 118 S.Ct. 1261 (footnotes omitted).

Therefore, the trial court did not err in allowing the State to redact from his statement DeBlase's offer to take a polygraph test.

X.

DeBlase contends that the trial court erred in allowing the State to present evidence of oral and written statements he made while he was in the Mobile Metro jail after his arrest. (Issue I in DeBlase's brief.) He argues that the statements were involuntary because, he says, they were coerced by promises from his cellmates, Brandon Newburn and Kinard Henson, to protect him from what he describes as continued, prolonged, and "dehumanizing abuse" that he was suffering at the hands of other inmates. (DeBlase's reply brief, p. 8.)

Because DeBlase did not move to suppress these statements or object when they were introduced into evidence by the State, we review this claim under the plain-error rule. See Rule 45A, Ala. R. App. P.

***39** The record reflects that after DeBlase was arrested on December 3, 2010, he was placed in a cell with Newburn and Henson. Newburn had been sentenced on December 2, 2010, to two consecutive life sentences for murder and robbery and Henson, a former investigator for the Mobile County District Attorney's Office, had been sentenced on November 2, 2010, to a total of 15 years' imprisonment for attempted murder and bribing a witness. Newburn testified at trial that DeBlase talked about his children and described how Keaton "punished them." (R. 2984.) According to Newburn, DeBlase said that Keaton poisoned the children and DeBlase described how Keaton put Natalie in a suitcase to punish her and taped Chase to a broom handle to punish him. Newburn said that he asked DeBlase why he let Keaton abuse and kill his children and DeBlase then admitted that he had killed Natalie and Chase. DeBlase told Newburn that when he found Natalie "she was so close to death that he had to choke her to put her out of her misery." (R. 2985.) DeBlase also told Newburn that he had killed his children because Keaton had given him an ultimatum -- her or the children -- and he had chosen Keaton.

As DeBlase continued to talk about his children, Newburn said, Henson encouraged DeBlase to "just write it down" and DeBlase wrote several statements between December 8, 2010, and January 2, 2011, which the State introduced into evidence at trial. (R. 2989.) In his written statements, which Newburn and/or Henson signed as witnesses, DeBlase confessed to killing both Natalie and Chase by choking them and claimed he did it because Keaton made him choose between her and his children and because he did not want them to suffer any more abuse at the hands of Keaton. Newburn testified that he kept DeBlase's written statements and initially gave them to Newburn's attorney. Newburn said that his attorney returned the statements to him and, in September 2011, he gave DeBlase's statements to the police. Newburn said that no one forced DeBlase to write the statements. The State did not call Henson to testify, and it indicated to the court before trial and to the jury during closing argument that Henson was not a credible witness because he had tried to "sell" DeBlase's statements to get a benefit for himself.

On cross-examination, Newburn testified that another inmate in the jail, John Pope, was threatening DeBlase and that he had heard, although he did not witness it himself, that Pope had forced DeBlase to lick a toilet seat. Newburn also said that he had told Pope to leave DeBlase alone and that Pope then left DeBlase alone. Newburn further testified that Henson encouraged DeBlase to write statements and asked a lot of questions about the children's murders, and when asked if he knew that Henson had tried to "sell" DeBlase's statements, Newburn said that he could "believe it." (R. 3012.) Newburn, however, denied that DeBlase was threatened or forced to make the statements or was promised anything for making the statements, and he denied that he had received, or would receive, any benefit for his testimony.

> "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In Culombe [v. Connecticut], 367 U.S. [568,] 602, 81 S.Ct. [1860,] 1879, 6 L.Ed.2d 1037 [(1961)], the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his will has been overborne' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. Id. (emphasis added).
>
> "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139–40, 22 L.Ed.2d 433 (1969); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see Beecher v. Alabama, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See Ex parte Matthews, 601 So.2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); Jackson v. State, 562 So.2d 1373, 1380 (Ala. Crim. App. 1990) (stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); Eakes v. State, 387 So.2d 855, 859 (Ala. Crim. App. 1978) (stating that the true test to be employed is 'whether the defendant's will was overborne at the time he confessed') (emphasis added)."

***40** McLeod v. State, 718 So.2d 727, 729 (Ala. 1998) (footnote omitted).

In his brief on appeal, DeBlase points to testimony and evidence presented during the penalty phase of the trial to support his claim that his statements were coerced and involuntary. DeBlase's father, Richard, testified at the penalty phase that he had visited DeBlase in jail approximately two weeks after DeBlase's arrest and that DeBlase's face was bruised, blistered, and swollen, and he had a chipped tooth. According to Richard, it looked like "[s]omebody had beat the stew out of him." (R. 4183.) In addition, medical records indicate that on March 10, 2011, and again on March 27, 2012, DeBlase was treated at a local hospital for injuries he sustained after being assaulted in jail. (C. 1599; 1609.) According to DeBlase, this evidence, coupled with Newburn's testimony that he had heard about another inmate forcing DeBlase to lick a toilet seat, that he had told inmate John Pope to leave DeBlase alone, and that both he and Henson had asked questions about the children's deaths establish that he was coerced into confessing that he had killed both Natalie and Chase in order to receive protection from Newburn and Henson. Thus, DeBlase concludes, his statements were made "under nearly identical conditions" as those in Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), conditions the United States Supreme Court said rendered a defendant's jailhouse statements involuntary. (DeBlase's brief, p. 13.) We disagree.

In Fulminante, Oreste Fulminante, a suspect in the murder of his 11-year-old stepdaughter, was convicted of possession of a firearm by a felon and, while incarcerated for that conviction, became friends with another inmate, Anthony Sarivola, a former police officer and a paid informant for the Federal Bureau of Investigation ("FBI"). After hearing a rumor that Fulminante was suspected of killing his stepdaughter, Sarivola "raised the subject" with Fulminante multiple times, and each time, Fulminante denied involvement in the murder. Fulminante, 499 U.S. at 283, 111 S.Ct. 1246. Sarivola informed the FBI about Fulminante, and the FBI instructed Sarivola to gather more information. Sarivola then broached the subject again with Fulminante, explaining that he knew Fulminante had been " 'starting to get some tough treatment and whatnot' from other inmates because of the rumor" that he had murdered his stepdaughter. Id. Sarivola offered to protect Fulminante from other inmates but only if Fulminante confessed to the murder, and Fulminate then confessed to murdering his stepdaughter. The United States Supreme Court agreed with the Arizona Supreme Court's conclusion that Fulminante's confession to Sarivola was involuntary because it had been coerced by Sarivola's promise of protection. The Court explained:

> "Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, 'coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). See also Culombe [v. Connecticut], supra, 367 U.S. [568,] 584, 81 S.Ct. 1860 [(1961)]; Reck v. Pate, 367 U.S. 433, 440–441, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); Rogers v. Richmond, 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); Payne v. Arkansas, 356 U.S. 560, 561, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Watts v. Indiana, 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949). As in Payne, where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S. at 564–565, 567, 78 S.Ct. 844, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion."

***41** 499 U.S. at 287-88, 111 S.Ct. 1246 (footnotes omitted).

This case is substantially different, in many ways, from Fulminante. In Fulminante, Sarivola was a paid informant and agent of the government tasked with gathering information about Fulminante's involvement in the murder. In this case, neither Newburn or Henson were agents of the government tasked with gathering information about Natalie and Chase's deaths.[23] In Fulminante, Sarivola promised to protect Fulminante from other inmates, but only if Fulminante confessed to the murder. In this case, although there was evidence indicating that Newburn told another inmate to leave DeBlase alone, there was no evidence indicating that either Newburn or Henson promised to protect DeBlase from other

inmates only if he confessed to murdering Natalie and Chase. Finally, in Fulminante, the record indicated that "there was a credible threat of physical violence" to Fulminante, 499 U.S. at 287, 111 S.Ct. 1246, and that Fulminante had been "receiving 'rough treatment from the guys.' " 499 U.S. at 286, 111 S.Ct. 1246 (quoting State v. Fulminante, 161 Ariz. 237, 244, 778 P.2d 602, 609 n.1 (1988)). In this case, however, there is no evidence in the record indicating that there was a credible threat of physical violence to DeBlase when he made the statements in December 2010 and January 2011. Newburn testified that he had heard that DeBlase had been forced to lick a toilet seat but said that he did not witness that actually happening. Although DeBlase's father testified that he saw injuries on DeBlase's face in December 2010 and that it looked like DeBlase had been assaulted, there was no evidence indicating that those injuries were, in fact, the result of an assault by other inmates. Finally, although medical records indicate that DeBlase was, in fact, assaulted in March 2011 and again in March 2012, those assaults occurred long after DeBlase's statements in December 2010 and January 2011. Therefore, Fulminante is not controlling here.

> "[W]hen an accused volunteers a confession to a person who is not a law enforcement official or agent and has no connection whatever with law enforcement authorities, who has no interest whatever in the prosecution of the accused, is not in a position to promise or give the accused anything to compensate for his confession or to harm him for not making a confession, and there was no occasion whatever on the part of the person to whom the confession was made to have threatened the defendant if he did not confess or to make him any promise if he did confess, the confession under such circumstances is voluntary and admissible in evidence."

Ex parte Williams, 627 So.2d 999, 1003 (Ala. 1993) (internal quotation marks and citations omitted). Considering the totality of the circumstances, we conclude that DeBlase's jailhouse statements were voluntary and admissible. Therefore, we find no error, much less plain error, in their admission into evidence.

XI.

***42** DeBlase contends that the trial court erred in allowing two police officers to testify about his demeanor when they performed a welfare check on Keaton at DeBlase and Keaton's apartment in Louisville, Kentucky, on November 15, 2010. (Issue IX in DeBlase's brief.) Specifically, DeBlase contends that the officers' testimony, as well as the prosecutor's comment on their testimony during closing arguments, "was a deliberate effort to protray [his] silence as a tacit admission of guilt, impliedly of something more serious than the domestic violence complaint" (DeBlase's brief, p. 73), in violation of the Alabama Supreme Court's opinion in Ex parte Marek, 556 So.2d 375, 382 (Ala. 1989), which abolished the tacit-admission rule in pre-arrest situations "to the extent that the rule allows the introduction of evidence of an accused's silence when confronted with an accusation." Because DeBlase did not object to this testimony or to the prosecutor's comment, we review this claim under the plain-error rule. See Rule 45A, Ala. R. App. P.

The record reflects that Lt. Kristina Hagan and Officer Shaun Eerie, with the Louisville Metro Police Department, were sent to DeBlase and Keaton's apartment on November 15, 2010, to perform a welfare check on a woman possibly being held against her will. When they arrived at the scene, Lt. Hagan and Officer Eerie first spoke with Keaton's mother, Hellena, and her fiancé, Jim Emery, outside the apartment, who informed them that DeBlase had killed his two children and that Keaton was being held against her will and wanted to be removed from the scene. Because of the seriousness of the allegations, when Lt. Hagan and Officer Eerie knocked on the door of the apartment and DeBlase answered, they told DeBlase that they were investigating a noise complaint and asked if they could enter the apartment. DeBlase allowed the officers inside, and the officers then separated DeBlase and Keaton -- with DeBlase in the living room and Keaton in the bedroom -- to avoid any problems. In the bedroom, Lt. Hagan told Keaton the real reason the officers were there and asked Keaton if she wanted to leave; Keaton said that she did. After Keaton packed her things, the officers escorted her from the apartment.

Lt. Hagan testified that while they were in the bedroom she tried to question Keaton about whether DeBlase had hurt her but Keaton "didn't want to talk about it" and "didn't say much at all." (R. 2650.) She also described Keaton as "nonchalant" and said that she took a long time to pack her things before they left. (R. 2658.) Lt. Hagan testified that she did not believe that Keaton was in any immediate danger but that she was "uneasy" about "the whole situation" because of the "silence." (R. 2660.) According to Lt. Hagan, silence is "very rare" in a domestic-violence situation, but in this case "there was no communication." (R. 2660.) Lt. Hagan also described DeBlase as "[v]ery distant" and said that he made her "feel uneasy." (R. 2661.)

Officer Eerie testified that, while Lt. Hagan and Keaton were in the bedroom, he attempted "to make small talk" with DeBlase in the living room -- asking DeBlase basic questions such as where he was from and how long he had been in Louisville -- to see if DeBlase knew the true purpose of the visit. (R. 2666.) Officer Eerie testified that DeBlase provided short answers to his questions, if he answered at all, and that DeBlase appeared "unconcerned." (R. 2667.) According to Officer Eerie, DeBlase was "very quiet"; he never asked why the officers had separated him and Keaton; and he "took our noise complaint for what it was." (R. 2669.) Officer Eerie said that it was "strange" for someone not to ask any questions about a police investigation. (R. 2669.) Officer Eerie described his conversation with DeBlase as "extremely awkward," noting that DeBlase "didn't want anything to do with me at that point." (R. 2667.) Officer Eerie also testified that Keaton took a long time to pack her things, that she moved "methodically" from room to room to gather things she needed, and that she did not appear to be in a hurry to leave. (R. 2668.) When Keaton came into the living room to collect some of her things, Officer Eerie said, she and DeBlase did not speak to each other. When asked to describe DeBlase's reaction when he realized that Keaton was leaving, Officer Eerie said that he "was expressionless," "didn't have anything to say," and "stared blankly out the side window most of the time." (R. 2668.)

***43** "[A] tacit admission ... is made when 'a statement incriminating [the] accused or charging him with crime is made in his presence and hearing, under circumstances naturally calling for a reply or denial, and he has full liberty to speak' " but does not do so. Ex parte Marek, 556 So.2d at 379 (quoting 22A C.J.S. Criminal Law, § 734(1) at 1068–69 (1961) (footnotes omitted)). "[A] statement incriminating the accused or charging him with a crime 'under circumstances naturally calling for a reply or denial' is a necessary predicate to a tacit admission." Largin v. State, 233 So.3d 374, 398 (Ala. Crim. App. 2015). Tacit admissions, whether before or after arrest, are inadmissible. See Ex parte Marek, 556 So.2d at 382.

In this case, there was no tacit admission because there was no accusatory statement against DeBlase. Both Lt. Hagan and Officer Eerie testified that they told DeBlase they were investigating a noise complaint, and nothing in the record indicates that either of them made any statement to, or in front of, DeBlase that incriminated him or charged him with any crime and that would naturally call for a response. See, e.g., Largin, 233 So.3d at 397-98, and Alexander v. State, 601 So.2d 1130, 1132 (Ala. Crim. App. 1992). Lt. Hagan and Officer Eerie did nothing more than testify about DeBlase's demeanor when they encountered him, and "evidence of a defendant's demeanor before or after the offense is admissible at trial." Largin, 233 So.3d at 398. Moreover, because there was no tacit admission, the prosecutor's comment during closing arguments on Lt. Hagan and Officer Eerie's testimony was proper.

Therefore, we find no error, much less plain error, in Lt. Hagan and Officer Eerie's testimony or in the prosecutor's comment on that testimony.

XII.

DeBlase contends that he was denied his constitutional right to confrontation when Keaton's two statements to police were introduced into evidence against him but she did not testify at his trial. (Issue XV in DeBlase's brief.) Because DeBlase did not raise this issue in the trial court, we review it for plain error. See Rule 45A, Ala. R. App. P.

Before trial, DeBlase filed a motion seeking a pretrial determination of the admissibility of Keaton's statements to police as well as evidence indicating that she had mental-health problems. In that motion, DeBlase argued that he was entitled to introduce into evidence those portions of Keaton's statements reflecting that Keaton was alone with Natalie the day Natalie was killed and reflecting Keaton's inconsistent stories regarding what happened to the children and to introduce evidence indicating that Keaton suffered from a mental disorder, that she was delusional, and that she had homicidal ideations. He simultaneously filed a motion in limine to prohibit the State from introducing into evidence those portions of Keaton's statements that implicated him in the children's deaths. In response, the State filed a motion in limine to prohibit DeBlase from introducing any portion of Keaton's statements or any evidence about Keaton's mental-health problems to establish that she had committed the murders.

At a pretrial hearing on the motions, DeBlase and the State informed the trial court that they had reached an agreement. The parties agreed that the entirety of Keaton's two statements to police would be admitted into evidence but that DeBlase would not present evidence or testimony about Keaton's mental-health problems. Both DeBlase's counsel and the

prosecutor stated that they had each made a strategic decision to allow admission of the entirety of Keaton's two statements and DeBlase's counsel specifically noted that "we'd be waiving any Bruton [24] objection that we would have otherwise but for this agreement as to those two statements alone." (R. 1032.) DeBlase did not object when the State introduced Keaton's statements at trial.

***44** On appeal, DeBlase recognizes that his counsel stipulated to the admission of Keaton's statements but he argues that the right to confrontation is personal and could not be waived by his counsel without his knowing, intelligent, and voluntary consent. He argues that the record fails to show that he knowingly, intelligently, and voluntarily waived, or consented to waive, his right to confrontation because the trial court did not engage in a colloquy with him and that, therefore, the admission of Keaton's statements denied him his constitutional right to confrontation.

DeBlase's contention is contrary to Alabama law. In Lokos v. State, 278 Ala. 586, 179 So.2d 714 (1965), judgment vacated on other grounds by Lokos v. Alabama, 408 U.S. 935, 92 S.Ct. 2854, 33 L.Ed.2d 749 (1972), the defendant's counsel stipulated that testimony of the murder victim's wife, the State's sole eyewitness to the murder, that she had given in a codefendant's trial could be read to the jury by the court reporter in lieu of the witness testifying at the defendant's trial. The Alabama Supreme Court held that counsel could validly waive a criminal defendant's right to confrontation, explaining:

> "In Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, decided by the Supreme Court of the United States on April 5, 1965, it was held that the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment to the United States Constitution. And Section 6 of the Constitution of this state provides that in all criminal prosecutions the accused has a right 'to be confronted by the witnesses against him.' But we think that right can be waived and that the record in this case shows that it was waived. True, the record only shows a waiver by counsel for appellant rather than an express waiver by the appellant himself, but it certainly shows no protest on the part of appellant and it seems to us that the procedure followed was to the advantage of appellant, since the wife of the deceased, who was herself brutally mistreated by the defendant and his companions, was not before the jury."

278 Ala. at 596, 179 So.2d at 724.

DeBlase's contention is also contrary to the majority of jurisdictions that have addressed this issue. In People v. Campbell, 208 Ill. 2d 203, 280 Ill.Dec. 684, 802 N.E.2d 1205 (2003), the Illinois Supreme Court addressed "whether defense counsel, by stipulating to the admission of evidence, can waive a defendant's constitutional right to confront the source of the evidence without the defendant's knowing consent to the stipulation." 208 Ill. 2d at 205, 280 Ill.Dec. at 685, 802 N.E.2d at 1206. The Court concluded that counsel may waive a defendant's constitutional right to confrontation as part of counsel's trial strategy, noting that the majority of jurisdictions that have addressed the issue have so held:

> "[T]his court has never directly addressed the issue of whether defense counsel may waive a defendant's right of confrontation by stipulating to the admission of evidence. We note, however, that a majority of the courts that have addressed the issue have held that counsel in a criminal case may waive his client's sixth amendment right of confrontation by stipulating to the admission of evidence.
>
> "For example, in United States v. Plitman, 194 F.3d 59, 63 (2d Cir. 1999), the United States Court of Appeals for the Second Circuit addressed whether and under what circumstances defense counsel could waive a defendant's right to confrontation. The defendant in Plitman had claimed that his attorney's stipulation concerning certain testimony was invalid because: (1) the defendant had not waived his sixth amendment right to confront the witnesses against him; (2) the defendant's attorney never said that his client had waived his right of confrontation and/or knew the risks involved in doing so; and (3) defense counsel's actions were not justified as matters of trial strategy. Plitman, 194 F.3d at 62. The Plitman court noted that in an earlier decision, it had suggested that defense counsel could make such a waiver where the stipulation involved trial strategy and tactics, even though the stipulation impacted on a defendant's constitutional rights. Plitman, 194 F.3d at 63. Similarly, other federal courts of appeals had held that defense counsel in a criminal case could stipulate to the admission of evidence as long as the defendant did not dissent from his attorney's decision, and as long as it could be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy. Plitman, 194 F.3d at 63. The court concluded that given the safeguards available to defendants from the constitutionally defective actions of their attorneys:

***45** " '[W]e reject Plitman's argument that a defendant in every instance personally must waive the right to confront the witnesses against him. We therefore join the majority of circuit courts of appeals and hold that defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of trial tactics or strategy that might be considered sound.' Plitman, 194 F.3d at 64.

"The court therefore held that the defendant's waiver of his right of confrontation through counsel was valid because the defendant achieved several tactical advantages as a result of the stipulation, and defendant did not object during the discussion concerning the stipulation or when his attorney made the decision to stipulate. Plitman, 194 F.3d at 64.

"As the Plitman court observed, a majority of the federal courts of appeals that have considered the issue have held that defense counsel may waive a defendant's sixth amendment right to confrontation when the decision is a matter of trial tactics or strategy and the defendant does not object to the stipulation. See Hawkins v. Hannigan, 185 F.3d 1146, 1155–56 (10th Cir. 1999) (defense counsel effectively waived defendant's confrontation rights where counsel's decision to stipulate to testimony was a matter of prudent trial strategy and there was no evidence that defendant disagreed with or objected to his counsel's decision); United States v. Stephens, 609 F.2d 230, 232–33 (5th Cir. 1980) (defense counsel may waive defendant's sixth amendment right to confrontation by stipulating to the admission of evidence as long as defendant does not dissent from his attorney's decision and as long as the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy); Wilson v. Gray, 345 F.2d 282, 287–88 (9th Cir. 1965) (defendant's right to confrontation was effectively waived by his counsel where stipulation was made in the presence of defendant and without his objection, and the decision to stipulate was a matter of trial tactics and strategy); United States v. Joseph, 333 F.2d 1012, 1013 (6th Cir. 1964) (right to confrontation may be effectively waived by defense counsel in open court in the presence of the defendant where the defendant indicates no dissent to the stipulation); Cruzado v. People of Puerto Rico, 210 F.2d 789, 791 (1st Cir. 1954) (where a defendant is represented by counsel, counsel may waive defendant's right to confrontation in defendant's presence, if the defendant manifests no dissent to the waiver and where the stipulation is a matter of trial tactics).

"In addition to the federal courts, a majority of the state courts that have considered this issue have held that defense counsel may waive a defendant's right to confrontation if the decision to stipulate is a matter of trial tactics and strategy and the defendant does not object to the decision. For example, in Carr v. State, 829 S.W.2d 101, 102 (Mo. App. 1992), the defendant argued that he had been denied the right to confront a witness against him when his counsel stipulated to portions of a witness' deposition testimony. The defendant claimed that he had not given his counsel permission to stipulate, and the record reflected that defendant did not personally agree to waive his right of confrontation and was not asked to waive that right. Carr, 829 S.W.2d at 102. The court observed, however, that the defendant voiced no objection when the stipulation was presented to the trial court and listened 'patiently' to his counsel read portions of the deposition which were advantageous to defendant. Carr, 829 S.W.2d at 102. The court denied defendant's claim that he was denied his right to confront the witness against him, noting that in addition to the defendant's failure to object to the stipulation, there were sound strategic reasons for defense counsel's decision to stipulate. Carr, 829 S.W.2d at 102. See also Lee v. State, 266 Ark. 870, 876–77, 587 S.W.2d 78, 82 (App. 1979) ('it seems to be the universal rule that a defendant in a criminal case may waive his right to confrontation * * * and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy'); State v. Oyama, 64 Haw. 187, 188, 637 P.2d 778, 779–80 (1981) (defense counsel can waive certain aspects of the right to confrontation where such waiver is a matter of trial tactics and procedure and, in such case, the trial court is not required to determine whether the defendant knowingly and voluntarily waived his right); Waldon v. State, 749 So.2d 262, 266 (Miss. App. 1999) (defense counsel may waive a defendant's sixth amendment right of confrontation by stipulating to the admission of evidence so long as defendant does not dissent and so long as the stipulation is a matter of trial tactics and strategy); State v. Bromwich, 213 Neb. 827, 830, 331 N.W.2d 537, 540 (1983) (counsel in a criminal case may waive his client's right of confrontation by stipulating to the admission of evidence if the decision to stipulate is a legitimate trial tactic and the defendant does not dissent from the decision); Ludlow v. State, 761 P.2d 1293 (Okla. Crim. App.1988) (lack of objection on the part of defense counsel to the admission of evidence will be deemed a waiver of defendant's sixth amendment right of confrontation where defendant does [not] indicate disagreement with counsel's

decision, and counsel's decision is a legitimate trial tactic); State v. Harper, 33 Wash. App. 507, 510, 655 P.2d 1199, 1200 (1982) (when a defendant does not object, defense counsel may, as a matter of trial tactics, waive a defendant's right to confrontation by stipulating to the admission of evidence as long as the stipulation is not tantamount to a guilty plea); Bilokur v. Commonwealth, 221 Va. 467, 473, 270 S.E.2d 747, 752 (1980) (stipulation into evidence of an incriminating extrajudicial statement was a legitimate trial tactic, and defendant did not object when stipulation was tendered; therefore, counsel properly waived defendant's right of confrontation). But see Lewis v. State, 647 S.W.2d 753 (Tex. App. 1983) (defendant must consent in writing to waiver of confrontation and agreement to stipulate and must have court's approval in writing); People v. Lawson, 124 Mich.App. 371, 376, 335 N.W.2d 43, 46 (1983) (rights of the confrontation clause must be personally waived by the defendant).

***46** "We find the reasoning of the majority of the federal and state courts to be persuasive.... We agree that defense counsel may waive a defendant's right of confrontation as long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy....

"In so holding, we note that defendant has cited Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997), in support of his claim that only a defendant may waive his right to confrontation. [25] We do not find Clemmons persuasive. In Clemmons, neither the defendant nor his counsel waived the defendant's right to confrontation. Clemmons, 124 F.3d at 956. In observing that the right to confrontation was not waived by defendant or his counsel, the Clemmons court stated that 'the law seems to be clear that the right of confrontation is personal and fundamental and cannot be waived by counsel.' Clemmons, 124 F.3d at 956. As the United States Court of Appeals for the Second Circuit has noted, however, Clemmons' statement that counsel cannot waive a defendant's right to confrontation was dicta. Plitman, 194 F.3d at 63. In addition, the case cited by the Clemmons court as support for the statement that counsel cannot waive the right of confrontation, Brookhart v. Janis, 384 U.S. 1, 7, 86 S.Ct. 1245, 1248, 16 L.Ed.2d 314, 319 (1966), was distinguishable. Plitman, 194 F.3d at 63 n.2.

"In Brookhart, defendant's counsel agreed to a 'prima facie trial,' which was equivalent to a guilty plea. Brookhart, 384 U.S. at 6–7, 86 S.Ct. at 1248, 16 L.Ed.2d at 318. Notably, after the trial judge stated that in a prima facie case the defendant in effect admits his guilt, the defendant responded that he wished to point out that in no way was he pleading guilty. Brookhart, 384 U.S. at 7, 86 S.Ct. at 1248, 16 L.Ed.2d at 318–19. The Court found that the stipulation at issue in Brookhart was not merely a matter of trial tactics or strategy, but instead was 'the practical equivalent of a plea of guilty.' Brookhart, 384 U.S. at 7, 86 S.Ct. at 1248, 16 L.Ed.2d at 319. In fact, in reversing the defendant's conviction, the Court stated that it was doing so because 'petitioner neither personally waived his right nor acquiesced in his lawyer's attempted waiver.' (Emphasis added.) Brookhart, 384 U.S. at 8, 86 S.Ct. at 1249, 16 L.Ed.2d at 319...."

208 Ill. 2d at 212-18, 280 Ill.Dec. at 689-92, 802 N.E.2d at 1210-13. See also United States v. Ceballos, 789 F.3d 607, 613-17 (5th Cir. 2015); United States v. Williams, 403 F.App'x 707 (3d Cir. 2010) (not selected for publication in the Federal Reporter); Hinojos-Mendoza v. People, 169 P.3d 662, 669-70 (Colo. 2007); Belden v. State, 73 P.3d 1041, 1086 (Wyo. 2003); Commonwealth v. Myers, 82 Mass. App. Ct. 172, 179-85, 971 N.E.2d 815, 820-25 (2012); and State v. Splawn, 23 N.C.App. 14, 17-18, 208 S.E.2d 242, 245 (1974).

In this case, DeBlase was present at the pretrial hearing when his counsel and the prosecutor informed the trial court of their agreement, but expressed no disagreement with counsel's decision to stipulate to the admission of Keaton's statements. Moreover, it is abundantly clear that counsel's decision to stipulate to the admission of the entirety of Keaton's statements was a sound strategic one designed to place the blame for the children's deaths on Keaton. Therefore, DeBlase was not denied his right to confrontation, and we find no error, much less plain error, in the admission, by stipulation, of Keaton's statements to police.

XIII.

***47** DeBlase contends that he was denied his right to a fair trial when, he says, the State "extensively reli[ed] upon properly excluded evidence" during the trial. (Issue V in DeBlase's brief, p. 52.) Specifically, he argues that the State improperly presented evidence and argument to the effect that Natalie and Chase may have been poisoned with antifreeze.

The condition of Natalie and Chase's remains made it impossible to affirmatively determine the cause of their deaths. As a result, the State alleged in the indictment that DeBlase had caused Natalie and Chase's deaths "by poisoning

and/or asphyxia and/or starvation and/or dehydration and/or a manner unknown to the grand jury," and the State pursued at trial three of those alternative theories of the cause of death. (C. 80.)

The State presented evidence of possible starvation through testimony that DeBlase and Keaton fed the children very little and that the children were often hungry. The State also presented evidence indicating that Natalie's leg bones contained "Harris lines," indicating a period of arrested growth that could have been caused by malnutrition and that there was a porous bone on the roof of Chase's eye orbit that is often an indicator of malnutrition. In addition, the State presented evidence of possible asphyxia through DeBlase's jailhouse statements, in which DeBlase said that both Natalie and Chase were alive when he found them and that he had choked them to death.

Finally, the State presented evidence indicating that Natalie and Chase may have been poisoned. The State presented evidence indicating that the "Harris lines" found on Natalie's leg bones could have been caused by poisoning as well as by malnutrition and that both DeBlase and Keaton told police that in the days before their deaths Natalie and Chase had a foul odor in their mouths and were throwing up "black stuff." Additional testimony presented by the State indicated that Chase appeared "emergency-room sick" a few months before he was killed. Moreover, in his jailhouse statements, DeBlase said that Keaton had put poison in the children's sippy cups, and the State presented evidence indicating that police found a bottle of antifreeze in DeBlase's van when it was searched.

The State also presented evidence indicating that in July 2012, Natalie and Chase's remains were exhumed and tested for antifreeze but that no evidence of antifreeze was found. Madeline Montgomery and Bruce Goldberger, both forensic toxicologists, testified for the State that the lack of any evidence of antifreeze in the children's remains could have been because the methods for testing were not sensitive enough to detect the presence of any antifreeze; because any antifreeze, which is soluble in water, was washed away by the elements; because any antifreeze had been metabolized by the children before they died, leaving no trace; or because the children were never poisoned with antifreeze. In addition, Goldberger testified that antifreeze poisoning, depending on the amount ingested, generally is characterized by three stages. When first ingested, it produces an intoxicating effect, such as alcohol. Once the body metabolizes the antifreeze, in only a few hours, physiological distress sets in, causing problems with heart rate, blood pressure, breathing, etc., leaving the person "quite distressed" and "struggl[ing] a fair amount just to stay alive." (R. 3604.) Finally, "a day or two" after ingestion, the person suffers renal failure. (R. 3604.)

***48** The State also sought to present evidence at trial of statements Keaton made while in jail to fellow inmates Donna Frazier and Rosanna Russell. Keaton had told Frazier and Russell that Natalie and Chase had been poisoned with antifreeze. During a break in the trial, the State informed the trial court that it planned to call both Frazier and Russell to testify about Keaton's statements. DeBlase objected to the admission of any statements Keaton had made to Frazier and Russell and the trial court excluded those statements on the ground that their admission would violate DeBlase's right to confrontation. The court noted that, although DeBlase had waived his right to confrontation with respect to Keaton's two statements to police, see Part XII of this opinion, supra, he had not waived that right with respect to any other statements Keaton had made.

A.

DeBlase first argues that the State presented evidence of Keaton's statements to Frazier and Russell in contravention of the trial court's ruling and in violation of his right to confrontation. Because DeBlase's objection was sustained and his motion for a mistrial untimely, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that while questioning Det. Prine about the exhumation of Natalie and Chase's remains, the following occurred:

> "[Prosecutor]: And when did the exhumation of the two children take place?
>
> "[Det. Prine]: July of 2012.
>
> "[Prosecutor]: And there was some time frame between the date of when [the original arrest] warrants were signed [in December 2010] until 2012, and why was that?
>
> "[Det. Prine]: Because, initially, we didn't have any reports of antifreeze or poison, and that didn't come in until later through witnesses such as Rosanna Russell and --
>
> > "[DeBlase's counsel]: Judge, I'm going to object to this. This is --

"THE COURT: Whoa, whoa, whoa.

"[DeBlase's counsel]: All right. Object to any hearsay that she's giving about Rosanna Russell.

"THE COURT: Sustained.

"[Prosecutor]: Don't go into what anyone said, but, after getting any reports, what did you do -- what took the length of time to get to the exhumation?

"[Det. Prine]: It took time because, one, we had to find an expert to do that. We don't have any around here to my knowledge and, so, that took a while to obtain an expert to exhume the bodies and do the analysis.

"[Prosecutor]: And so, that was the reason for the delay period?

"[Det. Prine]: Correct."

(R. 3529-30.)

DeBlase's counsel then cross-examined Det. Prine on several subjects, at which point the prosecutor interrupted the cross-examination and asked to approach the bench. The trial court placed the jury in recess, and the State then requested that the trial court give the jury a curative instruction to disregard any testimony from Det. Prine about antifreeze and to also instruct Det. Prine not to mention antifreeze during cross-examination. DeBlase moved for a mistrial, arguing that it was not possible "to unring that bell." (R. 3535.) The trial court denied the motion for a mistrial but agreed to give the jury a curative instruction, which it did when the jury returned. [26]

Contrary to DeBlase's contention, Det. Prine did not testify about any statements Keaton had made to anyone. Rather, Det. Prine referred in her testimony only to "reports of antifreeze or poison" by "witnesses such as Rosanna Russell." (R. 3529.) Moreover, as the State correctly points out in its brief to this Court, Det. Prine's testimony about "reports" of antifreeze was not offered for the truth of the matter asserted, i.e., it was not offered to prove that the children were poisoned with antifreeze, but was offered to explain why the children's remains were exhumed and tested for antifreeze over a year-and-a-half after they were discovered. Therefore, Det. Prine's testimony did not constitute hearsay. 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"). Because Det. Prine's testimony did not constitute hearsay, DeBlase's right to confrontation was not violated. 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"). Therefore, we find no error, much less plain error, as to this claim.

B.

***49** DeBlase also argues that the prosecutor committed misconduct by posing hypothetical questions to Montgomery and Goldberger about why no antifreeze was found in the children's remains based on what he says was a fact not in evidence, i.e., that Natalie and Chase had been poisoned with antifreeze, and then commenting on that testimony during closing arguments, thereby "expressly communicat[ing] that the question of antifreeze poisoning had been raised by the evidence, when it had not." (DeBlase's brief, p. 60.) DeBlase further argues that the prosecutor committed misconduct by displaying a bottle of antifreeze in the courtroom during the trial. DeBlase did not object to the prosecutor's questioning of Montgomery and Goldberger or to the prosecutor's comments on their testimony and, although he did request that the bottle of antifreeze be removed from the courtroom, his request was untimely made on the seventh day of the guilt phase of the trial, after the State had presented testimony from 40 witnesses, and because the trial court granted the request, there was no adverse ruling upon which to predicate error. Therefore, we review these claims for plain error. See Rule 45A, Ala. R. App. P.

Initially, we point out that DeBlase does not argue that evidence indicating that the children may have been poisoned was inadmissible generally and, indeed, the State was entitled to present evidence to support its alternative theories of the cause of Natalie and Chase's deaths. Instead, DeBlase's arguments focus on the identification of antifreeze as the poison that may have been used. According to DeBlase, the only evidence indicating that Natalie and Chase had been poisoned with antifreeze came from Keaton's statements to Frazier and Russell, which were excluded from evidence. Although DeBlase is correct that Keaton's statements were the only direct evidence indicating that Natalie and Chase had been poisoned with antifreeze, he is incorrect that those statements were the only evidence at all of possible antifreeze

poisoning. There was evidence presented at trial from which a reasonable inference could be drawn that Natalie and Chase may have been poisoned with antifreeze. As already noted, the State presented evidence indicating that Natalie and Chase may have been poisoned -- both DeBlase and Keaton told police that Natalie and Chase were vomiting "black stuff" and that they had a foul odor in their mouths before their deaths; testimony indicated that Chase looked "emergency-room sick" a few months before his death; and in his jailhouse statements, DeBlase said that Keaton had been putting poison in Natalie and Chase's sippy cups. In addition, the State presented evidence indicating that a bottle of antifreeze was found in DeBlase's van. From this evidence, a reasonable inference could be drawn that antifreeze may have been used to poison the children.

Because a reasonable inference from the evidence was that Natalie and Chase may have been poisoned with antifreeze, we cannot say that the prosecutor's questioning Montgomery and Goldberger about antifreeze or commenting on that testimony during closing arguments was improper. Moreover, although we question the propriety of the prosecutor's theatrics in displaying a bottle of antifreeze in the courtroom when the record does not indicate that the bottle on display was the same bottle found in DeBlase's van and the record reflects that the State never introduced into evidence any bottle of antifreeze, see, e.g., Bonner v. State, 921 So.2d 469 (Ala. Crim. App. 2005), after carefully reviewing the record and considering the display of the bottle of antifreeze in the context of the entire trial, we cannot say that the prosecutor's actions " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Therefore, we find no error, much less plain error, as to these claims.

Moreover, even if it was improper for the prosecutor to refer specifically to antifreeze when pursuing the theory that the children had been poisoned, we fail to see how identification of a specific poison was any more harmful to DeBlase than the evidence indicating generally that the children may have been poisoned, evidence that was properly admitted. "Claims of prosecutorial misconduct are subject to harmless-error analysis." Bonner, 921 So.2d at 473. Thus, even if error occurred, that error was harmless.

XIV.

***50** DeBlase contends that the trial court erred in allowing the State to present evidence indicating that he was involved in amateur entertainment wrestling as a hobby. (Issue VI in DeBlase's brief.) DeBlase takes issue with photographs of himself and Keaton -- in which he was wearing the costume of the "bad guy" persona "Damon Black" he had adopted as a wrestler -- that the State introduced into evidence and used as a visual aid during opening statements, and he argues that the State improperly "fixated" its questioning of witnesses on that "bad guy" persona, even though testimony indicated that he had adopted two different personas as a wrestler, one as "bad guy" Damon Black, and one as "good ole' boy" "Johnny Wayne." (DeBlase's brief, p. 62.) DeBlase argues that the photographs of him wearing the Damon Black costume were "particularly damaging" because the costume included a pentagram and "demon-like" mask, "thus creating the risk that jurors associated him with Satanism or occult practices." (DeBlase's brief, pp. 63-64.) According to DeBlase, his hobby as an amateur wrestler was irrelevant to any issue in the case, see Rules 401 and 402, Ala. R. Evid., and evidence of it was highly prejudicial because, he says, the State used his "bad guy" persona to suggest to the jury that he was "a depraved person with violent tendencies," in contravention of Rule 404(a) and (b), Ala. R. Evid. (DeBlase's brief, p. 63.) Because DeBlase did not object to any of the photographs or testimony about his wrestling hobby or to the prosecutor displaying one of those photographs during opening statements, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

During opening statements, the prosecutor set out a timeline of events from the time DeBlase met Natalie and Chase's mother, Corrine Heathcock, until DeBlase was charged with capital murder and, when explaining what she expected the evidence to show regarding DeBlase and Keaton's life when they first began dating, the prosecutor displayed a photograph of DeBlase and Keaton wearing their wrestling costumes, stating, in relevant part:

> "So, when she met John, they began wrestling. And this is them in their wrestling attire doing the wrestling circuit here in Mobile while raising these kids, Natalie and Chase DeBlase. And so, they would do their wrestling. This is Heather and John. They would do their wrestling and raise the kids. And John was attending Blue Cliff Career College

here in Mobile and they were going to get an apartment at Peach Place Apartments."

(R. 2381.) In addition, during its case-in-chief, the State called to testify several witnesses who had known DeBlase for many years through the local entertainment-wrestling circuit. Their testimony focused on what they had witnessed with respect to DeBlase and Keaton's treatment of the children or DeBlase's behavior after the children had been killed, but they each testified that they knew DeBlase and Keaton through wrestling. The State also briefly questioned Creighton Hobbs, DeBlase's friend and wrestling manager, on direct examination about DeBlase's stage name, and Hobbs stated that he did not remember. On cross-examination, DeBlase elicited testimony from Hobbs that entertainment wrestling is an act that is staged and rehearsed and does not actually involve violence. In addition, Hobbs testified that one of DeBlase's two personas as a wrestler was "good guy" Johnny Wayne who wore a white cowboy hat and a John Deere brand T-shirt. On redirect examination, the State asked Hobbs if one of DeBlase's wrestling personas was also "bad guy" Damon Black and Hobbs stated that it was, and the State introduced into evidence one of two photographs of DeBlase wearing his Damon Black costume. The State introduced the other photograph [27] as part of a collection of items that had been found during the search of DeBlase's van.

"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).

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)). "Evidence which is not relevant is not admissible." Rule 402, Ala. R. Evid.

***51** In addition, Rule 404(a), Ala. R. Crim. P., precludes "[e]vidence of a person's character or a trait of character ... for the purpose of proving action in conformity therewith," and Rule 404(b), Ala. R. Evid., precludes "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." "[T]he exclusionary rule prevents the State from using evidence of a defendant's prior 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).

We question whether evidence indicating that DeBlase was involved in amateur wrestling as a hobby constitutes the type of character evidence precluded by Rule 404(a) and (b). Amateur wrestling is not a crime or "bad act" and participation in such a hobby does not, alone, suggest that a person is of a certain character or prone to criminal acts. However, the State did more than simply present testimony that DeBlase was involved in amateur wrestling; it also presented testimony about, and photographs of, the "bad guy" persona DeBlase adopted as a wrestler, and it is evident from the record that the State's purpose in doing so was to suggest that DeBlase was, in fact, the "bad guy" he portrayed as a wrestler. Even under Alabama's liberal test of relevancy, we cannot say that DeBlase's hobby as an amateur wrestler or the personas he adopted in that capacity had any relevance to any issue in the case. Therefore, that evidence was inadmissible under Rules 402 and 404.

Nonetheless, we conclude that the admission of this evidence was, at most, harmless 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."

630 So.2d at 126 (emphasis omitted).

The majority of the evidence about DeBlase's involvement in amateur wrestling was innocuous, coming in the form of testimony from witnesses who stated they knew DeBlase from the local wrestling circuit, with no specific details. The testimony about DeBlase's "bad guy" persona and the photographs of DeBlase wearing the costume for that persona, although not innocuous, were not as egregious as DeBlase portrays them in his brief on appeal. Although the costume made DeBlase look somewhat imposing, we do not agree that it would have led the jury to believe that he was involved in Satanism or the occult. The jury was well aware that the costume was for DeBlase's wrestling persona and that the wrestling was not real and was simply entertainment. The jury was also well aware that the "bad guy" persona was only one of the characters DeBlase portrayed as a wrestler. In addition, the photographs were introduced by the State with little fanfare -- one as part of a group of exhibits -- and the State's use of one of the photographs during opening statements was not theatrical -- the State displayed the photograph while stating, matter-of-factly, that DeBlase and Keaton were involved in wrestling as they were raising the children.

***52** We have carefully reviewed the record, and we have no trouble concluding that evidence about DeBlase's hobby as an amateur wrestler and the personas he adopted in that capacity did not affect DeBlase's substantial rights and did not affect the outcome of the trial. Therefore, DeBlase is entitled to no relief on this claim.

XV.

DeBlase contends that the trial court erred in allowing the State to present what he claims was "extensive" evidence of collateral acts under Rule 404(b), Ala. R. Evid. (Issue XII in DeBlase's brief, p. 79.) Specifically, DeBlase challenges testimony that he once slapped Natalie on the mouth; that in January 2010 he intended to steal his mother's car; and that he had a biting fetish and acted "weird." DeBlase argues that the above evidence was not admissible under any of the exceptions in Rule 404(b) and was offered solely "to portray [him] as a bad person with criminal propensities who, at the time of the offenses, 'act[ed] in conformity therewith.' " (DeBlase's brief, p. 79) (quoting Rule 404(a), Ala. R. Evid.). He also argues that the trial court erred in not giving a limiting and/or curative instruction to the jury regarding any of the above testimony. DeBlase did not object to the testimony that he slapped Natalie or that he had a biting fetish, he did not receive an adverse ruling on his objection to the testimony that he intended to steal his mother's car, and he did not request a limiting and/or curative instruction with respect to any of the testimony. Therefore, we review these claims under the plain-error rule. See Rule 45A, Ala. R. App. P.

" '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).

Rule 404(b) provides:

"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."

"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.' " Woodard v. State, 846 So.2d 1102, 1106 (Ala. Crim. App. 2002) (quoting Ex parte Drinkard, 777 So.2d 295, 296 (Ala. 2000)). As explained in Part XIV of this opinion, "the exclusionary rule prevents the State from using evidence of a defendant's prior 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 at 302. "[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).

***53** However, "[t]he State is not prohibited from ever presenting evidence of a defendant's prior 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 v. State, 695 So.2d 70, 85 (Ala. Crim. App. 1995), aff'd, 695 So.2d 138 (Ala. 1997). "[T]he question of the admissibility of collateral-act evidence is whether the evidence is relevant for a limited purpose other than bad character." Horton v. State, 217 So.3d 27, 46 (Ala. Crim. App. 2016).

> " '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.' "

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)).

A.

Corrine Heathcock, Natalie and Chase's mother, testified that Natalie suffered from night terrors -- she would start screaming and crying while she was asleep and she could not be wakened. According to Heathcock, the first time Natalie had a night terror in the middle of the night and woke her and DeBlase up, DeBlase "popped her" on the mouth. (R. 3092.)

Contrary to DeBlase's belief, his conduct and interactions with his children were relevant and admissible in his trial for their murder. As this Court explained in Burgess v. State, 962 So.2d 272 (Ala. Crim. App. 2005):

> " ' " '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).'
>
> "Hunt v. State, 659 So.2d 933, 939 (Ala. Crim. App. 1994). See Harris v. State, 489 So.2d 688 (Ala. Crim. App. 1986) (prior acts of abuse toward child victim were admissible to show motive and intent to murder). See also Harvey v. State, 579 So.2d 22, 26 (Ala. Crim. App. 1990). '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."

962 So.2d at 282. There was no error, much less plain error, in the admission of Heathcock's testimony.

Moreover, "a trial court has no duty to sua sponte give a limiting instruction when the prior bad act evidence is offered as substantive evidence of guilt." Boyle v. State, 154 So.3d 171, 211 (Ala. Crim. App. 2013), overruled on other grounds

by Towles v. State, [Ms. CR-15-0699, April 27, 2018] —— So.3d —— (Ala. Crim. App. 2018). Because Heathcock's testimony was properly admitted as substantive evidence of DeBlase's motive and intent, there was no error, much less plain error, in the trial court's not sua sponte giving the jury a limiting instruction.

B.

***54** Robin Rios ("Robin") testified that DeBlase, Keaton, and the children stayed with him and his wife, Heather, for a few weeks in January 2010. Robin said that the day before they left the Rios' home, DeBlase told Robin that he was going to go to his parents house that day and ask if he, Keaton, and the children could stay with them. Robin testified that DeBlase left and then returned in his mother's car and said that his mother had let him borrow the car to transport his, Keaton's, and the children's things to his parents' house. The prosecutor then asked Robin if he knew where DeBlase, Keaton, and the children went after they left the Rios' home, and Robin said that he assumed they had gone to DeBlase's parents' house but that "it came out later that [DeBlase] had intended to steal his mother's car." (R. 3251.) DeBlase objected, and the trial court agreed that the testimony was not relevant. The prosecutor then continued questioning Robin about other topics.

The reference to DeBlase intending to steal his mother's car was incidental; it came in the form of a nonresponsive answer by Robin. The trial court agreed that the testimony was not relevant, and the prosecutor did not pursue it. There was no further mention of Robin's testimony in this regard during the trial. After thoroughly reviewing the record, we conclude that any error in Robin's testifying that DeBlase intended to steal his mother's car did not seriously affect DeBlase's substantial rights or the fairness and integrity of the proceedings and that it did not have an unfair prejudicial impact on the jury's deliberations. "It is inconceivable that a jury could have been influenced, under the circumstances here, to convict [DeBlase] of crimes of the magnitude charged here because of an oblique reference to [his intent to steal his mother's car]." Thomas v. State, 824 So.2d 1, 20 (Ala. Crim. App. 1999), overruled on other grounds by Ex parte Carter, 889 So.2d 528 (Ala. 2004). In addition, 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 plain error in the admission of Robin's testimony or in the trial court not sua sponte giving the jury a curative instruction.

C.

Heather Rios testified on direct examination about her observations of DeBlase, Keaton, and the children while they were staying with her and her husband, Robin. On cross-examination, DeBlase elicited testimony from Heather that DeBlase had a childlike mentality and needed constant reassurance and guidance. On redirect examination, the State asked Heather if she liked DeBlase, and Heather responded that she did not. The State then asked why she did not like DeBlase and Heather said it was because "he was always weird to me" and the first time she had met him he had told her that "he had a biting fetish he was trying to curb." (R. 3276.)

We cannot say that DeBlase's having a biting fetish or being "weird" constitutes the type of "other crimes, wrongs, or acts" precluded by Rule 404(b). Neither is a crime nor otherwise suggests that a person is of bad character or has a propensity to commit crimes. Moreover, even if this testimony could be classified as Rule 404(b) evidence, it did not rise to the level of plain error. The prosecutor did not exploit Heather's testimony and made no further mention of it during the trial. As with the testimony of her husband, after thoroughly reviewing the record, we conclude that any error in Heather's testifying that DeBlase was "weird" and had a biting fetish did not seriously affect DeBlase's substantial rights or the fairness and integrity of the proceedings, and it did not have an unfair prejudicial impact on the jury's deliberations. "It is inconceivable that a jury could have been influenced, under the circumstances here, to convict [DeBlase] of crimes of the magnitude charged here because of an oblique reference to [being weird and having a biting fetish]." Thomas, 824 So.2d at 20. In addition, 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, 142 So.3d at 815.

***55** Therefore, we find no plain error in the admission of Heather's testimony or in the trial court not sua sponte giving the jury a curative instruction.

XVI.

DeBlase contends that the trial court improperly equated reasonable doubt with an "abiding conviction" during its instructions to the jury, thereby lessening the State's burden of proof in violation of Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). (Issue XVIII in DeBlase's brief.) Because DeBlase did not object to the trial court's instruction on reasonable doubt, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The trial court instructed the jury on reasonable doubt as follows:

> "In my instructions and, as you've heard many times, you've heard the words 'reasonable doubt.' A reasonable doubt is a doubt for which you have a reason. A reasonable doubt is not a mere guess or surmise and is not a forced or capricious doubt. If, after considering all the evidence in this case, you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt. It would then be your duty to convict the Defendant.
>
> "The reasonable doubt that entitles an accused to an acquittal is not a mere fanciful, vague, conjectural, or speculative doubt, but a reasonable doubt arising from the evidence and remaining after a careful consideration of the testimony such as reasonable, fair-minded, and conscientious people would entertain under the circumstances.
>
> "Now, you'll observe the State is not required to convince you of the Defendant's guilt beyond all doubt, but simply beyond all reasonable doubt. If, after comparing and considering all of the evidence in this case, your minds are left in such a condition you cannot say you have an abiding conviction of the Defendant's guilt, then you are not convinced beyond a reasonable doubt and the Defendant would be entitled to be acquitted. If the jury has a reasonable doubt of the Defendant's guilt growing out of the evidence, any part of the evidence, or lack of evidence, the Defendant must be acquitted."

(R. 3960-61; emphasis on portion complained of by DeBlase.)

Both this Court and the Alabama Supreme Court have repeatedly held that instructions informing the jury, as the trial court did here, that, if it had "an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt" but that, if it did not have "an abiding conviction of the Defendant's guilt, then you are not convinced beyond a reasonable doubt" are proper and not violative of Cage and its progeny. (R. 3960-61.) See Ex parte Brooks, 695 So.2d 184, 192 (Ala. 1997); Callen v. State, [Ms. CR-13-0099, April 28, 2017] ––– So.3d ––––, –––– (Ala. Crim. App. 2017); Phillips v. State, [Ms. CR-12-0197, December 18, 2015] ––– So.3d ––––, –––– (Ala. Crim. App. 2015); Lane v. State, 169 So.3d 1076, 1130-31 (Ala. Crim. App. 2013), judgment vacated on other grounds by Lane v. Alabama, 577 U.S. ––––, 136 S.Ct. 91, 193 L.Ed.2d 7 (2015); Harris v. State, 2 So.3d 880, 912-14 (Ala. Crim. App. 2007); and Smith v. State, 838 So.2d 413, 453-55 (Ala. Crim. App. 2002).

The trial court's instruction accurately conveyed to the jury the concept of reasonable doubt, was not confusing or misleading, and did not lessen the State's burden of proof. Therefore, we find no error, much less plain error, as to this claim.

XVII.

***56** DeBlase contends that the trial court's jury instructions on accomplice liability and intent were defective and that they rendered his death sentence unconstitutional. (Issue IV in DeBlase's brief.) He makes three arguments in this regard, each of which we address below, bearing in mind the following.

When instructing the jury on the elements of each of the three capital-murder charges, the trial court instructed the jury on the intent to kill using the following, and at subsequent times similar, language:

> "A person commits an intentional murder if he causes the death of another person and, in performing the act or acts that caused the death of that person, he intends to kill that person." (R. 3949-52.)
>
> "To convict ..., the State must prove beyond a reasonable doubt each of the following elements ... that in committing

the act or acts that caused the death[s] ... the Defendant intended to kill [the children].” (R. 3949-52)

“A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill must be real and specific.” (R. 3949-53.)

The trial court gave the following instruction on accomplice liability:

“On the subject of accomplice liability, a person is legally accountable for the behavior of another person constituting a crime, in this case, murder, if, with intent to promote or assist in the commission of the murder, he either procures, induces, or causes such other person to commit the crime or he aids or abets such person in committing the crime. Aid or abet comprehends all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary, or has a legal duty to prevent the murder, in this case, of his children and fails to make such effort as he is legally required to make to prevent it; that is, the murder. A parent has a legal duty to take action to prevent harm or murder to a child -- to their children.

“Accomplice liability may be proven by direct or circumstantial evidence. Presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the crime may be inferred. Each person who joins the unlawful enterprise is responsible for the result whether committed by one or by all.”

(R. 3955-56.) During deliberations, the jury twice requested that the trial court again instruct on the elements of capital murder, on the elements of the lesser-included offenses of reckless manslaughter and criminally negligent homicide, and on the doctrine of accomplice liability, and the trial court reinstructed the jury in substantially the same language set forth above.

The trial court's instructions tracked the language of the Alabama pattern instructions on intent and accomplice liability. See Alabama Pattern Jury Instructions: Criminal, Capital Murder, Murder of Victim Less than 14 Years of Age and Murder of Two or More Persons (Single Act) (both adopted July 30, 2010) (currently found at http://judicial.alabama.gov/library/juryinstructions); and Alabama Pattern Jury Instructions -- Criminal (3d ed. 1994).[28] “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).

***57** “ ‘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). “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).

A.

DeBlase first contends that the trial court erroneously instructed the jury that a parent has a legal duty to protect his or her children “without defining, explaining, or limiting that duty.” (DeBlase's brief, p. 46.) He maintains that the court failed to provide the jury with “guidance as to the effort a parent is legally required to make; it is unclear, for example, whether a parent must shield his children from gunfire, stop a spouse's corporal punishment, or enter a burning building.” (DeBlase's brief, p. 46.) According to DeBlase, absent a limiting explanation as to the scope of a parent's legal duty, the court's instruction was unconstitutionally vague because, he says, it permitted the jury to convict him of capital murder “where [his] only involvement was having a legal duty to stop a murder.” (DeBlase's brief, p. 48.) DeBlase did not raise this specific claim in the trial court; therefore, we review it for plain error. See Rule 45A, Ala. R. App. P.

A trial court is not required to define each term or phrase used in its jury instructions. “If we required otherwise, a jury charge could potentially continue ad infinitum; for every term in a jury charge could become the subject of attack.” Thornton v. State, 570 So.2d 762, 772 (Ala. Crim. App. 1990). “[W]hether it is necessary for the trial court to define the term

for the jury hinges on the facts of the case," Ivery v. State, 686 So.2d 495, 501–02 (Ala. Crim. App. 1996), and on whether "the challenged terms can be understood by the average juror in their common usage." Thornton, 570 So.2d at 772. As this Court recognized in Roberts v. State, 735 So.2d 1244 (Ala. Crim. App. 1997):

> " 'Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.' "

735 So.2d at 1252 (quoting Boyde v. California, 494 U.S. 370, 380-81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

In Alabama, a parent has a legal duty to protect his or her children, and that duty is circumscribed only by reasonableness. As this Court explained in C.G. v. State, 841 So.2d 281 (Ala. Crim. App. 2001), aff'd, 841 So.2d 292 (Ala. 2002):

> "Alabama has recognized a duty on the part of a parent to care for and to protect his or her children. The Alabama Uniform Parentage Act defines the 'parent-and-child relationship' as 'the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.' § 26–17–2, Ala. Code 1975. (Emphasis added.) In R.J.D. v. Vaughan Clinic, P.C., 572 So.2d 1225 (Ala. 1990), the Alabama Supreme Court acknowledged that '[t]he parents' common law duty to care for their children is widely recognized.' 572 So.2d at 1227. It said:
>
> ***58** " ' "It is ordinarily for the parent in the first instance to decide ... what is actually necessary for the protection and preservation of the life and health of his child, so long as he acts as a reasonable and ordinarily prudent parent would act in the like situation." '
>
> "Id., quoting 59 Am.Jur.2d Parent and Child § 48, at 193–94 (1987). See also Silas v. Silas, 680 So.2d 368, 371 (Ala. Civ. App. 1996).
>
> "....
>
> "We cite with approval the language of the North Carolina Supreme Court, as quoted by the North Carolina Court of Appeals in State v. Ainsworth, 109 N.C.App. 136, 426 S.E.2d 410 (1993), regarding a parent's duty to his or her children:
>
> > " ' "[W]e believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent. Further we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.
> >
> > " ' "In some cases, depending upon the size and vitality of the parties involved, it might be reasonable to expect a parent to physically intervene and restrain the person attempting to injure the child. In other circumstances, it will be reasonable for a parent to go for help or to merely verbally protest an attack upon the child. What is reasonable in any given case will be a question for the jury after proper instructions from the trial court." '
> >
> > "109 N.C.App. at 143–44, 426 S.E.2d 410, quoting State v. Walden, 306 N.C. at 475–76, 293 S.E.2d at 786–87. (Emphasis added.)"

841 So.2d at 288-89.

It would be the better practice to use the reasonable-person standard when instructing the jury that a parent has a legal duty to protect his or her children as part of an accomplice-liability instruction. And we can envision cases in which the failure to include the reasonable-person standard may constitute error. For example, if the evidence established that the defendant took substantial steps to protect his or her children but ultimately failed to protect them, it would be left to the jury to determine whether the steps taken satisfied

the defendant's legal duty, i.e., whether the defendant made the "effort he is legally required to make." § 13A-2-23(3), Ala. Code 1975. To so do, the jury would be called upon to determine whether the steps taken were reasonable under the circumstances, and a more precise instruction that included the reasonable-person standard would likely be necessary. However, this is not such a case. Here, the evidence unequivocally established that DeBlase took no steps whatsoever, much less reasonable ones, to protect his children, and he even rebuffed his friends when they expressed concern about the children's safety.

***59** In this case, we fail to see the necessity of including the reasonable-person standard in the court's instruction. An average juror would, without such a precise instruction, understand that a parent's duty to protect his or her children is not boundless, and a more precise instruction would have added little to the jury's understanding of the duty a parent owes his or her children. DeBlase has failed to show how the trial court's failure to provide a limiting explanation of a parent's duty that included the reasonable-person standard could have caused any conceivable confusion among the jurors as to the duty he owed Natalie and Chase under the particular facts in this case. Therefore, under the circumstances in this case, we find no error, much less plain error, on the part of the trial court in not providing a more precise explanation of the scope and extent of the duty a parent owes his or her children.

B.

DeBlase also contends that the trial court "failed to make clear that specific intent was required for a conviction under accomplice liability." (DeBlase's brief, p. 49.) According to DeBlase, the court's instructions permitted the jury to convict him of capital murder absent a finding that he possessed the requisite intent to kill, or any level of intent at all and, in fact, permitted the jury to "determine that he did nothing at all, and still return a capital murder conviction." (DeBlase's brief, p. 50.) This argument is meritless.

It is well settled that " 'no defendant is guilty of a capital offense unless he had an intent to kill.' " Lewis v. State, 456 So.2d 413, 416 (Ala. Crim. App. 1984) (quoting E. Carnes, Alabama's 1981 Capital Punishment Statute, 42 Ala. Law. 456, 468 (1981)). "[T]o be convicted of [a] capital offense and sentenced to death, a defendant must have had a particularized intent to kill and the jury must have been charged on the requirement of specific intent to kill." Ziegler v. State, 886 So.2d 127, 140 (Ala. Crim. App. 2003).

In this case, the trial court properly, and repeatedly, instructed the jury that DeBlase could not be convicted of capital murder unless he had the intent to kill Natalie and Chase and that the intent to kill had to be real and specific. In addition, the court's instruction on accomplice liability followed almost immediately after its instructions on the elements of the capital-murder charges, [29] and the court properly instructed the jury that for DeBlase to be guilty as an accomplice, he had to have the "intent to promote or assist in the commission of the murder[s]." (R. 3955.) Considering the court's charge as a whole, as we must, we conclude that the jury was properly and adequately informed that DeBlase could not be convicted of capital murder, as a principal or as an accomplice, unless he had the specific intent to kill Natalie and Chase. See, e.g., Ziegler, supra at 139-40, and Smith v. State, 745 So.2d 922, 936-37 (Ala. Crim. App. 1999) (both upholding instructions similar to the instructions in this case).

We note that DeBlase's reliance on cases such as Crowe v. State, 171 So.3d 681 (Ala. Crim. App. 2014), Tomlin v. State, 591 So.2d 550 (Ala. Crim. App. 1991), and Russaw v. State, 572 So.2d 1288 (Ala. Crim. App. 1990), is misplaced. In Crowe, the trial court erroneously instructed the jury that it could convict the defendant of capital murder if it found that either the defendant or another participant in the murder had the intent to kill. In Tomlin, the trial court erroneously instructed the jury that it could convict the defendant, as an accomplice, of the capital murder of two or more people if it found that the defendant had the intent to kill only one of the victims. And in Russaw, the trial court erroneously failed to instruct the jury that in order to find the defendant guilty as an accomplice of capital murder during a robbery it had to find that the defendant was an accomplice in the murder as opposed to being an accomplice in the robbery. The defects in the instructions in Crowe, Tomlin, and Russaw are not present in this case.

***60** Therefore, we find no error in the trial court's jury instructions on intent and accomplice liability.

C.

Finally, DeBlase contends that "[a] death sentence based solely on the violation of a legal duty to protect, rather than the defendant's personal participation" violates Enmund v.

Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). (DeBlase's reply brief, p. 30.) Because DeBlase did not raise this specific claim in the trial court, we review it for plain error. See Rule 45A, Ala. R. App. P.

In Enmund, supra, the United States Supreme Court held that the death penalty is unconstitutional "under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." 458 U.S. at 787, 102 S.Ct. 3368. The Court emphasized that, in determining the validity of capital punishment for a particular defendant, "[t]he focus must be on his culpability" and the punishment "tailored to his personal responsibility and moral guilt." 458 U.S. at 798-801, 102 S.Ct. 3368. In that case, the defendant was the getaway driver in a robbery during which his codefendants killed two people. However, the defendant "himself did not kill or attempt to kill" and the record established that he did not have "any intention in participating in or facilitating a murder." 458 U.S. at 798, 102 S.Ct. 3368. In addition, the jury was instructed that it could find the defendant guilty of murder during a robbery " 'even though there is no premeditated design or intent to kill' " as long as the evidence established " 'that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration or of in the attempted perpetration of the robbery.' " 458 U.S. at 785, 102 S.Ct. 3368.

Subsequently, in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the United States Supreme Court held "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." 481 U.S. at 158, 107 S.Ct. 1676. In that case, the two defendants, along with several codefendants, plotted and executed a plan to help a family member escape from prison. They assembled an arsenal of weapons, successfully executed the escape plan and, during flight, kidnapped and robbed a family of four; two of the codefendants brutally shot and killed the family, and both defendants claimed they did not intend to kill the family, which claim the United States Supreme Court accepted as true. Nonetheless, the United States Supreme Court held that the defendants "fall outside the category of felony murderers for whom Enmund explicitly held the death penalty disproportional [because] their degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life." 481 U.S. at 151, 107 S.Ct. 1676.

"The rule that has evolved from Enmund and Tison is that the death sentence is disproportionate under the Eighth Amendment for the non-triggerman who was not present at the scene and did not intend that anyone be killed; however, it is permissible under the Eighth Amendment for felony murderers who actually killed, attempted to kill, or intended that a killing take place or that lethal force be used. In White v. Wainwright, 809 F.2d 1478, 1484 (11th Cir. 1987), in holding that the death penalty may be imposed for conviction of a joint robbery undertaking where the defendant contemplated that lethal force would be used, even though he claims personal opposition to the use of lethal force, the court stated:

> ***61** " 'In Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc) we considered the possibility that appellant was a non-shooter and that the fatal shot was fired by his accomplice. We declined to read Enmund in a mechanistic fashion but merely "as requiring a level of individual participation that justifies the application of the death penalty," id. at 1489, and we concluded that the primary purposes of capital punishment, deterrence and retribution, legitimately could be applied to the facts of the case. Id. We found, in the language of Enmund, that the defendant's "intentions, expectations and actions" rose to a level of culpability that the retributive purposes of capital punishment would be furthered by defendant's sentence. Id. And, in reaching these holdings, we considered not only the contemplation of lethal force but also the active participation by the defendant in the activities that culminated in the victim's death. Id.' "

Haney v. State, 603 So.2d 368, 386-87 (Ala. Crim. App. 1991), aff'd, 603 So.2d 412 (Ala. 1992).

In Gilson v. State, 8 P.3d 883 (Okla. Crim. App. 2000), the Oklahoma Court of Criminal Appeals addressed the validity of the death penalty under facts similar to those here. In that case, the defendant was charged with first-degree murder by child abuse based on two theories -- he committed the abuse that resulted in the death of the child or he permitted the abuse that resulted in the death of the child to be committed by the child's mother. The defendant was convicted as charged and sentenced to death. The Court upheld the validity of the death sentence under Enmund and its progeny, explaining, in relevant part:

> "This Court has not previously ruled on whether a defendant convicted of First Degree Child Abuse Murder

by permitting child abuse is death eligible. Both Appellant and the State direct us to Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), for the application of the death penalty to a defendant who does not kill by his/her own hand. In Tison, a felony-murder case in which the defendant himself did not kill, the Supreme Court held that a defendant who did not actually commit the act which caused death, but who was a major participant in the felony and who had displayed reckless indifference to human life, may be sufficiently culpable to receive the death penalty. 481 U.S. at 158, 107 S.Ct. at 1688. The Supreme Court stated:

> " 'Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.'

"Id. at 481 U.S. at 157–58, 107 S.Ct. at 1688.

"Tison modified the Supreme Court's holding in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), that the Eighth Amendment forbids the imposition of the death penalty on 'one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.' Id., 458 U.S. at 797, 102 S.Ct. at 3376.

"Although this Court has held that an Enmund/Tison analysis does not apply in the case of the actual killer, see Wisdom [v. State], 918 P.2d [384,] 395 [(Ok. Crim. App. 1996)], we find it does apply in a case where the defendant was not the actual killer. See Hatch v. State, 701 P.2d 1039, 1040 (Okl. Cr. 1985), cert. denied, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). In as much as one of the underlying theories of this case is murder by the permitting of child abuse, we apply the analysis used in Enmund and Tison.

"....

"... Appellant argues the death penalty is constitutionally disproportionate to the crime of permitting child abuse murder. He contends the death penalty is excessive as: (1) it does not contribute to the goals of punishment and results in needless imposition of pain and suffering, and (2) the punishment is grossly disproportionate to the severity of the crime. See Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). In discussing the constitutionality of the death sentence for a defendant who did not kill, the Supreme Court in Enmund stated:

> ***62** "In Gregg v. Georgia[, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976),] the opinion announcing the judgment observed that '[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.' (citation omitted). Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment. Coker v. Georgia, 433 U.S. [584,] 592, 97 S.Ct. [2861,] 2866, 53 L.Ed.2d 982 [(1977)].

"Enmund, 458 U.S. at 798, 102 S.Ct. at 3377.

"The Supreme Court stated that neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund as the Court was unconvinced 'that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken.' Id., at 458 U.S. at 798–799, 102 S.Ct. at 3377. In reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robberies, and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill. Id., at 458 U.S. at 799, 102 S.Ct. at 3377–78.

"As for the principle of retribution, the Court stated the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.

> " 'As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability -- what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to "the degree of [his] criminal culpability," (citation omitted), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.'

"Id., at 458 U.S. at 800, 102 S.Ct. at 3378,

"Enmund was the driver of the 'getaway' car in an armed robbery of a dwelling. The occupants of the house, an elderly couple, resisted and Enmund's accomplices killed them. The result in Enmund did not turn on the mere fact that Enmund was convicted of felony murder. It is important to note how attenuated was Enmund's responsibility for the deaths of the victims in that case.

"In the present case, Appellant was convicted of first degree murder by child abuse by the commission of the child abuse or in the alternative first degree murder by child abuse through the willful permitting of child abuse. 21 O.S. 1991, § 701.7(C). We have determined the evidence is sufficient to support either of the alternative ways to commit first degree murder under the statute. The offense of willfully permitting child abuse murder requires a knowing and willful permitting of child abuse to occur by a person authorized to care for the child. Child abuse does not always result in death, but death is the result often enough that the death penalty should be considered as a justifiable deterrent to the felony itself. Children are the most vulnerable citizens in our communities. They are dependent on parents, and others charged in their care, for sustenance, protection, care and guidance. Depending on age and physical development they tend to be more susceptible to physical harm, and even death, if unreasonable force is inflicted upon them. Within this context, legislative action to address the specific crime of child abuse murder is legally justified.

***63** "Applying the death penalty to this situation wherein Appellant, willfully, purposefully and knowingly allowed the victim to be abused to the extent that death resulted, when he was in a position to have prevented that abuse, certainly serves both the deterrent and retributive purposes of the death penalty. The threat that the death penalty will be imposed for permitting child abuse which results in the death of the child accentuates the responsibility a parent or person charged with the care and protection of a child has to that child and will deter one who permits that abuse.

"As for retribution, Appellant's personal culpability in this situation is high. The situation is quite different from that where the child abuse occurs and the individual is not aware of the abuse. Appellant's responsibility for the death of the victim was not so attenuated as was that of Enmund who merely waited in the car while the victims were shot and had no knowledge of or immediate control over the actions of his co-defendants. Appellant's personal participation in permitting [the child's mother] to abuse the victim to the extent that death resulted was major and substantial, and there was proof that such participation was willful and knowing. Therefore the death penalty is not excessive retribution for his crime.

> "Accordingly, we find the requirements of Enmund and Tison have been met, and the death penalty is an appropriate punishment for the crime of first degree murder by permitting child abuse in these circumstances."

8 P.3d at 919-24. We agree.

Applying the death penalty to one who intends to kill his children and intentionally promotes or assists in the murder of his children by allowing his children to be abused by another to the extent that death resulted, when he had a legal duty to protect his children and "was in a position to have prevented that abuse, certainly serves both the deterrent and retributive purposes of the death penalty." Gilson, 8 P.3d at 923. Moreover, the situation in this case, as in Gilson, "is quite different from that where the child abuse occurs and the individual is not aware of the abuse." Id. at 924. DeBlase was acutely aware that Keaton was abusing his children on a regular basis. He knew that Keaton had duct-taped Natalie and placed her in a suitcase, but he chose to leave Natalie there for some 12 hours while he attended school. He also knew that Keaton had duct-taped Chase to a broom handle and forced him to stand in a corner, yet he chose to take a sleeping pill and go to bed. DeBlase gave Keaton free rein to treat his children as she wanted, rebuffed his friends when they expressed concerns about the children's safety, and did nothing to protect his children because, in his own words, he was "blinded by love" and "had to make a choice" between Keaton and his children and he "cho[s]e her [rather] than my own children." (C. 1050-51.) His participation in permitting Keaton to abuse Natalie and Chase to the extent that death resulted was neither attenuated nor minor -- it was substantial, and the evidence clearly established that he had the intent to kill and the intent to promote or assist Keaton in killing Natalie and Chase when he permitted Keaton to continually abuse them. Simply put, DeBlase's level of individual participation justifies the imposition of the death penalty in this case.

Therefore, the culpability requirement in Enmund was satisfied and the death penalty was permissible under the facts and circumstances in this case.

XVIII.

DeBlase contends that the prosecutor committed misconduct during both the guilt and penalty phases of his trial. (Issue XVI in DeBlase's brief.)

***64** "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."

Ferguson v. State, 814 So.2d 925, 945-46 (Ala. Crim. App. 2000), aff'd, 814 So.2d 970 (Ala. 2001). In addition, " 'the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' " Kuenzel v. State, 577 So.2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So.2d 531 (Ala. 1991) (quoting Johnson v. Wainwright, 778 F.2d 623, 629 n.6 (11th Cir. 1985)).

A.

First, DeBlase contends that, during guilt-phase closing arguments, the prosecutor inflamed the passions of the jury by making an emotional appeal to the jurors' as parents and grandparents. Because DeBlase did not object to this argument by the prosecutor, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that, at the conclusion of her initial guilt-phase argument, after arguing that DeBlase acted intentionally, as opposed to recklessly or negligently, the prosecutor stated:

"I have a four-year-old, and many of you in here have children, small children, grandchildren. Something that would happen probably to most of you, and, over the last course of the three or four weeks that we've been in here, one of the nights we were doing the normal bedtime routine, you know, read the book, say our prayers, tuck into bed. Walk out of the room and my four-year-old screams, 'Mommy, there's a monster in my room.'

> "So, I go back in the room and I turn on the light and I say, look, baby, there's no monster. Everyone has done this before, I'm sure. It's your teddy bear and the night light and it's the shadow on the wall because there are no monsters. But, in Natalie's world, at four years old, she knew that there were monsters. In Chase's world, at [three] years old, he knew there were monsters. It wasn't a world full of princesses and super heroes. They knew that there were real monsters.

> They knew that the one person, the one single person on this earth that was supposed to protect them and love them and take care of them took their life from them. So, yes, those two babies knew that there were monsters. Hold him accountable for Natalie. Hold him accountable for Chase. Hold him accountable for what he did because we've proven every single element under the law. Hold him accountable and find him guilty of all three counts of capital murder."

***65** (R. 3851-52.)

When viewing this argument in context of complete closing arguments and the entire trial, it is clear that the prosecutor's purpose was not "to lead the jury to convict for an improper reason," Williams v. State, 710 So.2d 1276, 1304 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), nor was it " 'to induce a decision not based on a rational assessment of the evidence," McNair v. State, 653 So.2d 320, 334-35 (Ala. Crim. App. 1992), aff'd, 653 So.2d 353 (Ala. 1994) (quoting D. Overby, Improper Prosecutorial Argument in Capital Cases, 58 U.M.K.C.L.Rev. 651, 668–670 (1990)). Rather, the prosecutor was merely attempting to describe what Natalie and Chase must have been feeling when their own father either failed to protect them from being abused and killed or killed them himself. " 'A prosecutor is entitled to argue forcefully.... "[E]nthusiastic rhetoric, strong advocacy, and excusable hyperbole" are not grounds for reversal.... The jury are presumed to have a certain measure of sophistication in sorting out excessive claims on both sides.' " Thompson v. State, 153 So.3d 84, 159 (Ala. Crim. App. 2012) (quoting Commonwealth v. Wilson, 427 Mass. 336, 350, 693 N.E.2d 158, 171 (1998)).

We find no error, much less plain error, in the prosecutor's argument. [30]

B.

DeBlase also contends that, during opening statements at the penalty phase of the trial, the prosecutor misstated the law regarding the weighing of aggravating circumstances and mitigating circumstances. Because DeBlase did not receive an adverse ruling on his objections, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The prosecutor stated:

> "You, the jury have to weigh and assign weight, weight to the State's aggravating circumstances and weight to the Defense's mitigating circumstances, not numerical weight as in we have two and they have ten. You have to assign weight. And if you find that the State's aggravating factors outweigh the defense mitigating factors, then you are to return a verdict of death. That is your job.
>
> "Likewise, if you find that the defense mitigating circumstances outweigh the State's aggravating circumstances --"

(R. 4043.) At that point, DeBlase objected, arguing that the prosecutor had misstated the law because, if the aggravating circumstances "don't outweigh, then life without parole is the punishment [and t]he burden is always on the State to prove that they outweigh." (R. 4043.) The prosecutor agreed, stating: "Absolutely." (R. 4043.) The trial court then instructed the jury to "listen to the lawyers," but stated that "when we get through with this, I want you to listen carefully to me because I'm going to make sure that I tell you the law just the way it is," and the court emphasized that it would be its instructions on the law that would "control" the jury's deliberations. (R. 4044.)

***66** The prosecutor then resumed her opening statement, stating:

> "Again, if the State's aggravating factors, the two that we are alleging that we have proven to you and will prove to you by additional evidence today, outweigh the mitigating circumstances, then your vote should be for death.
>
> "And let me tell you that at least ten of you have to return -- if you -- in order for there to be a verdict of death, at least ten of you must make that finding. Ten out of the 12 jurors must make that finding for there to be a verdict of death.
>
> "Likewise, if you find that the State has not met its burden that the aggravating circumstances outweigh the mitigating circumstances and that the mitigating

> circumstances have outweighed the aggravating circumstances, then --"

(R. 4044-45.) DeBlase again objected, arguing that the prosecutor "keeps misstating these principles" and requested that the trial court instruct the prosecutor to state the law correctly. (R. 4045.) The prosecutor asserted that her statement was correct, at which point the following occurred:

> "THE COURT: There's more to it than that, but, as a bottom line, when the weighing is completed, as [the prosecutor] was saying, it requires ten not a unanimous verdict, but ten in favor of the death penalty to return a death verdict. And she's probably getting ready to tell you that it's got to take seven or more -- at least seven to recommend a penalty of life without the possibility of parole.
>
> "[Prosecutor]: Yes, Judge.
>
> > "THE COURT: There's more detail to it, but I'm not -- the lawyers are not charging you on the law. They're talking about giving you an orientation to tell you what they expect the evidence to be. So, I'll let her go ahead. I note your objection."

(R. 4046.)

We cannot agree with DeBlase that the prosecutor affirmatively misstated the law. It is apparent from the record that the prosecutor intended to say, but because DeBlase objected, could not complete her sentence, that if the mitigating circumstances outweighed the aggravating circumstances, the proper sentence would be life imprisonment without the possibility of parole. Although this statement, had it been completed by the prosecutor, would have been an incomplete statement of the law, as the trial court pointed out, it was not an affirmative misstatement. Life imprisonment without the possibility of parole is the proper sentencing recommendation if the mitigating circumstances outweigh the aggravating circumstances, just as it is the proper sentencing recommendation if the aggravating circumstances and the mitigating circumstances are of equal weight; only if the aggravating circumstances outweigh the mitigating circumstances is death the proper sentencing recommendation. See, e.g., Ex parte Bryant, 951 So.2d 724, 728 (Ala. 2002) ("[O]f the three possibilities -- that the mitigating circumstances outweigh the aggravating circumstances, that the mitigating circumstances only equal the aggravating circumstances in weight, or that the aggravating circumstances outweigh the mitigating circumstances -- only the third -- that the aggravating circumstances outweigh the mitigating circumstances -- will allow a death penalty recommendation.").

***67** Moreover, considering the prosecutor's statements in the context of the entire trial, we cannot say that the statements " 'so infected the trial with unfairness as to make the resulting [death sentence] a denial of due process.' " Darden v. Wainwright, 477 U.S. 168, 180, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). After DeBlase's first objection, the trial court instructed the jury that it would charge the jury on the law, and after DeBlase's second objection, the trial court stated that the attorneys were not instructing the jury on the law. During its penalty phase instructions, the trial court properly instructed the jury on the weighing of the aggravating circumstances and the mitigating circumstances and also instructed the jury that what the attorney's said during trial was not evidence. "[J]urors are presumed to follow, not disregard, the trial court's instructions." Brooks v. State, 973 So.2d 380, 409 (Ala. Crim. App. 2007).

We find no error, much less plain error, in the prosecutor's statements.

C.

Finally, DeBlase contends that, during opening statement at the penalty phase of the trial, the prosecutor misstated the law regarding remorse as a mitigating circumstance. Specifically, he argues that the prosecutor improperly stated that remorse is not a mitigating circumstance when, he says, "[i]t is beyond question that remorse can serve as a mitigating factor in capital cases in Alabama." (DeBlase's brief, p. 92.) Because DeBlase did not receive an adverse ruling on his objection, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that, after the prosecutor asserted that the evidence would establish that the murders were especially

heinous, atrocious, or cruel when compared to other capital offenses, she stated:

> "You know, the actions of the Defendant -- we anticipate that the Defense will try and say that John DeBlase was remorseful, and we want you to take into consideration in openings that this particular remorse is not a mitigating circumstance and cannot serve as a mitigating factor in this case.
>
> "In addition to that --"

(R. 4051.) DeBlase objected, arguing that the prosecutor's statement was "a totally inaccurate statement of the law," and the trial court instructed the jury: "I'm going to tell you what the law is." (R. 4051.)

When viewed in the context of complete opening statements and the entire trial, it is clear that the prosecutor was not asserting that remorse is not, as a matter of law, a mitigating circumstance. The prosecutor stated that remorse was not a mitigating circumstance "in this case." In other words, the prosecutor was asserting that, based on the evidence that had been presented during the guilt phase of the trial and that would be presented during the penalty phase of the trial, any remorse DeBlase expressed did not rise to the level of a mitigating circumstance under the circumstances in this case. A prosecutor may argue against the existence of a mitigating circumstance that has been proffered by, or that the prosecution believes will be proffered by, the defense, or that has been raised by the evidence.[31] See, e.g., Maples v. State, 758 So.2d 1, 54 (Ala. Crim. App. 1999), aff'd, 758 So.2d 81 (Ala. 2000) (holding that prosecutor's telling the jury not to consider the defendant's age, voluntary intoxication, or mental impairments as mitigating circumstances was not error). As this Court explained in McCray v. State, 88 So.3d 1 (Ala. Crim. App. 2010):

> " ' "[I]mpeachment of the evidence of a defendant and the matter of impairment of its weight are properly matters for argument of counsel...." ' Burgess[v. State], 827 So.2d [134,] 162 (Ala. Crim. App. 1998) (quoting Mosley v. State, 241 Ala. 132, 136, 1 So.2d 593, 595 (1941)). 'Further, "[a] prosecutor may present an argument to the jury regarding the appropriate weight to afford the mitigating factors offered by the defendant." ' Vanpelt v. State, 74 So.3d 32, 90 (Ala. Crim. App. 2009) (quoting Malicoat v. Mullin, 426 F.3d 1241, 1257 (10th Cir. 2005)). That is, 'the prosecutor, as an advocate, may argue to the jury that it should give the defendant's mitigating evidence little or no weight.' Mitchell[v. State], 84 So.3d [968,] 1001 [(Ala. Crim. App. 2010)]. See also State v. Storey, 40 S.W.3d 898, 910–11 (Mo. 2001) (holding that no error resulted from the prosecutor's characterization of mitigation as excuses because the 'State is not required to agree with the defendant that the evidence offered during the penalty phase is sufficiently mitigating to preclude imposition of the death sentence[, and] the State is free to argue that the evidence is not mitigating at all')."

***68** 88 So.3d at 49.

We find no error, much less plain error, in the prosecutor's statement.

XIX.

DeBlase contends that it was error to use the murder of two or more persons by one act or pursuant to one scheme or course of conduct as both an element of capital murder under § 13A-5-40(a)(10), Ala. Code 1975, and as an aggravating circumstance pursuant to § 13A-5-49(9), Ala. Code 1975. (Issue XX in DeBlase's brief.) However, this practice, known as "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); Floyd v. State, [Ms. CR-13-0623, July 7, 2017] —— So.3d ——, —— (Ala. Crim. App. 2017); Phillips v. State, [Ms. CR-12-0197, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015), aff'd, [Ms. 1160403, October 19, 2018] —— So.3d —— (Ala. 2018); Bohannon v. State, 222 So.3d 457, 515 (Ala. Crim. App. 2015), aff'd, 222 So.3d 525 (Ala. 2016); and Shaw v. State, 207 So.3d 79, 125-26 (Ala. Crim. App. 2014). Therefore, there was no error in "double counting" the murder of two or more persons by one act or pursuant to one scheme or course of conduct as both an element of the crime and as an aggravating circumstance.

XX.

DeBlase contends that Alabama's former capital-sentencing scheme, under which he was convicted and sentenced, 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 XIX in DeBlase's brief.) However, all of DeBlase's arguments have been addressed and expressly rejected by both this Court and the Alabama Supreme Court. See Ex parte Bohannon, 222 So.3d 525, 528-34 (Ala. 2016); and State v. Billups, 223 So.3d 954 (Ala. Crim. App. 2016). Therefore, DeBlase is entitled to no relief on this claim.

XXI.

In accordance with Rule 45A, Ala. R. App. P., we have examined the record for any plain error with respect to DeBlase's capital-murder convictions, 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. In reaching this conclusion, we have considered whether the evidence was sufficient to establish that the murders of Natalie and Chase, which occurred over three months apart, were committed by one act or pursuant to one scheme or course of conduct under § 13A-5-40(a)(10), Ala. Code 1975. After properly instructing the jury on the elements of the offense of capital murder of two or more persons pursuant to § 13A-5-40(a)(10), the trial court instructed the jury that "[i]t is not required that the deaths occur on the same occasion." (R. 3953.) The trial court's instruction was correct, and we have no trouble concluding that the murders of Natalie and Chase, although committed months apart and not by one act, were committed pursuant to one scheme or course of conduct.

***69** For multiple murders to have been committed pursuant to one scheme or course of conduct, they must be connected in some fashion; they must have been "related to one another in some way," State v. Harris, 284 Kan. 560, 572, 162 P.3d 28, 37 (2007), or there must be some "factual link" between them. State v. Sapp, 105 Ohio St. 3d 104, 112, 822 N.E.2d 1239, 1250 (2004). Although temporal proximity is certainly a relevant consideration, any number of factors could establish the requisite connection between the murders, such as "location, murder weapon, ... cause of death[,] ... the killing of victims who are close in age or who are related[, or] a similar motivation on the killer's part for his crimes, a common getaway car, or perhaps a similar pattern of secondary crimes (such as rape) involving each victim." Id. See also State v. Cummings, 332 N.C. 487, 509, 422 S.E.2d 692, 704 (1992) (holding that, for purposes of the aggravating circumstance that the murder occurred as "part of a course of conduct" of violent crimes, several factors must be considered, including the temporal proximity and modus operandi of the crimes and the defendant's motive in committing the crimes).

In this case, although separated in time, both murders occurred in a similar manner, the bodies were disposed of in a similar fashion, and it is clear that the motive for both murders was the same -- to eliminate Natalie and Chase because Keaton did not want to raise DeBlase's children. Therefore, the evidence was sufficient to establish that the murders of Natalie and Chase were committed pursuant to one scheme or course of conduct. See, e.g., State v. Robinson, 303 Kan. 11, 206, 363 P.3d 875, 1010 (2015) (holding that the evidence was sufficient to establish that multiple murders, occurring over the course of over 10 years, were committed pursuant to a common scheme or course of conduct where the defendant "lured his victims with promises of financial gain, employments, or travel; exploited them sexually or financially; used similar methods to murder and dispose of their bodies; and used deception to conceal the crimes, including phony letters and e-mails to victims' friends and family members"); State v. McKnight, 107 Ohio St. 3d 101, 124, 837 N.E.2d 315, 344 (2005) (holding that the evidence was sufficient to establish that two murders, which occurred over five months apart, were part of one course of conduct where there were "similarities in the commission of the offenses, the causes of death, and the disposal of the bodies"); and Gonzalez v. State, (No. 03-00-00668-CR), 2001 WL 1240708 (Tex. Ct. App. 2001) (not designated for publication) (holding that the evidence was sufficient to establish that three murders, which occurred over the course of three years, were committed pursuant to the same scheme or course of conduct where the defendant formed relationships with three women, was abusive and threatening to them during the relationships, and killed them and disposed of their bodies in similar manners).

We have also reviewed DeBlase's sentence in accordance with § 13A-5-53(a), Ala. Code 1975, which requires that we determine whether any error adversely affecting DeBlase'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), Ala. Code 1975, 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 DeBlase of the capital offenses charged in the indictment, by virtue of which the jury unanimously found the existence of the aggravating circumstance that he murdered two or more people by one act or pursuant to one scheme or course of conduct, see § 13A-5-49(10), 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 recommended, by a vote of 10-2, that DeBlase be sentenced to death for his capital-murder convictions.

***70** 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 DeBlase 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. In its sentencing order, the trial court entered specific written findings concerning the aggravating circumstances it found to exist pursuant to § 13A-5-49, Ala. Code 1975, [32] concerning the existence or nonexistence of each mitigating circumstance enumerated in § 13A-5-51, Ala. Code 1975, and the mitigating circumstances it found to exist under § 13A-5-52, Ala. Code 1975, as well as written findings of fact summarizing the offense.

The trial court found the existence of two statutory aggravating circumstances: that DeBlase murdered two or more people by one act or pursuant to one scheme or course of conduct, see § 13A-5-49(9), Ala. Code 1975, and that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala. Code 1975. The trial court found one statutory mitigating circumstance to exist: that DeBlase had no significant history of prior criminal activity. See § 13A-5-51(1), Ala. Code 1975. The trial court also found that DeBlase's childhood, his history of gainful employment, his capacity to love and to care for his children before he met Keaton, and his assisting law enforcement in locating Natalie and Chase's remains constituted nonstatutory mitigating circumstances 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 mitigating circumstances, the trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced DeBlase 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 DeBlase's rights during the penalty phase of the trial or the sentencing proceedings before the court.

DeBlase was convicted of two counts of murder of a victim less than 14 years of age and one count of murder of two or more persons by one act or pursuant to one scheme or course of conduct, both defined by statute as capital offenses. See §§ 13A-5-40(a)(10) and (a)(15), Ala. Code 1975. We take judicial notice that similar crimes have been punished capitally throughout the state. See, e.g., Creque v. State, [Ms. CR-13-0780, February 9, 2018] —— So.3d —— (Ala. Crim. App. 2018) (two or more persons); Largin v. State, 233 So.3d 374 (Ala. Crim. App. 2015) (two or more persons); Luong v. State, 199 So.3d 173 (Ala. Crim. App. 2015) (two or more persons and victims less than 14 years of age); 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, —— U.S. ——, 137 S.Ct. 158, 196 L.Ed.2d 6 (2016) (victim less than 14 years of age); Woolf v. State, 220 So.3d 338 (Ala. Crim. App. 2014) (two or more persons and victim less than 14 years of age); Shaw v. State, 207 So.3d 79 (Ala. Crim. App. 2014) (two or more persons); Scott v. State, 163 So.3d 389 (Ala. Crim. App. 2012) (victim less than 14 years of age); Reynolds v. State, 114 So.3d 61 (Ala. Crim. App. 2010) (two or more persons and victim less than 14 years of age); Sharifi v. State, 993 So.2d 907 (Ala. Crim. App. 2008) (two or more persons); Brownfield v. State, 44 So.3d 1 (Ala. Crim. App. 2007), aff'd, 44 So.3d 43 (Ala. 2009) (two or more persons and victim less than 14 years of age); and Maxwell v. State, 828 So.2d 347 (Ala. Crim. App. 2000) (two or more persons and victim less than 14 years of age).

***71** Considering DeBlase and the crimes he committed, we conclude 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 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, DeBlase's capital-murder convictions and his sentence of death are affirmed.

AFFIRMED.

Windom, P.J., concurs. Welch and Joiner, JJ., concur in the result.

All Citations

--- So.3d ----, 2018 WL 6011199

Footnotes

1 The jury's sentencing verdict is no longer a recommendation. Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended, effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury. That Act, however, does not apply retroactively to DeBlase. See § 2, Act No. 2017-131, Ala. Acts 2017, § 13A-5-47.1, Ala. Code 1975.

2 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3 The original record was filed with this Court on April 28, 2015. Due to a pagination error, a corrected record was filed on May 6, 2015. In the corrected record, the transcript of the pretrial hearings and the trial are each paginated separately. At DeBlase's request, a supplemental record was filed on July 15, 2015, in which the transcript of all proceedings is sequentially paginated. In this opinion, citations to the clerk's record are to the corrected record filed on May 6, 2015, and are designated (C. ___), and citations to the transcript are to the supplemental record filed on July 15, 2015, and are designated (R. ___).

4 DeBlase was subsequently re-indicted in August 2012 because of a defect in the two original indictments.

5 The one continuance not at DeBlase's request was the result of the State re-indicting DeBlase in August 2012.

6 DeBlase requested this continuance, not because a proper mitigation investigation had not been completed, but because one of the defense's expert witnesses, Dr. Ronald McCarver, had been diagnosed with a terminal illness and his health had declined so quickly that he was no longer able to assist the defense.

7 We note that the trial judge had granted DeBlase's February 2014 request for additional funds for Hodson before the hearing.

8 Dr. Goff spoke with Hodson before he completed his report.

9 At that point, the trial was scheduled to begin in October 2013. As explained in Part I of this opinion, supra, the October 2013 trial date was subsequently continued, and DeBlase was tried in October 2014.

10 During the hearings, there were lengthy discussions about information DeBlase had requested but not received from various media outlets as well as about the information DeBlase had obtained from media outlets, including the number and content of stories about the case and recordings of broadcasts from local television stations. However, DeBlase introduced none of this information into evidence. The trial court denied DeBlase's motion for a change of venue at the conclusion of the September 2013 hearing but indicated that it would revisit the issue at a later date if requested to do so by DeBlase and that it would accept whatever evidence DeBlase wanted to present at that time. The record reflects that DeBlase did not renew his motion for a change of venue.

11 The trial court had earlier explained to the venire the difference between direct evidence and circumstantial evidence.

12 DeBlase does not challenge on appeal the State strikes of Jurors no. 25, 32, and 77. Although he mentions those jurors in his brief, he does so only in passing without any argument regarding why he believes the State's reasons for striking those jurors were pretextual. In any event, the record reflects that the State's reasons for striking Jurors no. 25, 32, and 77 were race-neutral and not pretextual.

13 One of the questions asked on the questionnaire was whether the juror had had a memorable experience with law enforcement, either positive or negative. Juror no. 10 indicated a negative experience based on her marriage.

14 The State also asserted that it struck Juror no. 35 because of his views on the death penalty. DeBlase does not challenge this additional reason for striking Juror no. 35, and the record reflects that this reason was not pretextual. The State also

asserted that it struck Juror no. 106 because she indicated she had had a negative experience with law enforcement when she was falsely accused of speeding, a reason we address in Part VI.E. of this opinion, infra, and because her husband had been convicted of soliciting a prostitute, a reason DeBlase does not challenge and that the record reflects was not pretextual.

15 The State did ask Juror no. 106, who had indicated on her questionnaire that she had previously taken classes in pursuit of a master's degree in counseling, whether she planned to continue with her education in counseling, to which Juror no. 106 responded in the affirmative. The State also asked Juror no. 106 several questions about her job at the Mobile Housing Board, and Juror no. 106 indicated that she counseled clients and assisted them in obtaining benefits they needed. She agreed that her work was similar to that of a social worker.

16 The State also asserted that it struck Juror no. 93 because he knew DeBlase's father and because he indicated that the uncle who had killed his mother and aunt had mental-health issues. DeBlase does not challenge those reasons for the strike, and our review of the record reveals that those reasons were not pretextual.

17 The State also asserted that it struck Juror no. 62 because he had previously served on a criminal jury that had returned a not-guilty verdict, because of his views on the death penalty, and because the district attorney prosecuting DeBlase had prosecuted for murder a co-worker of Juror no. 62. DeBlase does not challenge those reasons for the State's striking Juror no. 62, and our review of the record reveals that those reasons were not pretextual.

18 As noted above, the trial court never found that DeBlase had established a prima facie case of discrimination. Rather, the State offered to provide reasons for its strikes without such a finding.

19 As noted at the beginning of this opinion, DeBlase presented this evidence during the penalty phase of the trial through the testimony of Dr. Goff.

20 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

21 The only exception is that in his first statement on December 3, 2010, DeBlase initially proffered an incredulous story about Natalie and Chase being abducted in broad daylight from a public park. Of course, DeBlase quickly abandoned that story during his first statement and did not repeat it during any of his subsequent statements.

22 Some of these jurisdictions have indicated that a defendant's offer to take a polygraph test may be admissible if a polygraph test is actually administered and both parties stipulate to the admission of the test results before it is administered. Because those circumstances are not present here, we need not decide whether an offer to take a polygraph would be admissible in such circumstances.

23 DeBlase argues that Fulminante also confessed to Sarivola's wife, who was not a government agent, and that “the Court considered these confessions in tandem.” (DeBlase's brief, p. 14 n.5.) This is incorrect. In its opinion, the Arizona Supreme Court held that Fulminante's confession to Sarivola's wife was voluntary and admissible, and the United States Supreme Court specifically stated that “[t]his aspect of the Arizona Supreme Court's decision is not challenged here.” Fulminante, 499 U.S. at 284 n.1, 111 S.Ct. 1246. The United States Supreme Court considered Fulminante's confession to Sarivola's wife only in determining whether the admission of his confession to Sarivola was harmless.

24 Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (holding that a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible against the accused). See also Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

25 DeBlase also cites Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997), in support of his argument.

26 To the extent DeBlase challenges the trial court's curative instruction as “vague and delayed,” because we find no error in Det. Prine's testimony, there was no need for a curative instruction and this argument is moot. (DeBlase's brief, p. 56.)

27 The record indicates that the State introduced two copies of this photograph.

28 The pattern instruction on accomplice liability was amended one week before DeBlase's trial. See Alabama Pattern Jury Instructions: Criminal, Parties to Offenses, Accountability for Behavior of Another -- Accessory (adopted October 17, 2014) (currently found at http://judicial.alabama.gov/library/juryinstructions). The trial court used the 1994 pattern instruction.

29 After instructing the jury on the elements of the capital-murder charges, the trial court gave the jury a brief, one paragraph, instruction on circumstantial evidence and then instructed the jury on accomplice liability.

30 In a footnote in his brief, DeBlase states that the prosecutor made a similar argument during her rebuttal closing argument. We find no impropriety in that argument, either.

31 Although DeBlase did not specifically argue remorse as a mitigating circumstance during the penalty phase of the trial, he had expressed remorse in the statements he made to police and the statements he wrote while he was in jail, all of which were in evidence and before the jury for its consideration.

32 The trial court did not make specific findings of fact regarding the existence or nonexistence of each aggravating circumstance enumerated in § 13A-5-49, Ala. Code 1975, as required by § 13A-5-47(d), Ala. Code 1975, as it read before the amendment effective April 11, 2017. See note 1, supra. It made findings only as to the aggravating circumstances it found to exist. However, the trial court's sentencing order otherwise complies with the statutory requirements. This Court has recognized that, when the only defect in the sentencing order is the failure to include specific findings of fact regarding the existence or nonexistence of each aggravating circumstance in § 13A-5-49, that error is harmless. See, e.g., Gobble v. State, 104 So.3d 920, 984-85 (Ala. Crim. App. 2010) (opinion on return to remand); Saunders v. State, 10 So.3d 53, 114-15 (Ala. Crim. App. 2007); Beckworth v. State, 946 So.2d 490, 527-28 (Ala. Crim. App. 2005); and Stewart v. State, 730 So.2d 1203, 1219 (Ala. Crim. App. 1996), aff'd, 730 So.2d 1246 (Ala. 1999).

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

February 22, 2019

CR-14-0482 **Death Penalty**

John Joseph DeBlase v. State of Alabama (Appeal from Mobile Circuit Court: CC12-3095)

NOTICE

You are hereby notified that on February 22, 2019, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Roderick P. Stout, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Alicia A. D'Addario, Attorney
Glenn L. Davidson, Attorney
Rachel Judge, Attorney
Arthur T. Powell, III, Attorney
Beth Jackson Hughes, Asst. Atty. Gen.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

August 23, 2019

1180393

Ex parte John Joseph DeBlase. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: John Joseph DeBlase v. State of Alabama) (Mobile Circuit Court: CC-12-3095; Criminal Appeals : CR-14-0482).

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 August 23, 2019:

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

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 23rd day of August, 2019.

Julia Jordan Weller

Clerk, Supreme Court of Alabama