Appendix A

2019 WL 3070058
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Lisa Leane GRAHAM
v.
STATE of Alabama

CR-15-0201
|
July 12, 2019

Synopsis
Background: Defendant was convicted on retrial in the Circuit Court, Russell County, CC-07-686, of capital murder, and was sentenced to death, after her first trial ended in a mistrial. She appealed.

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

defendant was not denied constitutional right to speedy trial as result of 29-month delay between mistrial and her second trial;

manifest necessity existed to warrant declaring mistrial and, thus, retrial of defendant did not violate double jeopardy;

prospective juror who indicated during voir dire that she was a good friend of testifying sheriff and would place great weight on his testimony because she knew him to be truthful was subject to being struck for cause;

trial court's error in failing to strike prospective juror for cause was harmless; and

evidence was sufficient to support finding of "pecuniary gain" needed for conviction.

Affirmed.

Minor, J., concurred specially, with opinion, which Windom, P.J., and McCool, J., joined.

Cole, J., recused himself.

Appeal from Russell Circuit Court (CC-07-686); Jacob A. Walker III, Judge.

Attorneys and Law Firms

Charlotte R. Morrison and Claudia B. Flores, Montgomery; Robert G. Poole, Opelika; and Margaret Y. Brown, Auburn, for appellant.

Luther Strange and Steve Marshall, attys. gen., and Stephen M. Frisby (withdrew 01/11/2019) and Audrey K. Jordan, asst. attys. gen., for appellee.

Opinion

KELLUM, Judge.

***1** Lisa Leane Graham was convicted of hiring Kenneth Walton to murder her daughter, Stephanie "Shea" Graham, for "a pecuniary or other valuable consideration or pursuant to a contract or for hire," a murder defined as capital by § 13A-5-40(a)(7), Ala. Code 1975. Graham's first trial ended in a mistrial, and she was tried a second time and convicted of capital murder.

The State's evidence tended to show that on July 5, 2007, Earlic Dinkins was driving on Highway 165 near Bowden Road when he discovered the partially nude body of Shea Graham lying on the side of the road. Dinkins telephoned emergency 911, and shortly thereafter Russell County sheriff's deputies arrived on the scene. Dr. Steven Boudreau, a pathologist with the Alabama Department of Forensic Sciences, testified that Shea died of multiple gunshot wounds. Dr. Boudreau testified:

> "There was a close range gunshot wound which had entered the right eye and obliterated the right eye and orbit. The bullet went through the head and exited the back of the head. There was another gunshot wound to the head at the back right side of the head which entered the skull and exited over on the left side of the head. There was, in addition, a gunshot wound in the chest ... and exited the back. It perforated –– the lung and the top part of the liver on its way through. There were two gunshot wounds in the abdomen. One in the upper right abdomen, which lacerated the liver again and then exited the back. The second gunshot wound to the abdomen ... just went through the skin on the right-hand side."

(R. 3075.) Both shots to Shea's head were fatal wounds, Dr. Boudreau said. (R. 3078.)

Kevin Graham, Graham's husband, testified that when he learned of Shea's death he informed police that Kenneth Walton was probably responsible because, he said, Walton had told him on two occasions that Graham had asked Walton to kill Shea.[1] Kevin also testified that he had given Graham a gun and that she kept that gun in the console of her vehicle.

Walton testified that Graham had hired him to kill Shea. Walton said that he had previously worked for the Grahams in their construction business and that Graham first approached him about killing her daughter when he was in prison in August 2004. On multiple occasions, after that date, Walton said, Graham asked him to kill Shea. On July 5, 2007, Walton testified, Graham telephoned him and asked him to meet her at a local library. At the library, Walton said, Graham asked him if he was ready to kill Shea. He testified:

"[Prosecutor]: Can you tell me what else happened at the library other than talking with Lisa Graham?

"[Walton]: Yes, sir. On that particular day, I talked to her, she said was I ready, I said yes. She said well, here is my keys. She gave me the keys [to her truck]. I get the keys. I go to a truck.

"[Prosecutor]: What kind of truck did she have?

"[Walton]: She has a blue Avalanche.

***2** "[Prosecutor]: What did you do when you got to the truck?

"[Walton]: I unlocked the passenger door. I opened the console. I retrieved a nine millimeter handgun, gray and silver, and I took the gun. Put it in my truck."

(R. 2919-20.)

Walton further testified regarding the event of July 5 and July 6, 2007. In the evening of July 5, he received a telephone call from Shea during which she asked him to meet her at a Race Track convenience store on Victory Drive in Columbus, Georgia. Shea asked for help in getting an automobile. At the store, Shea got into Walton's truck, and they drove toward Eufaula, Alabama. They stopped at the end of Highway 165 near Bowden Road so that Shea could go to the bathroom on the side of the road. Walton retrieved the gun while Shea was behind one of the truck doors using the bathroom. He shot Shea two times in her head and then four times in her chest. As he was driving away in his truck, he ran over Shea's right arm. (R. 2928.)

The next morning Walton checked his voice-mail messages and discovered a message from Graham. She asked if he had seen Shea, and they arranged to meet. Graham asked Walton for the gun, and he retrieved it from his truck. Graham told him to put it where he had "gotten it." (R. 2939.) Warren Thompson, Graham's grandfather, came up to them as they were talking, and Thompson asked them if they had seen Shea. Walton told Graham that the gun was dirty and needed to be cleaned. Walton then got the gun and gave it to Thompson so that Thompson could clean it. Walton further testified:

"[Prosecutor]: Did she -– other than asking you to do her a favor, did -– did she in any way offer you anything in return for doing that?

"[Walton]: She told me I owed her this favor because I had been covering up for her husband seeing my cousin.

"[Prosecutor]: What -– what -– what did that mean to you, that you had been covering up for her husband and your cousin?

"[Walton]: It meant I had been hiding stuff from her and she wanted me to do her a favor by killing her daughter in return.

"[Prosecutor]: Anything else?

"[Walton]: I shot and killed her.

"[Prosecutor]: Oh. Well, my question is, did she promise you or offer you anything else?

"....

"[Prosecutor]: Did you expect anything else?

> "[Walton]: Yes, sir. She never said what she was going to give me, but she said if I needed anything, just call her."

(R. 2945-47.) Forensic tests showed that the bullets that killed Shea were fired from the gun that Walton got from Graham.

Walton testified that, while police were questioning him, he suggested that he telephone Graham so the police could monitor the call. (C. 2948.) In that conversation, Walton asked if Graham could give him bail money and Graham asked the amount of his bail.

Stephen Hemilburger testified that he lived across the street from the Grahams at the time of Shea's murder. According to Hemilburger, "Lisa [told him that] she was tired of the little bitch [Shea], and that -– she said that she would pay [him] five thousand dollars if [he] would kill her. And [he] told her she was nuts." (R. 3480.) Hemilburger said that he thought Graham was kidding "until she reiterated that she wanted the little bitch dead; that she was tired of spending money for attorney's fees on her." (R. 3481.)

***3** Rachel Cunningham testified that she lived about two blocks from the Grahams and visited their house on numerous occasions. Graham frequently spoke of Shea being killed, she said. Several weeks before Shea was murdered, Cunningham overheard a conversation between Shea and Walton. Cunningham testified: "I heard a conversation between Mr. Walton and Ms. Graham talking about how to kill Shea Graham, what they needed to do, what would be the best clean up of that, how fast it would be, and how easy they would be able to get it done." (R. 3448.)

The jury found Graham guilty of capital murder as set out in § 13A-5-40(a)(7), Ala. Code 1975. A presentence report was prepared, and a sentencing hearing was held before the same jury that convicted Graham. The jury recommended, by a vote of 10 to 2, that Graham be sentenced to death. The Russell Circuit Court found that the murder was committed for pecuniary gain, an aggravating circumstance listed in § 13A-5-49(6), Ala. Code 1975, and sentenced Graham to death.[2] This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-55, Ala. Code 1975.

Standard of Review

Because Graham faces the ultimate penalty -- death -- this Court must search the record of the lower court proceedings for "plain error." 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."

In discussing the scope of Rule 45A, the Alabama Supreme Court has stated:

> " ' "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.' " Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
>
> > " 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 [102 S.Ct. 1584, 71 L.Ed.2d 816] (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [56 S.Ct. 391, 80 L.Ed. 555 (1936)]. In other words, the 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. Frady, 456 U.S. at 163, n.14.'
>
> "See also Ex parte Hodges, 856 So. 2d 936, 947-48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

***4** Ex parte Brown, 11 So. 3d 933, 938 (Ala. 2008).

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

" '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). Although [the appellant's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992)."

Knight v. State, [Ms. CR-16-0182, August 10, 2018] ––– So. 3d ––––, –––– (Ala. Crim. App. 2018).

With these principles in mind, we review the claims raised by Graham in her brief to this Court.

Guilt-Phase Issues

I.

Graham argues that her constitutional right to a speedy trial was violated because, she says, more than eight years elapsed between her arrest and her conviction. Graham was arrested in July 2007 and sentenced in November 2015. She further argues that there was no "manifest necessity" for declaring a mistrial in her first trial; therefore, she asserts, her constitutional right to be free from double jeopardy was also violated.

A.

In determining whether a defendant has been denied his or her constitutional right to a speedy trial, we apply the four-prong test announced by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). We consider the following: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant.

The Alabama Supreme Court, in Ex parte Walker, 928 So. 2d 259, 263 (Ala. 2005), noted:

" 'A single factor is not necessarily determinative, because this is a "balancing test, in which the conduct of both the prosecution and the defense are weighed." ' Ex parte Clopton, 656 So. 2d [1243] at 1245 [(Ala. 1995)] (quoting Barker [v. Wingo], 407 U.S. [514] at 530, 92 S.Ct. 2182 [(1972)]). We examine each factor in turn."

928 So. 2d at 263.

Graham and the State agree that 8 years, or 96 months, passed from the time that she was arrested until her conviction. However, Graham ignores the fact that her first trial ended in a mistrial. The intervening mistrial impacts the starting date for examining the Barker v. Wingo factors. Under the circumstances, Alabama has joined the majority of jurisdictions, measuring the starting date for purposes of a speedy-trial analysis from the declaration of a mistrial.

" '[T]he time between a conviction and a reversal which requires retrial is clearly not counted for speedy trial purposes. See United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).' United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982), cert. denied, 459 U.S. 973, 103 S.Ct. 305, 74 L.Ed.2d 286 (1982). Other states that base their analysis of the speedy trial issue in [such a] situation on the constitutional standards set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), also begin the period on the date of reversal, where appellate action requires the retrial. State v. Ferguson, 576 So. 2d 1252 (Miss. 1991)."

***5** Nickerson v. State, 629 So. 2d 60, 63 (Ala. Crim. App. 1993). More recently, in Clancy v. State, 886 So. 2d 166, 171 (Ala. Crim. App. 2003), this Court, relying on Nickerson, held that, when evaluating a speedy-trial claim after a mistrial, the relevant starting date is the date of the declaration of the mistrial.

" '[F]or the purpose of determining whether a defendant has been denied a speedy trial in a retrial, the time period is measured from "the action occasioning the retrial." Nickerson v. State, 629 So. 2d 60, 62-63 (Ala. Crim. App. 1993).' Weaver v. State, 763 So. 2d 972, 978 (Ala. Crim. App. 1998). Clancy's second trial commenced on April 7, 2001. For purposes of our speedy-trial analysis, then, we consider the approximately 19-month delay between the mistrial and the second trial."

886 So. 2d at 171.

Other courts apply the same analysis. See Greene v. State, 237 Md. App. 502, 515 n. 3, 186 A.3d 207, 214 n.3 (2018) ("[W]hen a mistrial is declared or when a case is reversed on appeal, it is the time between the grant of

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

a mistrial (or mandate reversing the prior trial) and the commencement of the subsequent trial date that is counted in a speedy trial analysis."); State v. White, 275 Kan. 580, 602, 67 P.3d 138, 153-54 (2003) ("The speedy trial statute, K.S.A. 22-3402(4), dictates how time is to be computed when the trial court grants a mistrial: '(4) in the event a mistrial is declared or a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided for herein shall commence to run from the date the mistrial is declared or the date the mandate of the supreme court or court of appeals is filed in the district court.' "); People v. Merrihew, 755 N.Y.S.2d 462, 463, 301 A.D.2d 970, 971 (2003) ("[T]he criminal action is deemed to have recommenced, thus triggering the speedy trial clock, when a mistrial is declared and a new trial is ordered. ..."); Jones v. State, 846 So. 2d 1041, 1045 (Miss. App. 2002) ("The statutory right [to a speedy trial] is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. Only the constitutional speedy trial analysis is relevant thereafter.").

> "The State argues on appeal that any delay in [the appellant's] first trial is irrelevant in an analysis of a speedy trial claim. It cites the rule set forth in the American Bar Association Project on Minimum Standards for Criminal Justice, Speedy Trial, Section 2.2, (Approved Draft 1968), which was adopted by this Court in State v. Sanders (1973), 163 Mont. 209, 214, 516 P.2d 372, 375:
>
> > "When time commences to run.
> >
> > "The time for trial should commence running ...
> >
> > "....
> >
> > " '(c) if the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, from the date of the mistrial, order granting a new trial, or remand.' "

State v. Marquardt, 243 Mont. 133, 135, 793 P.2d 799, 800 (1990).[3]

***6** 1. Length of Delay. Shea was murdered on July 5, 2007, Graham was arrested on July 8, 2007, and Graham was indicted on October 20, 2007. (C. 80.) Graham was originally tried in September 2012, tried a second time in February 2015, and convicted in March 2015. The delay in this case –- the period between the mistrial and the second trial –- was 29 months, not the 96 months that Graham asserts applies in this case.

> "In Doggett v. United States, the United States Supreme Court explained that the first factor -- length of delay -- 'is actually a double enquiry.' 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The first inquiry under this factor is whether the length of the delay is ' "presumptively prejudicial." ' 505 U.S. at 652, 112 S.Ct. 2686 (quoting Barker [v. Wingo], 407 U.S. [514] at 530-31, 92 S.Ct. 2182 [(1972)]). A finding that the length of delay is presumptively prejudicial 'triggers' an examination of the remaining three Barker factors. 505 U.S. at 652 n. 1, 112 S.Ct. 2686 ('[A]s the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.'). See also Roberson v. State, 864 So. 2d 379, 394 (Ala. Crim. App. 2002)."

Ex parte Walker, 928 So. 2d at 263-64.

> "The Alabama Supreme Court in [Ex parte] Walker, [928 So. 2d 259 (Ala. 2005),] held that a 50-month delay between arrest and trial was presumptively prejudicial. See also State v. Van Wooten, 952 So. 2d 1176 (Ala. Crim. App. 2006) (29-month delay was presumptively prejudicial); State v. Stovall, 947 So. 2d 1149 (Ala. Crim. App. 2006) (41-month delay was presumptively prejudicial); Vincent v. State, 607 So. 2d 1290 (Ala. Crim. App. 1992) (31-month delay was presumptively prejudicial). Cf. State v. Johnson, 900 So. 2d 482 (Ala. Crim. App. 2004) (28-month delay not presumptively prejudicial); Payne v. State, 683 So. 2d 440 (Ala. Crim. App. 1995) (25-month delay was not presumptively prejudicial)."

Sharifi v. State, 993 So. 2d 907, 922 (Ala. Crim. App. 2008). Thus, because the delay in this case was presumptively prejudicial, we also examine the remaining Barker factors.

2. Reasons for the Delay. On September 25, 2012, a mistrial was declared by Judge George R. Greene. Thereafter, Judge Greene was granted a leave of absence for medical reasons.

In October 2012, Graham moved that she be immediately released from custody and that all judges except Judge Greene be disqualified from presiding over her retrial. (C. 360.) On October 31, 2012, the Presiding Judge of the Russell Circuit Court certified to the Chief Justice of the Alabama Supreme Court that all the judges in that county had recused themselves from the case and that a special judge was needed. (C. 365.) On November 8, 2012, the Chief Justice appointed Judge

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Jacob A. Walker III to preside over the case. (C. 366.) Judge Walker set the case for a status conference on January 3, 2013. In May 2013, Graham moved that the case against her be dismissed because, she argued, the Double Jeopardy Clause barred her retrial. (C. 380.) A lengthy hearing was held on this motion. On July 13, 2013, Judge Walker issued a 17-page order denying Graham's motion to dismiss. (C. 406.) On July 16, 2013, Graham moved that the proceedings be stayed pending the disposition of a petition for a writ of mandamus that she intended to file in an appellate court. The circuit court granted that motion and stayed all proceedings on July 17, 2013. On July 26, 2013, Graham filed a petition for a writ of mandamus in this Court attacking the circuit court's ruling denying her motion to dismiss. By order dated October 2, 2013, this Court denied mandamus relief. Ex parte Graham (No. CR-12-1690, October 2, 2013), 173 So. 3d 12 (Ala. Crim. App. 2013)(table). Graham then filed a similar petition in the Alabama Supreme Court. On August 8, 2014, the Alabama Supreme Court likewise denied mandamus relief. Ex parte Graham (No. 1130052, August 8, 2014), 194 So. 3d 991 (Ala. 2014)(table).

***7** Immediately after the mandamus proceedings were concluded, the State moved that a date be set for Graham's retrial. (C. 469.) Graham was tried in February 2015 and convicted in March 2015.

The majority of the delay in this case was based on motions and extraordinary petitions filed by Graham. " ' "Delays occasioned by the defendant or on his behalf are excluded from the length of the delay and are heavily counted against the defendant in applying the balancing test of Barker." ' " Walker, 928 So. 2d at 265, quoting Zumbado v. State, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993), quoting in turn McCallum v. State, 407 So. 2d 865, 868 (Ala. Crim. App. 1981).

3. Assertion of Right. Graham did not file any motion for a speedy trial. Indeed, she never asserted her right to a speedy trial. In fact, the record shows that on January 3, 2013, Graham's counsel specifically stated: "[T]here is, in fact, an agreement we would waive a speedy trial." (R. 23.)

4. Prejudice to Defendant. Graham argues that she was prejudiced by the delay because (1) the judge handling the case was forced to declare a mistrial; (2) one of the State witnesses, Warren Thompson, passed away; and (3) she was held without bond until 2013. However, Graham makes no argument as to how she was prejudiced by these three factors. First, the mistrial was declared due to the judge's medical problem and the judge's indefinite leave of absence. Second, Thompson testified in Graham's first trial and was subjected to cross-examination, and his testimony was admitted into evidence at Graham's second trial. Third, Graham was first granted bond in September 2010 well before the date she cites in her brief to this Court.

Based on our weighing of the Barker factors, we hold that Graham was not denied her constitutional right to a speedy trial. Graham is due no relief on this claim.

B.

Graham also argues that her double jeopardy rights were violated because, she says, there was no "manifest necessity" for declaring a mistrial in her first trial.

The record shows that in May 2013 Graham moved that the charges against her be dismissed based on double-jeopardy grounds. The circuit judge denied that motion, and this Court denied mandamus relief on that basis. When denying Graham's mandamus petition, this Court stated:

> "Judge [Jacob] Walker, in his order, discussed the four considerations addressed by the Alabama Supreme Court in Ex parte Head, 958 So. 2d 860 (Ala. 2006), when considering whether a retrial was barred: (1) Whether the trial judge acted in Graham's best interest; (2) Whether alternatives to a mistrial were considered; (3) Whether Graham was given an opportunity to explain [her] position on the mistrial; and (4) Whether the declaration of a mistrial denied Graham the right to ' "retain primary control of the course to be followed" in the event of an error at trial.' 958 So. 2d at 866-67.
>
> "Judge [George] Greene testified that he has had diabetes for 15 years and at the time of Graham's trial he had a 'vitreous hemorrhage in his right eye,' which resulted in headaches and blurred vision for distant objects. He said that he knew he needed medical treatment but that he delayed treatment to complete the trial. After consulting with the Presiding Judge of that circuit, he said he was 'ordered' to declare a mistrial because of his 'medical status.' Judge Johnson testified that he was aware of Judge Greene's past medical problems, that he had been alerted that Judge Greene was sleeping during voir dire, that he urged Judge Greene to seek medical help, and that he did

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

not order Judge Greene to declare a mistrial. There was also testimony that there was no other judge in the circuit that could handle Graham's case if a mistrial had not been declared. Judge Walker found that he was 'unable to reach a clear determination about whether the defense was given an opportunity to object prior to the declaration of the mistrial; therefore, this factor does not lend any guidance towards whether manifest necessity existed.' Judge Walker stated: '[i]t appears that the mistrial was not declared to protect the interests of any one individual; it was declared out of a need to protect the rights of all parties, including the immediate health concerns of Judge Greene, and to promote the substantial ends of public justice.'

***8** "Graham failed to meet her heavy burden of establishing a clear legal right to the issuance of a writ of mandamus."

(Order of October 2, 2013.)

On appeal, the State argues that this Court's ruling on Graham's petition for the writ of mandamus constitutes the law of the case and is binding on this Court in this appeal. It relies on Arthur v. State, 238 So. 3d 1276 (Ala. Crim. App. 2017), to support this argument.

This Court in Arthur held that the Alabama Supreme Court's prior determination "that Arthur's declaratory-judgment action [was] in substance a Rule 32, Ala. R. Crim. P., petition" was the law of the case. 238 So. 3d at 1278. Our holding in Arthur has no application to the facts of this case because it did not involve a ruling on an extraordinary petition and a subsequent direct appeal involving the same issue in the same case.

Indeed, the Alabama Supreme Court in Ex parte Shelton, 814 So. 2d 251 (Ala. 2001), specifically held that the previous denial of a mandamus petition raising the same issue does not invoke the law-of-the-case doctrine. The Court stated:

"[T]his Court has held, 'the denial [of a petition for a writ of mandamus] does not operate as a binding decision on the merits.' R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229 (Ala. 1994). '[T]he denial of relief by mandamus does not have res judicata effect.' Cutler v. Orkin Exterminating Co., 770 So. 2d 67, 69 (Ala. 2000); Jack Ingram Motors, Inc. v. Ward, 768 So. 2d 362 (Ala. 1999); Quality Truck & Auto Sales, Inc. v. Yassine, 730 So. 2d 1164, 1167 (Ala. 1999)."

814 So. 2d at 255. This is true because the standard of review when considering a petition for a writ of mandamus is stricter than the standard for reviewing an issue on direct appeal.

Other states have reached this same conclusion. For example, the Oklahoma Supreme Court in Miller Dollarhide, P.C. v. Tal, 174 P.3d 559 (Okla. 2006), stated:

"Our sister jurisdictions considering this issue have generally adopted the rule that a denial of a writ of mandamus by a supervisory court, without opinion, is not entitled to preclusive effect. The Supreme Court of Alabama in In re Shelton, 814 So. 2d 251, 255 (Ala. 2001), has taken the position that 'the denial of a petition for a writ of mandamus does not operate as a binding decision on the merits.' Likewise, the Supreme Court of California reached a similar conclusion in Kowis v. Howard, 3 Cal. 4th 888, 12 Cal. Rptr. 2d 728, 838 P. 2d 250, 256 (1992):

" '... if the denial followed a less rigorous procedure, [than that of full argument and opinion], it should not establish law of the case. To be sure, the court on a later appeal might often reach the same result as before. But it is not required to do so by the law of the case doctrine ... A summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason. ...'

"The Federal Courts have adopted a similar approach."

174 P.3d at 564-65. See also Annot., Judgment Granting or Denying Writ of Mandamus or Prohibition as Res Judicata, 21 A.L.R. 3d 206 (Supp. 2003).

Nonetheless, we reach the same holding that this Court reached when it issued its order denying Graham's mandamus petition. A mistrial was properly declared because the trial judge had a medical problem and there was no other judge in that circuit who could preside over Graham's trial.

***9** "[T]he accused may be subjected to a second trial only where the prosecutor can demonstrate manifest necessity for

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

terminating the first trial." Ex parte Whirley, 530 So. 2d 865, 868 (Ala. 1988).

> "The words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."

Arizona v. Washington, 434 U.S. 497, 505-06, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)(footnotes omitted).

"Because the illness of the judge rendered completion of the trial by the original tribunal effectively impossible, there was no method by which appellant's 'valued right to have his trial completed by a particular tribunal,' United States v. Jorn, 400 U.S. 470, 484, 91 S.Ct. 547, 557, 27 L.E.2d 543 (1971)(plurality opinion)(Harlan, J.) could be reconciled with the public interest in obtaining the adjudication of guilt or innocence." Commonwealth v. Robson, 461 Pa. 615, 623, 337 A. 2d 573, 577 (1975).

> "[W]e hold that when, as in this case, the trial judge has become so seriously ill as to be confined to a hospital, and when it is expected that he may be required to remain in the hospital for more than one day (and in this case did remain for one week), the state, upon proof of such fact (which are admitted in this case), has sustained its burden to show that there was such a 'manifest necessity' as to justify the dismissal of the jury and avoid the bar of double jeopardy."

State v. Cole, 286 Or. 411, 424, 595 P.2d 466, 473 (1979). See also United States v. Holley, 986 F.2d 100, 104 (5th Cir. 1993) ("[M]anifest necessity for mistrial exists where judge or juror cannot attend because of illness or death."); Commonwealth v. Hunter, 381 Pa. Super. 499, 505, 554 A.2d 112, 115 (1989) ("Circumstances in which retrial was justified by manifest necessity include 'jury deadlock, jury bias and illness of the judge or jury.' "); State ex rel. Brooks v. Worrell, 156 W.Va. 8, 11-12, 190 S.E.2d 474, 476 (1972) ("[I]t has been held that where unforeseeable circumstances arise during the trial of a case, such as, illness or death of a juror, the accused, the judge or counsel, making the completion of the trial impossible, a manifest necessity to discharge the jury will exist and the declaration of a mistrial will be justified."); United States v. Smith, 390 F.2d 420, 425 (4th Cir. 1968) ("It is manifestly necessary to curtail a trial when ... a participant in the proceedings dies or becomes ill. ..."); State v. Malouf, 199 Tenn. 496, 504, 287 S.W.2d 79, 82 (1956) ("It is now universally held that a dismissal of a jury without [the defendant's] consent will not acquit the defendant when the jury has been unable to agree or if it is done on account of the illness or death of the trial judge. ...").

***10** Accordingly, we affirm this Court's holding that Graham's right to be free from double jeopardy was not violated in this case because a manifest necessity existed for declaring a mistrial in Graham's original trial. Graham is due no relief on this claim.

II.

Graham next argues that the circuit court erred in "reopening the suppression hearing." (Graham's brief at p. 35.) Specifically, she argues that the circuit court's ruling in her first trial on the merits of her motion to suppress the contents of a conversation with her husband should not have been reconsidered during her retrial because, she says, "the principles of collateral estoppel" barred the court from reconsidering the issue.

In Graham's first trial, the circuit court granted Graham's motion to suppress because, it ruled, the conversation was protected by marital privilege.[4] However, in the second trial the circuit court denied Graham's motion to suppress after finding that Graham knew that her conversation with her husband was being recorded; therefore, the court concluded, the conversation was not a confidential marital communication.

> " 'A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties "as though no trial had taken place." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results "in no binding

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

adjudication of the rights of the parties." Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).

" '....

" 'Here, the case having resulted in a mistrial, it was a nullity and therefore began anew when called again for trial. State v. Mills, 281 S.C. 60, 314 S.E.2d 324, cert. denied 469 U.S. 930, 105 S.Ct. 324, 83 L.Ed.2d 261 (1984) (when mistrial occurs because of inability of jury to agree on verdict, it is the same as if no trial took place).' "

Morris v. State, 60 So. 3d 326, 361-62 (Ala. Crim. App. 2010), quoting State v. Woods, 382 S.C. 153, 157-58, 676 S.E.2d 128, 131 (2009). See also State v. Knight, 245 N.C. App. 532, 538, 785 S.E.2d 324, 331 (2016) ("[W]hen a defendant is retried following a mistrial, prior evidentiary rulings are not binding. State v. Harris, 198 N.C. App. 371, 376, 679 S.E.2d 464, 468 (2009). Indeed, once a mistrial has been declared, 'in legal contemplation there has been no trial.' "); State v. Campbell, 414 N.J. Super. 292, 298, 998 A.2d 500, 504 (2010) (" '[T]he declaration of mistrial rendered nugatory all of the proceedings during the first trial,' ... Further, '[a] mistrial is not a judgment or order in favor of any of the parties. It lacks the finality of a judgment, and means that the trial itself was a nullity.' ").

The circuit court did not abuse its considerable discretion in issuing a different ruling on this issue during the retrial. [5] Indeed, because all the rulings in the first trial were by legal definition a nullity, the circuit court correctly reconsidered every evidentiary issue that was presented at Graham's second trial. Graham is entitled to no relief on this claim.

III.

***11** Next, Graham argues that death-qualifying the prospective jurors resulted in a conviction-prone jury and disproportionately excluded minorities and women.

The United States Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), held that prospective jurors in a capital-murder case may be "death-qualified." Alabama has repeatedly upheld this practice.

"A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Neither the federal nor the state constitution prohibits the state from ... death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391–92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993)."

Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand).

The circuit court correctly allowed the prospective jurors to be death-qualified concerning their views on capital punishment. Graham is due no relief on this claim.

IV.

Graham next argues that the circuit court erred in refusing to remove prospective juror E.P. [6] for cause because, she says, E.P. indicated that she was a good friend of Sheriff Heath Taylor and would place great weight on his testimony because she knew him to be truthful.

The record shows that E.P. indicated during voir dire examination that she had been good friends with Sheriff Taylor for many years. The following occurred:

"[Defense counsel]: The fact that the Sheriff, he's -- he's the prosecuting agent on this case, he's going to be a witness in this case. The fact that you know him, and I assume you known him -- have known him over the years, would you be able to sit on a jury where he is a witness, where he is the prosecuting agent, and still be fair and impartial to Ms. Graham?

"[E.P.]: I can."

(R. 2047.) Later during voir dire, the following occurred:

"[Defense counsel]: You said that you have been close friends for a long time with Sheriff Taylor.

"[E.P.]: Yes, ma'am.

"[Defense counsel]: And that y'all would be maybe on a first name basis.

"[E.P.]: That's correct.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"[Defense counsel]: Do you think that if he's the case agent and he testified in this case, would you be more likely to give his testimony more weight than you would any other witness, like all other things being equal, just because you know him and are friends with him?

"[E.P.]: I can tell you that I trust him.

"[Defense counsel]: Well -– and that's my question. Would your knowledge of him and your opinion of him, would you tend to weigh that and take what he said over another witness that maybe you did not know their reputation, had not been friends with them?

"[E.P.]: I believe that I would.

"[Defense counsel]: Okay. And I know you said you would try to be fair.

***12** "[E.P.]: Yes.

"[Defense counsel]: But that would be something that would just be natural?

"[E.P.]: I understand."

(R. 2085-87.) Immediately after the above exchange, defense counsel moved that E.P. be struck for cause. (R. 2087.) The circuit court denied Graham's challenge and indicated that placing more weight on Sheriff Taylor's testimony was not a sufficient reason to remove E.P. for cause. (R. 2093.) E.P. was not questioned further about her comments concerning the weight she would attach to Sheriff Taylor's testimony. However, E.P. did not serve on Graham's jury -- Graham used her second peremptory strike to remove E.P. (R. 2535.)

"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." ' Clark v. State, 621 So. 2d 309, 321 (Ala. Cr. App. 1992) (quoting Nettles v. State, 435 So. 2d 146, 149 (Ala. Cr. App. 1983)). This court has held that 'once a juror indicates initially that he or she is biased or prejudiced or has deepseated impressions' about a case, the juror should be removed for cause. Knop v. McCain, 561 So. 2d 229, 234 (Ala. 1989). 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 Taylor, 666 So. 2d 73, 82 (Ala. 1995). A juror 'need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.' Kinder v. State, 515 So. 2d 55, 61 (Ala. Cr. App. 1986)."

Ex parte Davis, 718 So. 2d 1166, 1171-72 (Ala. 1998).

This Court has recognized that

" '[a] juror ... who will unquestionably credit the testimony of law enforcement officers over that of defense witnesses is not competent to serve.' State v. Davenport, 445 So. 2d 1190, 1194 (La. 1984). See also State v. Nolan, 341 So. 2d 885 (La. 1977); State v. Thompson, 331 So. 2d 848 (La. 1976); State v. Johnson, 324 So. 2d 349 (La. 1975); State v. Jones, 282 So. 2d 422 (La. 1973); State v. Williams, 643 S.W.2d 832, 834 (Mo. App. 1982). 'A juror who will not be governed by the established rules as to the weight and effect of the evidence is incompetent.' Watwood v. State, 389 So. 2d 549, 550 (Ala. Cr. App.), cert. denied, Ex parte Watwood, 389 So. 2d 552 (Ala. 1980)."

Uptain v. State, 534 So. 2d 686, 687 (Ala. Crim. App. 1988), abrogated on other grounds by Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002).

A prospective juror who responds that he or she will credit the testimony of a police officer more than the testimony of other witnesses may subsequently be rehabilitated; here, E.P. was asked no further questions. See Sharifi v. State, 993 So. 2d 907, 926 (Ala. Crim. App. 2008). E.P. should have been removed for cause based on her comments concerning the credibility of Sheriff's Taylor's testimony.

However, the Alabama Supreme Court has recognized that the harmless-error rule applies to a circuit court's failure to remove a prospective juror for cause. In Bethea v. Springhill Memorial Hospital, 833 So. 2d 1 (Ala. 2002), the Alabama Supreme Court returned to the harmless-error analysis when reviewing a circuit court's denial of a motion to remove a prospective juror for cause.

***13** "The application of a 'harmless-error' analysis to a trial court's refusal to strike a juror for cause is not new to this Court; in fact, such an analysis was adopted as early as 1909:

" 'The appellant was convicted of the crime of murder in the second degree. While it was error to refuse to allow the defendant to challenge the juror C.S. Rhodes for cause, because of his having been on the jury which had tried another person jointly indicted with the defendant,

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> yet it was error without injury, as the record shows that the defendant challenged said juror peremptorily, and that, when the jury was formed the defendant had not exhausted his right to peremptory challenges.'

"Turner v. State, 160 Ala. 55, 57, 49 So. 304, 305 (1909). However, in Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), overruled on other grounds, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court stated, in dicta, that '[t]he denial or impairment of the right is reversible error without a showing of prejudice.' (Emphasis added.) Some decisions of this Court as well as of the Alabama Court of Criminal Appeals reflect an adoption of this reasoning. See Dixon v. Hardey, 591 So. 2d 3 (Ala. 1991); Knop v. McCain, 561 So. 2d 229 (Ala. 1989); Ex parte Rutledge, 523 So. 2d 1118 (Ala. 1988); Ex parte Beam, 512 So. 2d 723 (Ala. 1987); Uptain v. State, 534 So. 2d 686, 688 (Ala. Crim. App. 1988) (quoting Swain and citing Beam and Rutledge); Mason v. State, 536 So. 2d 127, 129 (Ala. Crim. App. 1988) (quoting Uptain).

"... [T]his Court has returned to the 'harmless-error' analysis articulated in the Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and [United States v.] Martinez–Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const. 1901 § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.

> "In this instance, even if the Betheas could demonstrate that the trial court erred in not granting their request that L.A.C. be removed from the venire for cause (an issue we do not reach), they would need to show that its ruling somehow injured them by leaving them with a less-than-impartial jury. The Betheas do not proffer any evidence indicating that the jury that was eventually impaneled to hear this action was biased or partial. Therefore, the Betheas are not entitled to a new trial on this basis."

Bethea, 833 So. 2d at 6-7 (footnotes omitted). But see Ex parte Colby, 41 So. 3d 1 (Ala. 2009); General Motors Corp. v. Jernigan, 883 So. 2d 646 (Ala. 2003) (harmless-error analysis does not apply when the circuit court erroneously denies challenges for cause of multiple jurors).

Other jurisdictions have also applied the harmless-error rule to a court's erroneous failure to remove a prospective juror for cause after that prospective juror was removed by a peremptory strike.

> "[I]n State v. Barlow, we held that even if the failure to dismiss a juror for cause was erroneous, any error was cured by the defendant's exercise of a peremptory challenge to remove the juror. 541 N.W.2d 309, 312–13 (Minn. 1995). We noted that '[t]he peremptory [challenge] served the purpose for which it is intended and the potential juror did not serve on defendant's jury.' Id. at 312. We concluded that the necessity to exercise a peremptory challenge to strike a juror whom the district court had erroneously refused to remove for cause does not deprive the defendant of a fair trial. Id. at 311 (citing Ross v. Oklahoma, 487 U.S. 81, 89, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988))."

***14** State v. Prtine, 784 N.W.2d 303, 311 (Minn. 2010). See also State v. Kang, 859 So. 2d 649, 652 (La. 2003) ("Generally, an individual who will unquestionably credit the testimony of law enforcement officers over that of defense witnesses is not competent to serve as a juror."); State v. Bingham, 176 Ariz. 146, 147, 859 P.2d 769, 770 (1993) ("A juror's inclination to credit the testimony of police officers more than other witnesses is grounds for dismissing that juror."); State v. Stewart, 729 S.W.2d 246, 247 (Mo. Ct. App. 1987) ("[J]uror Larson indicated she would ... accord police testimony greater weight than that of other witnesses. ... [W]e are certain [the court] erred in refusing to strike Larson for cause.").

In her brief, Graham argues that a harmless-error analysis should not apply in this case because, she says, she was sentenced to the ultimate penalty and is entitled to heightened scrutiny on this claim. However, this Court has repeatedly relied on the harmless-error rule in death-penalty cases involving the erroneous strike of a prospective juror for cause. See Henderson v. State, 248 So. 3d 992 (Ala. Crim. App. 2017); Scott v. State, 163 So. 3d 389 (Ala. Crim. App. 2012); Doster v. State, 72 So. 3d 50 (Ala. Crim. App. 2010); Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007).

In a footnote, Graham further states: "As a result, Ms. Graham did not have strikes available to remove J.Z. and B.V., who both said they would expect Ms. Graham to testify and make her 'voice heard.' " (Graham's brief at p. 85 n. 23.) This is the entire argument on this claim. However, we have examined the record and find no evidence indicating that the jury that convicted Graham was biased or impartial. Accordingly, any error in the circuit court's failure to remove prospective juror E.P. for cause was harmless based on the Alabama Supreme Court's holding in Bethea v. Springhill Memorial Hospital. Graham is due no relief on this claim.

V.

Graham next argues that the State violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by improperly using its peremptory strikes to remove African-American prospective jurors from her jury.

The United States Supreme Court in Batson held that it was a violation of the Equal Protection Clause of the United States Constitution to strike an African-American individual from an African-American defendant's jury based solely on their race. This holding was extended to white defendants in Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); to defense counsel in criminal cases in Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); and to gender in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The Alabama Supreme Court extended this holding to white prospective jurors in White Consolidated Industries, Inc. v. American Liberty Insurance, Inc., 617 So. 2d 657 (Ala. 1993).

Here, Graham did not make a Batson objection after the jury was selected. Thus, we review this issue for plain error. See Rule 45A, Ala. R. App. P.

> "To find plain error in the Batson [v. Kentucky, 476 U.S. 79 (1986),] context, we first must find that the record raises an inference of purposeful discrimination by the State in the exercise of its peremptory challenges. E.g., Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007). Where the record contains no indication of a prima facie case of racial discrimination, there is no plain error. See, e.g., Gobble v. State, 104 So. 3d 920, 949 (Ala. Crim. App. 2010)."

Henderson v. State, 248 So. 3d 992, 1016 (Ala. Crim. App. 2017). See also Blackmon v. State, 7 So. 3d 397, 425 (Ala. Crim. App. 2005) (opinion on rehearing). [7]

> ***15** "In [Ex parte] Branch, [526 So. 2d 609 (Ala. 1987),] this Court discussed a number of relevant factors ... to establish a prima facie case of racial discrimination; those factors are likewise applicable in the case of a defendant seeking to establish gender discrimination in the jury selection process. Those factors, stated in a manner applicable to gender discrimination, are as follows: (1) evidence that the jurors in question shared only the characteristic of gender and were in all other respects as heterogenous as the community as a whole; (2) a pattern of strikes against jurors of one gender on the particular venire; (3) the past conduct of the state's attorney in using peremptory challenges to strike members of one gender; (4) the type and manner of the state's questions and statements during voir dire; (5) the type and manner of questions directed to the challenged juror, including a lack of questions; (6) disparate treatment of members of the jury venire who had the same characteristics or who answered a question in the same manner or in a similar manner; and (7) separate examination of members of the venire. Additionally, the court may consider whether the State used all or most of its strikes against members of one gender."

Ex parte Trawick, 698 So. 2d 162, 167–68 (Ala. 1997). "[N]umbers and statistics do not, alone, establish a prima facie case of racial discrimination." Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ––– So. 3d ––––, –––– (Ala. Crim. App. 2019).

Here, after prospective jurors were excused for cause, the venire consisted of 45 prospective jurors –- 20 African-American prospective jurors and 25 white prospective jurors. The State and Graham each had 15 peremptory strikes. The State used 12 or its strikes to remove African-American prospective jurors and 3 of its strikes to remove white prospective jurors. [8] Defense counsel used 14 of its strikes to remove white prospective jurors and used its last strike to remove an African-American prospective juror. Graham's jury was composed of five African-American jurors and seven white jurors.

The record shows that the voir dire of the prospective jurors was extensive and consists of over 2,100 pages of

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

the record. (R. 393-2534.) Prospective jurors also completed juror questionnaires. (C. 280-301.)

It is clear from the record that African-American prospective jurors D.D., T.R., J.S., L.M., T.L., and T.K. indicated on their juror questionnaires that they had close relatives that had convictions. African-American prospective jurors F.B., C.B., D.D., T.L., C.L., L.M., J.S., and S.R. indicated on their questionnaires that they had only a “fair” or “poor” opinion of lawyers. Prospective juror C.L. also indicated both during voir dire examination and in her questionnaire that she did not believe in the court system, and she appeared adamant about this view. (R. 531.) Prospective juror F.B. also stated that she would rather not sit on a death-penalty case, that she had a sister who had been murdered, that she had been the victim of a crime, and that she had heard about the case. African-American prospective juror R.H. indicated that she had previously served on a criminal jury. African-American prospective juror B.W. indicated that it would bother him if the defendant did not testify. Prospective juror B.W. also failed to answer a great deal of the questions in his questionnaire.

> ***16** “The above reasons, which are readily discernible from the record, were all race-neutral reasons. ‘The fact that a family member of the prospective juror has been prosecuted for a crime is a valid race-neutral reason.’ Yelder v. State, 596 So. 2d 596, 598 (Ala. Crim. App. 1991). ‘[A] veniremember's connection with or involvement in criminal activity may serve as a race-neutral reason for striking that veniremember.’ Wilsher v. State, 611 So. 2d 1175, 1183 (Ala. Crim. App. 1992). ‘ “That a veniremember has reservations about the death penalty, though not sufficient for a challenge for cause, may constitute a race-neutral and reasonable explanation for the exercise of a peremptory strike.” ’ Fisher v. State, 587 So. 2d 1027, 1036 (Ala. Crim. App. 1991).”

Bohannon v. State, 222 So. 3d 457, 482 (Ala. Crim. App. 2015). It is a valid race-neutral reason to strike a prospective juror who has a “ ‘chip on her shoulder’ regarding the judicial system.” Zumbado v. State, 615 So. 2d 1223, 1232 (Ala. Crim. App. 1993). “Failure to answer questions on a juror questionnaire is a race-neutral reason for a peremptory strike.” Martin v. State, 62 So. 3d 1050, 1063 (Ala. Crim. App. 2010).

“[T]he [Ex parte] Watkins[, 509 So. 2d 1074 (Ala. 1987),] Court established that when nothing in the record supports the bare allegation that a constitutional violation occurred, a court cannot find plain error.” Ex parte Walker, 972 So. 2d 737, 754 (Ala. 2007). Based on the record in this case, we cannot say that there was plain error in regard to Graham's Batson argument. Thus, Graham is due no relief on this claim.

VI.

Graham next argues that the circuit court erred in allowing her conversation with her husband to be admitted into evidence because, she says, the conversation was a privileged conversation between a husband and wife. She cites Rule 504(b), Ala. R. Evid., and the United States Supreme Court case of Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951), to support her argument. Graham further argues that the conversation was the functional equivalent of a police interrogation; therefore, she asserts, the contents of the conversation were improperly admitted because Graham was not given her Miranda [9] rights before the start of the conversation.

A.

In Alabama, “the husband-wife privilege” is addressed in Rule 504, Ala. R. Evid. That rule provides, in pertinent part:

> “(b) General Rule or Privilege. In any civil or criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication made by one spouse to the other during the marriage.
>
> “(c) Who May Claim the Privilege. The privilege may be claimed by either spouse, the lawyer for either spouse in that spouse's behalf, the guardian or conservator of either spouse, or the personal representative of a deceased spouse. The authority of those named to claim the privilege in the spouse's behalf is presumed in the absence of evidence to the contrary.” [10]

The United States Supreme Court in Blau v. United States, 340 U.S. 332, 333, 71 S.Ct. 301, 95 L.Ed. 306 (1951), recognized that “martial communications are presumptively confidential” but the privilege may be waived.

***17** The record shows that after Walton confessed that Graham had solicited him to kill Shea the police interviewed Graham at the police station. Immediately before the

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

interview, Kevin Graham, Graham's husband, asked if he could speak with Graham because, he said, he could get her to tell the truth about her involvement in their daughter's death. (R. 2585.) Kevin entered the interrogation room where Graham was located and the two had a lengthy discussion before police formally questioned Graham. (C. 1109-41.)

Graham moved that the statements be suppressed because she "claimed marital privilege as to any conversations between she and her husband, Kevin Graham." (R. 160.) The prosecutor countered:

> "The fundamental element for the privilege -– for marital privilege is that there is a confidentiality. When a –- conversation or a statement without regard to the privilege -–attorney/client position, patient, marital privilege, when that conversation is knowingly published their -– their confidentiality is extinguished. There is no confidentiality on that. It's clear that both Kevin Graham and Lisa Graham knew that this conversation was being video and audio recorded. It's also apparent that there are times during the course of that interview when Lisa Graham makes an attempt to whisper so that it will not be heard. It's absolutely apparent she knew that this conversation was being published. There is no confidentiality. There is no privilege."

(R. 2673-74.) The circuit court allowed the conversation to be admitted after it found clear indications that the privilege had been waived because, it found, the Grahams were both aware that their conversation was being recorded. (R. 2677.)

In the conversation, Graham said that she met Walton at a library and gave him a gun. However, she said that she thought that Walton was going to use the gun to kill her husband's girlfriend -- Ieisha Hodge. The conversation consisted mostly of the two questioning why Graham was asked to the police station. Kevin indicated at one point that Walton killed Shea to get back at them after they had fired Walton.

This Court in Johnson v. State, 584 So. 2d 881 (Ala. Crim. App. 1991), addressed a similar issue and held that there was no privilege because the conversation between the two spouses occurred in the presence of police. We stated:

> "The appellant contends that the transcript of the conversation between him and his wife that occurred in the Albertville detectives' room in the presence of Detectives Edsel Whitten and Tommy Cole was introduced in violation of the marital privilege. Specifically, he argues that this transcript was improperly admitted because the police did not advise Mrs. Johnson of her marital privilege.
>
> "However, the marital privilege for confidential communications has no application here. This court in Epps v. State, 408 So. 2d 562, 565 (Ala. Cr. App. 1981), held that:
>
> > " 'The privilege exists only for confidential communications or "acts performed with the confidence of the marriage in mind." Arnold v. State, 353 So. 2d 524, 527 ([Ala.]1977). The marital communication loses its confidential character (and thus its privilege status) if it is made in the presence of third parties. Caldwell v. State, 146 Ala. 141, 41 So. 473 (1906).'
>
> "See also Howton v. State, 391 So. 2d 147 (Ala. Cr. App. 1980), which held that testimony of an investigator concerning contents of a letter defendant's wife had sent to defendant while he was incarcerated did not violate the rule governing privileged communications, in that such rule does not operate to exclude testimony of a third party who overheard private conversation, even if such conversation was overheard while spying or eavesdropping.
>
> ***18** "In this case, the conversation was not private. It was a conversation in the open presence of Detectives Whitten and Cole.
>
> "Furthermore, the record reveals that at some point Mrs. Johnson had been advised of her rights: 'They read me my rights and I had no idea what for.' (R. 783.) See McCoy v. State, 221 Ala. 466, 129 So. 21 (1930), holding that prior voluntary testimony at a preliminary hearing by the nonaccused spouse, although made without having been advised of her privilege not to testify, may be admitted through a third party who heard this testimony even where the spouse invokes the privilege not to testify at the subsequent trial."

584 So. 2d at 885. Graham argues that Johnson does not apply in this case because, she says, the police were not in the same room when she and her spouse were talking.

However, the question is not whether a third party was present with Graham and her husband but whether Graham had any expectation of privacy in the conversation she had with her husband. "[C]ourts have generally found no 'reasonable expectation of privacy' for overheard or monitored conversations in police cars, police interview rooms, or in prisons." State v. Howard, 728 A.2d 1178, 1182 (Del. Super. Ct. 1998) (footnotes omitted). "If

the communication is made with the contemplation or expectation that a third party will learn of it, the confidential communication privilege does not apply." Matthews v. State, 89 Md. App. 488, 502, 598 A.2d 813, 820 (1991).

> "Whether defendant's communications with his wife while at the Onslow County Sheriff's Department were protected by this privilege hinges on whether those statements constitute confidential communications. To qualify as a confidential marital communication under N.C. Gen. Stat. § 8–57(c), the communication must be one that was 'induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.' [State v. Freeman,] 302 N.C. 591[, 598], 276 S.E.2d 450[, 454] (1981) (citations omitted). There must also be '[1] a reasonable expectation of privacy on the part of the holder and [2] the intent that the communication be kept secret.' State v. Rollins, 363 N.C. 232, 238, 675 S.E.2d 334, 338 (2009). In determining whether a reasonable expectation of privacy existed, '[t]he circumstances in which the communication takes place, including the physical location and presence of other individuals' are taken into account. Id. at 237, 675 S.E.2d at 337 (citation omitted).
>
> "....
>
> "In State v. Rollins, our Supreme Court held that conversations between a husband and wife in the public visiting area of a correctional facility did 'not qualify as confidential communications under section 8–57(c).' 363 N.C. at 235, 675 S.E.2d at 336. The Supreme Court further held that 'incarcerated persons have a diminished expectation of privacy.' Id. at 239, 675 S.E.2d at 338. The New York case of Lanza v. New York[, 370 U.S. 139 (1962),] was cited for the proposition that 'to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure ... is at best a novel argument.... In prison, official surveillance has traditionally been the order of the day.' Rollins, 363 N.C. at 239, 675 S.E.2d at 339 (citing Lanza v. New York, 370 U.S. 139, 143, 82 S.Ct. 1218, 8 L.Ed.2d 384, 388–89 (1962)).
>
> ***19** " 'The rationale that the spouses may ordinarily take effective measures to communicate confidentially tends to break down where one or both are incarcerated. However, communications in the jailhouse are frequently held not privileged, often on the theory that no confidentiality was or could have been expected.'
>
> "Rollins, 363 N.C. at 240, 675 S.E.2d at 339 (citing Kenneth S. Broun et al., McCormick on Evidence § 82 (6th ed. 2006)). In the instant case, both defendant and his wife had been placed under arrest and were in an interview room. There were warning signs in the Sheriff's Department that the premises were under audio and visual surveillance. There were cameras and recording devices throughout the Sheriff's Department, and in the conference room. Given these undisputed findings of fact, they support the trial court's conclusion that defendant and his wife did not have a reasonable expectation of privacy in the interview room."

State v. Terry, 207 N.C. App. 311, 314-17, 699 S.E.2d 671, 674-76 (2010).

Here, immediately after entering the interview room to speak to his wife, Kevin asked why they were in a room by themselves. Graham answered: "Because they're recording everything we're saying." (C. 1111.) A little later Graham asked why some lights in the room were on and Kevin said: "I don't know. I was looking to see if there was a camera in them and couldn't see one." (C. 1131.) Graham then responded: "Yeah. There's one in behind it. I seen old doofas [sic] in there putting a tape in there so he can record everything." (C. 1131.) At one point the Grahams are whispering. It is abundantly clear that both Graham and her husband were aware that their conversation was not "confidential" but, in fact, was being recorded. The circuit court's ruling finding that the marital privilege had been waived is more than supported by the record. Graham is due no relief on this claim.

B.

Graham further argues that her conversation with her husband was the functional equivalent of a police interrogation and that, therefore, she should have been advised of her Miranda rights before the conversation took place.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

" 'Interrogation' is not limited to express questioning of a suspect while in custody. ... The concept also embraces any words and conduct of the police that are the functional equivalent of interrogation." Benjamin v. State, 116 So. 3d 115, 121-22 (Miss. 2013). If questioning is the equivalent of an interrogation, Miranda warnings are necessary.

This Court recently addressed a similar issue and stated:

> "The United States Supreme Court addressed this issue more fully in Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), when considering whether the police had interrogated Mauro within the meaning of Miranda [v. Arizona, 384 U.S. 436 (1966),] and [Rhode Island v.] Innis[, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980),] when they permitted him to speak with his wife in the presence of an officer. The Court stated that '[i]n deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in Miranda and Edwards [v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.' Arizona v. Mauro, 481 U.S. at 529–30. The Court further stated:
>
> > ***20** " 'One of the questions frequently presented in cases in this area is whether particular police conduct constitutes "interrogation." In Miranda, the Court suggested in one passage that "interrogation" referred only to actual "questioning initiated by law enforcement officers." 384 U.S. at 444. But this statement was clarified in Rhode Island v. Innis, [446 U.S. 291 (1980)]. In that case, the Court reviewed the police practices that had evoked the Miranda Court's concern about the coerciveness of the " 'interrogation environment.' " 446 U.S. at 299 (quoting Miranda, supra, at 457). The questioned practices included "the use of lineups in which a coached witness would pick the defendant as the perpetrator ... [,] the so-called 'reverse line-up' in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime," and a variety of "psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.' " 446 U.S. at 299 (quoting Miranda, supra, at 450) (brackets by Innis Court). None of these techniques involves express questioning, and yet the Court found that any of them, coupled with the "interrogation environment," was likely to " 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299 (quoting Miranda, supra, at 457). Thus, the Innis Court concluded that the goals of the Miranda safeguards could be effectuated if those safeguards extended not only to express questioning, but also to "its functional equivalent." 446 U.S. at 301. The Court explained the phrase "functional equivalent" of interrogation as including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Ibid. (footnotes omitted). Finally, it noted that "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Ibid.'
>
> "Arizona v. Mauro, 481 U.S. at 526–27.
>
> "The United States Supreme Court reversed the judgment of the Arizona Supreme Court, which had held that the tape recording of the conversation Mauro had with his wife should not have been admitted at trial. The Court stated that Mauro had not been subjected to the functional equivalent of interrogation and noted that, during the couple's brief conversation, the police officer asked Mauro no questions about the crime and that the decision to allow Mauro's wife to see him was not 'the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation.' 446 [481] U.S. at 527 (footnote omitted). The Court also stated that examination of the police officers' actions from Mauro's perspective, as suggested by Innis, indicated that it was unlikely that Mauro felt he was being coerced into incriminating himself when his wife was permitted to speak with him. Finally, the Court held that, even though the officers testified that they knew it was possible that Mauro would incriminate himself if they permitted the couple to speak with one another, there was no interrogation. The Court stated: 'Officers do not interrogate a suspect simply by hoping that he will incriminate himself.' 446 [481] U.S. at 529."

Largin v. State, 233 So. 3d 374, 395-97 (Ala. Crim. App. 2015).

There is no evidence indicating that police used Graham's husband as a ploy to make Graham confess. Indeed, she did not confess during her conversation with her husband. Also, it is clear that Kevin asked to speak to his wife before she was questioned and was not asked or coerced to speak to Graham

by police. The conversation between Graham and her husband was not the functional equivalent of a police interrogation. Therefore, Miranda warnings were not necessary. Graham is due no relief on this claim.

VII.

Graham next argues that the circuit court erred in denying her motion to suppress her statements to police. Specifically, she argues that the statements were not voluntary because she did not waive her right to counsel and, at the time she gave her statements, she was exhausted, confused, and on medication.

The record shows that Graham moved to suppress her statements to police. (C. 160-161.) [11] In that motion, she argued that the statements should be suppressed because they were involuntary. A suppression hearing was held. (R. 2573.) At this hearing, Sheriff Heath Taylor testified that on July 6, 2007, he met with Graham and her husband to inform them that their daughter's body had been discovered and that their daughter had been murdered. (R. 2580.) The next day, Sheriff Taylor met with Kenny Walton, and Walton confessed that he had been hired by Graham to kill Graham's daughter. After that interview, police contacted Graham and she voluntarily came to the police station with her husband, Kevin. Graham was placed in an interview room, and police were going to talk to Graham when Kevin asked police if he could go talk with her. (R. 2585.) About 30 minutes after Kevin entered the room to talk to Graham, Sheriff Taylor entered the room with a standard waiver-of-rights form. As soon as he entered the room, Sheriff Taylor said, Graham started discussing the case. He told her that he could not talk to her until she had been notified of and waived her Miranda rights. (R. 2590.) A waiver-of-rights form was admitted into evidence, and it was signed by Graham. Sheriff Taylor said that, at the time she signed the form, Graham did not appear to be under the influence of any drugs and appeared to understand her rights. He also testified that he did not offer Graham any inducement to make a statement. Sheriff Taylor testified as follows:

> ***21** "[Prosecutor]: Did Lisa Graham at any time request of you that she be given the opportunity to call a lawyer or have a conference with or --
>
> "[Taylor]: No, sir, she --
>
> "[Prosecutor]: -– or have a lawyer present?
>
> "[Taylor]: No, sir, she didn't."

(R. 2591.)

Police interviewed Graham a second time on the evening of July 8 after she was formally arrested. That interview was conducted by Officer Grover Goodrich and Sgt. Rod Costello. (R. 2595.) Sheriff Taylor said that an officer came to his office during the interview to tell him that Graham wanted to talk to him "to tell me the truth." (R. 2597.) During that interview, Sheriff Taylor said, Graham never indicated that she wanted to speak with a lawyer. (R. 2599.) Sheriff Taylor testified as follows:

> "[Prosecutor]: Other than -– other than that statement, and I am paraphrasing, if Jim McKoon [12] -–if Jim McKoon knew I signed [the waiver-of-rights form], he would shit a gold brick. Did she ever mention a lawyer?
>
> "[Taylor]: Well, I -– I don't know if it was the first or second interview, but I do remember another instance of her saying something about Mr. McKoon, and that was when she brought up what meds she was on, and she said I can give you two people to verify my meds; one was Dr. [Edward] Lammons, [Graham's former physician,] and she said you know the other person, and that's Jim McKoon."

(R. 2621.)

Grover Goodrich, a former investigator with the Russell County Sheriff's Department, testified that he was involved in investigating the homicide. He testified that on July 8, 2007, he administered Miranda rights to Graham. Goodrich said that Graham initialed each page of and signed the waiver-of-rights form. According to Goodrich, the statement Graham gave was audiotaped and videotaped, he did not offer her any promises or inducements, and the interview lasted a couple of hours. Goodrich testified:

> "[Prosecutor]: Did [Graham] appear to you to be lucid in every way?
>
> "[Goodrich]: Oh, yes, sir, she was.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"[Prosecutor]: Respond to your questions -– your questions -– as well as you could tell respond to them indicating that she understood them?

"[Goodrich]: Yes, sir."

(R. 2644.) Goodrich stated, at some point, that the interview was "paused" and he was relieved by Sgt. Rod Costello.

Sgt. Costello of the Russell County Sheriff's Department testified that he had observed the interview between Goodrich and Graham. After Goodrich left the interview room, Sgt. Costello said, he went into the room and spoke to Graham for about 10 minutes. He said that Graham told him that she wanted to speak with Sheriff Taylor "and tell him the whole truth and everything that happened." (R. 2872.)

***22** In Graham's second statement, she said that she met Walton at a library, that it was Walton's idea to get rid of Shea by killing her, and that the gun Walton used was hers. However, she said that she did not think that Walton was serious about killing Shea and that she thought he would not go through with the killing.

In reviewing a circuit court's ruling on a motion to suppress a confession, we apply the standard adopted by the Alabama Supreme Court in McLeod v. State, 718 So. 2d 727 (Ala. 1998):

"For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. Ex parte Singleton, 465 So. 2d 443, 445 (Ala. 1985). The initial determination is made by the trial court. Singleton, 465 So. 2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. Marschke v. State, 450 So. 2d 177 (Ala. Crim. App. 1984). ...

"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] at 602, 81 S.Ct. [1860] at 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)."

718 So. 2d at 729 (footnote omitted). See also Ex parte Landrum, 57 So. 3d 77, 83 (Ala. 2010); Ex parte Woods, 789 So. 2d 941, 946 (Ala. 2001).

A.

Graham first argues that her statements were involuntary because, she says, she made several references to an attorney and the police should have followed up on whether Graham wanted an attorney present for questioning.

Here, Graham did not specifically ask for counsel, although she did mention the word attorney during questioning. When Sheriff Taylor first entered the interrogation room occupied by Graham and her husband, the following occurred:

***23** "[Graham]: Do you want me to tell you what I know?

"[Sheriff Taylor]: Well, hold on. No, I don't want you to tell me yet.

"[Graham]: My attorney would shit a gold brick if he knew I signed one of them [a waiver-of-rights form].

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"[Sheriff Taylor]: Well, but the problem is, I understand that, but you've got to make the decision whether you want to talk to me about this case and you want me to tell you what I've been told.

"[Graham]: Kenny called and told me he is pinning it on me."

(R. 1142) (emphasis added). Moments later, the following occurred:

"[Sheriff Taylor]: This says no promise or threats have been made to you, no pressure of any kind, you further state that you can read and write, you completed 12th Grade at Woodland High School in Phenix City, Alabama, and that you understand your rights after having been read to you by me. This top part says that you don't have to talk to me. If you decide to stop talking to me and you want to talk to a lawyer, you can. Nobody can stop you.

"[Graham]: I don't know what kind of crap Kenny told you.

"[Sheriff Taylor]: Well, I'll be glad to tell you word for word what he's told me.

"[Graham]: And I know because we went through this ten times with Shea. The first time the attorney found out that she talked, he chewed her up one side and down the other because it tends to be it comes back and it ain't typed up nothing like it was said.

"[Sheriff Taylor]: Well, I'm not going to do that. I don't know who talked to Shea. I don't know you did any of that, but I can tell you that whatever you and I talk about is going to be, word for word, what you and I talk about. Now, every case is different and everybody thinks different.

"[Graham]: Uh-huh.

"[Sheriff Taylor]: You can stop talking to me, Lisa, any time you get ready to stop talking. And you can sign this saying that nothing's been pressured, and that you don't mind talking to me."

(R. 1144-45) (emphasis added).

"Unlike the right to counsel under the Sixth Amendment, which attaches automatically, the Fifth Amendment right to counsel will attach only when affirmatively invoked by the accused." Reed v. State, 227 S.W.3d 111, 115 (Tex. App. 2006). "The ultimate determination of '[w]hether a statement constitutes an unequivocal request for counsel ... is a question of law,' subject to de novo review." Hathaway v. State, 399 P.3d 625, 629 (Wyo. 2017).

"Not all statements mentioning a lawyer are an effective request for the presence of counsel. See [Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994)]. A suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' Id. at 459, 114 S.Ct. at 2355. The inquiry is entirely objective -– the subjective expectations of the suspect are irrelevant."

Burrell v. Commonwealth, 58 Va. App. 417, 429, 710 S.E.2d 509, 515 (2011). "An invocation must be clear and unambiguous; the mere mention of the word 'attorney' or 'lawyer' without more, does not automatically invoke the right to counsel." Dinkins v. State, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995).

***24** A Texas Court of Appeals in Molina v. State, 450 S.W.3d 540, 547 (Tex. App. 2014), considered whether the defendant's statement –- "If I'm getting blamed for something like that ... I'm going to just go ahead and call my lawyer" –- was sufficient to invoke the defendant's right to counsel. The court stated: "Appellant's statement was not in the form of a request, nor did appellant expressly say that he wanted a lawyer. We hold that, under the circumstances presented here, appellant's statement was not a clear and unambiguous request for counsel." 450 S.W.3d at 547.

"Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' McNeil v. Wisconsin, 501 U.S. [171] at 178 [111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid. ('[T]he

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards [v. Arizona]'); Edwards v. Arizona, supra, 451 U.S. [477] at 485 (1981)] (impermissible for authorities 'to reinterrogate an accused in custody if he has clearly asserted his right to counsel') (emphasis added).

"Rather, the suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' Smith v. Illinois, 469 U.S. [91] at 97-98 [105 S.Ct. 490, 83 L.Ed.2d 488 (1984)] (brackets and internal quotation marks omitted). Although a suspect need not 'speak with the discrimination of an Oxford don,' post, at 476 (Souter, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. See Moran v. Burbine, 475 U.S. 412, 433, n. 4 [106 S.Ct. 1135, 89 L.Ed.2d 410] (1986) ('[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney') (citations and internal quotation marks omitted)."

Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

Clearly, the above statements that Graham made were not clear and unambiguous requests for counsel but merely comments that mentioned an attorney. Graham did not invoke her right to counsel and is due no relief on this claim.

B.

Graham also argues that her statements were involuntary because, she says, she was tired, confused, and on medication when she made them.

As noted above, the officers testified that Graham did not appear confused and that she appeared lucid. "A defendant's ... use of drugs at the time of a confession [is] ... considered, but [does] not render a confession involuntary." State v. Aten, 130 Wash. 2d 640, 664, 927 P.2d 210, 222 (1996). "The fact that a defendant is in pain or taking pain medication does not, in and of itself, render any statement made involuntary." Larry v. State, 266 Ga. 284, 286, 466 S.E.2d 850, 853 (1996).

"Statements made under the influence of sedatives, pain-killers, or other drugs are voluntary unless the drug renders 'the mind of the defendant ... substantially impaired ... [so] as to make [the] individual unconscious of the meaning of his words.' Watkins v. State, 495 So. 2d 92, 99 (Ala. Cr. App. 1986). The trial court was warranted in finding that the appellant did not establish that he was under the influence of Demerol to the degree that it rendered his statements involuntary. See Cleckler v. State, 570 So. 2d 796, 804 (Ala. Cr. App. 1990); Holladay v. State, 549 So. 2d 122, 127 (Ala. Cr. App. 1988), affirmed, 549 So. 2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989); Cross v. State, 536 So. 2d 155, 158–59 (Ala. Cr. App. 1988)."

***25** Nelson v. State, 623 So. 2d 432, 435 (Ala. Crim. App. 1993).

Based on the totality of the circumstances, we hold that the circuit court did not abuse its discretion in denying Graham's motion to suppress her statements to police. See McLeod, supra. Graham is due no relief on these claims.

VIII.

Graham next argues that the circuit court erred in limiting her attorney's ability to cross-examine the State's key witness. Specifically, Graham argues that she was not allowed to question Kenny Walton about what he told Graham and her daughter about killing a man named Earl Taylor in Georgia. She asserts that the day after Shea was killed Shea was scheduled to appear in a Georgia court on pending charges, and, Graham says, Shea could have used the information about Walton's involvement in the Taylor killing to get leniency on her pending case. Graham argues that evidence of Earl Taylor's death, allegedly at the hands of Walton, was evidence that Walton had his own motive to kill Shea.

The record shows that before Walton testified a hearing was held at which Walton's attorney was present. The State moved that Graham be prohibited from presenting any evidence suggesting that Walton had "killed another man named Earl Taylor." (R. 2894.) The State asserted that Walton had never been charged with that crime and that there was no evidence indicating that Walton had killed Taylor. The circuit court indicated that it agreed with the State that such evidence was not admissible but that, if the issue arose at trial, Graham should ask for a hearing outside the presence of the jury. (R.

2899.) During Walton's cross-examination, Graham moved that a hearing be held. The following occurred:

"The Court: It doesn't have anything to do with [Earl] Taylor.

"[Defense counsel]: No. But the thing is, she was in the process -– they had -– they had both been told by Mr. Walton that he killed Earl Taylor. And there had been inquiries -– and there had been inquiries ever since this case started about the weapons that were used and -– and trying to check these weapons to see through [a police officer] in Muscogee County Sheriff's Office.

"[Walton's attorney]: Well, Judge, I don't think I need much discussion. If you're allowed -– if [defense counsel] is allowed to ask that, I am going to be advising [Walton] to take the Fifth.

"....

"The Court: Well, right now I am not going to allow the question in front of the jury. As far as I know, there is -– Mr. Walton -– here it is 2015 [9 or 10 years since Taylor's murder and Walton] has never been charged with that."

(R. 3018-20.)

At trial, the discussion surrounding this issue was confusing. Graham makes a more detailed argument in her brief to this Court. It appears that whether Shea intended to use the information concerning Taylor's death was purely speculation on the part of Graham and not based on any evidence. In fact, the only evidence indicating that Graham and Shea knew anything about Taylor's death were Graham's own statements. Graham presented no evidence at trial that Shea intended to capitalize on this information. Graham relies on Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), to support her argument that the circuit court committed reversible error in excluding this information.

***26** "Alabama courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. See Ex parte Walker, 623 So. 2d 281 (Ala. 1992); Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988); Green v. State, 258 Ala. 471, 64 So. 2d 84 (1953); Underwood v. State, 239 Ala. 29, 193 So. 155 (1939); Orr v. State, 225 Ala. 642, 144 So. 867 (1932); Houston v. State, 208 Ala. 660, 95 So. 145 (1923); Tennison v. State, 183 Ala. 1, 62 So. 780 (1913); McGehee v. State, 171 Ala. 19, 55 So. 159 (1911); McDonald v. State, 165 Ala. 85, 51 So. 629 (1910). In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:

" 'It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one.'

"Charles W. Gamble, McElroy's Alabama Evidence § 48.01(1) (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence "must relate to the 'res gestae' of the crime"; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence "would have to be admissible if the third party was on trial." See Ex parte Walker, 623 So. 2d at 284, and Thomas, 539 So. 2d at 394–96."

Ex parte Griffin, 790 So. 2d at 354–55.

Graham's purported evidence that Shea could have used the death of Earl Taylor to her advantage was based on pure speculation and "would [have] serve[d] only to confuse the jury. ..." Petric v. State, 157 So. 3d 176, 217 (Ala. Crim. App. 2013). As the circuit court noted, Walton had not been charged with Taylor's murder and over nine years had passed since Taylor's death. This evidence was properly excluded, and its exclusion did not prevent Graham from properly cross-examining Walton. Graham is due no relief on this claim.

IX.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Graham next argues that the circuit court erred in allowing evidence of prior bad acts that Graham committed against Shea to be admitted into evidence. Specifically, Graham challenges the introduction of evidence that was admitted during two state witnesses' testimony -– Stephanie Vasquez and Kevin Graham.

A.

First, Graham argues that the circuit court erred in allowing the State to question Stephanie Vasquez about Graham's prior treatment of her daughter. She asserts that the evidence was too remote and its admission violated Rule 404(b), Ala. R. Evid., and the Supreme Court's holding in Ex parte Boone, 228 So. 3d 993 (Ala. 2016).

> "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."

***27** Rule 404(b), Ala. R. Evid.

The Alabama Supreme Court in Boone held that evidence of the defendant's gang membership was not admissible under Rule 404(b), because there was no evidence that the murder the defendant was accused of committing had been gang affiliated. However, the quote that Graham cites in her brief is not from the main opinion in Boone but from Justice Shaw's special concurrence. Justice Shaw wrote that Rule 404(b) evidence is "admissible only when it is relevant to the crime charged and is not so remote as to lose its relevancy." 228 So. 3d at 999. In fact, Boone does not address the issue of remoteness as that term applies to Rule 404(b).

Here, the record shows that Vasquez testified that she grew up with Shea and that they were best friends and spent a lot of time together before she went into foster care at 12 years of age. Vasquez was asked to characterize the relationship between Graham and her daughter. Defense counsel objected and argued that Vasquez only had daily contact with Shea until she was about 11 years old and that that was over 10 years earlier and too remote. Vasquez then testified that she had spent weekends with the Graham family after she went into foster care and had maintained contact with Shea. Vasquez testified:

> "So when Lisa would pick me up for the weekends, she would be very negative towards Shea. Shea could never do anything right. Shea –- Shea was always fat. Shea was always dirty. Her room was never clean. Shea was -– she was always negative. Never said anything positive towards Shea. And that was her attitude towards Shea when I was a child and was around Shea."

(R. 3095-96.)

"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. Crim. App. 1990).

> "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)."

Hunt v. State, 659 So. 2d 933, 939 (Ala. Crim. App. 1994). "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." I Charles W. Gamble & Robert I. Goodwin, McElroy's Alabama Evidence § 45.01(8) (6th ed. 2009).

> "The testimony concerning the appellant's other prior bad acts against the victim and her brother was also admissible as exceptions to the exclusionary rule. Evidence of these other bad acts was not admitted to show the appellant's bad character, but rather was admissible under the motive, intent, and common plan or scheme exceptions to the exclusionary rule.
>
> > " ' "In a prosecution for murder, evidence of recent abuse to the child by the accused is admissible to show 'intent, motive or scienter.' ... 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)

(citations omitted). See also Baker v. State, 441 So. 2d 1061, 1062 (Ala. Cr. App. 1983).'

***28** "Eslava v. State, 473 So. 2d 1143, 1146 (Ala. Cr. App. 1985). See also Burkett v. State, 439 So. 2d 737, 748–49 (Ala. Cr. App. 1983).

"Evidence of these prior bad acts was also admissible to show a common plan and scheme by the appellant, as indicated by the testimony of a State's witness who stated that the appellant had told her that he treated the children in such a manner because he was 'training' them and because he did not want them. 'Evidence of the accused's commission of another crime is admissible if such evidence, considered with other evidence in the case, warrants a finding that both the now-charged crime and such other crime were committed in keeping with or pursuant to a single plan, design, scheme, or system, whether narrow or broad in scope.' Nicks v. State, 521 So. 2d 1018, 1027 (Ala. Cr. App. 1987), affirmed, 521 So. 2d 1035 (Ala. 1988), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988), citing C. Gamble, McElroy's Alabama Evidence § 69.01(6) (3d ed. 1977)."

Harvey v. State, 579 So. 2d 22, 26 (Ala. Crim. App. 1990).

" 'Neither the Alabama Rules of Evidence nor Alabama caselaw sets a specific time limit for when a collateral act is considered too remote, other than a conviction for impeachment purposes.' " Bedsole v. State, 974 So. 2d 1034, 1040 (Ala. Crim. App. 2006), quoting McClendon v. State, 813 So. 2d 936, 944 (Ala. Crim. App. 2001). "The remoteness of a collateral act goes to the weight of the evidence rather than its admissibility." Siler v. State, 705 So. 2d 552, 557 (Ala. Crim. App. 1997).

The circuit court did not abuse its discretion in allowing the State to question Vasquez about Graham's prior treatment of her daughter, the victim. Any issue concerning the remoteness of the evidence affected its weight, not its admissibility. Graham is due no relief on this claim.

B.

Second, Graham argues that the circuit court erred in allowing Kevin Graham to testify concerning the relationship between Graham and Shea because, she says, it was highly prejudicial.

The following occurred during Kevin's testimony:

"[Prosecutor]: What was the relationship to the best of your knowledge between Shea and her mother, [Graham] here, in the months leading up to July the 5th of 2007?

"[Kevin Graham]: They did not get along at all.

"[Prosecutor]: Did you ever -– did you ever see any violence between your wife [Graham] and your daughter Shea?

"[Kevin Graham]: Yes, sir.

"[Prosecutor]: How many times?

"[Kevin Graham]: A couple of times.

"[Prosecutor]: Did you ever see your wife point that gun at your daughter?

"[Kevin Graham]: Yes, sir."

(R. 3549-50.) Graham did not object to this testimony; therefore, we are limited to determining whether there is plain error. See Rule 45A, Ala. R. App. P.

As stated above, "violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim." State v. Smith, 868 S.W.2d 561, 574 (Tenn. 1993).

***29** Moreover, the evidence was not due to be excluded because its admission was more prejudicial than probative. As this Court stated in Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ––– So. 3d –––– (Ala. Crim. App. 2017):

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

" 'In making ... a determination [as to whether the prejudicial effect of the collateral-act evidence

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

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

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

"In this case, evidence of the prior altercations was reasonably necessary to the State's case to establish Floyd's intent and motive. As noted above, Floyd placed his intent at issue when he asserted intoxication and evidence of motive is always admissible. Additionally, the evidence of the prior altercations was clear and conclusive and highly relevant to establishing Floyd's intent and motive in killing Jones"

—— So. 3d at ——.

Here, the evidence was relevant to show Graham's motive and intent for killing Shea. Graham's motive and intent were in dispute at trial. Accordingly, there was no error, much less plain error, in the State's asking Kevin about Graham's relationship with her daughter Shea. Graham is due no relief on this claim.

C.

Graham further argues that the error in admitting the evidence discussed in Parts IX.A. and IX.B. was compounded because, she says, the court did not give a limiting instruction on the use of the evidence.

There was no request for a limiting instruction; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The Alabama Supreme Court in Johnson v. State, 120 So. 3d 1119 (Ala. 2006), held that when prior bad acts are introduced as substantive evidence of guilt there is no plain error when a court fails to sua sponte give a limiting instruction on the use of that evidence.

***30** "This Court has required a trial court to instruct the jury sua sponte 'only [in] those instances where evidence of prior convictions [were] offered for impeachment purposes.' Johnson v. State, 120 So. 3d 1119, 1128 (Ala. 2006)(citing Ex parte Martin, 931 So. 2d [759] at 769 [(Ala. 2004)]). In such cases, the trial court has been required to issue a sua sponte instruction because, in light of the facts in those particular cases, an instruction was considered necessary to protect the defendant from the misuse of 'presumptively prejudicial' information that could be considered by the jury for a limited purpose. Ex parte Minor, 780 So. 2d 796, 804 (Ala. 2000)."

Ex parte Bohannon, 222 So. 3d 525, 534 (Ala. 2016).

Accordingly, for the reasons stated in Bohannon, there is no plain error in the circuit court's failure to sua sponte give a limiting instruction on use of the prior-bad-acts evidence. Graham is due no relief on this claim.

X.

Graham next argues that the State failed to present sufficient evidence that the murder was committed for pecuniary gain or for other valuable consideration. She further argues that she was not given sufficient notice of the crime for which she was to defend against. Graham asserts that the State presented no evidence indicating that Walton received any financial reward for killing Shea, only that Graham promised to do Walton a "favor," and that that is not sufficient, she argues, to comply with the capital-murder statute regarding pecuniary gain. Furthermore, there was a variance, Graham argues, between the evidence presented at trial and the indictment because there was no proof that money was exchanged for the killing.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

The State argues that Graham focuses on the testimony of 1 witness and not the other 19 witnesses who testified. The State contends that there was evidence demonstrating that Graham intended to give money to the person who killed her daughter –– though no amount was ever specified. The State asserts: "Indeed, the State presented evidence of Walton's attempt to cash in on the 'favor' when he called Graham and asked her if she could hire a lawyer or post his bond. In other words, Walton sought something of economic value for murdering Shea." (State's brief at p. 24.)

Graham was indicted for violating § 13A-5-40(a)(7), Ala. Code 1975. The indictment charged:

> "Lisa L. Graham, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Stephanie S. Graham, by shooting her with a pistol, for a pecuniary or other valuable consideration or pursuant to a contract or for hire, to-wit: Lisa L. Graham solicited or contracted with, or requested, or commanded or importuned Kenneth R. Walton to cause the death of Stephanie S. Graham, and Lisa L. Graham promised or agreed to give the said Kenneth R. Walton an unspecified sum of United States currency or other valuable consideration, a further and better description being otherwise unknown to the grand jury, in return for the said Kenneth R. Walton causing the death of Stephanie S. Graham."

(C. 81) (emphasis added).

The indictment tracked the language of the statute. Section 13A-5-40(a)(7) provides that a capital murder is committed when the "murder [is] done for a pecuniary or other valuable consideration or pursuant to a contract or for hire." (Emphasis added.) The statute is written in broad terms, as evidenced by the legislature's use of the word "or" instead of "and." Indeed, this Court has discussed the broad application of § 13A-5-40(a)(7). In Harris v. State, 632 So. 2d 503 (Ala. Crim. App. 1992), we held that an indictment that charged murder for "a pecuniary or other valuable consideration or pursuant to a contract or for hire" was an indictment that charged "alternative methods" of proving the same capital offense. 632 So. 2d at 514. We further stated:

> ***31** "[T]he appellant argues that the instruction was error because it did not require the unanimity as to one of the alternative theories of the capital offense, i.e., murder for hire, murder pursuant to a contract, or murder for pecuniary gain. However, because we have previously concluded that the jury did not have to decide between this alternative language, the trial court committed no error in its instructions. See Schad v. Arizona, [501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)] (it was constitutionally permissible for the jurors to agree on a unanimous verdict based on any combination of the alternative means to a single offense. 501 U.S. at 624, 111 S.Ct. at 2493–506."

Harris, 632 So. 2d at 515.

In discussing the sufficiency of the evidence to sustain a conviction, this Court has stated:

> " 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. Faircloth v. State, 471 So. 2d 485 (Ala. Cr. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985).' Powe v. State, 597 So. 2d 721, 724 (Ala. 1991). It is not the function of this Court to decide whether the evidence is believable beyond a reasonable doubt, Pennington v. State, 421 So. 2d 1361 (Ala. Cr. App. 1982); rather, the function of this Court is to determine whether there is legal evidence from which a rational finder of fact could have, by fair inference, found the defendant guilty beyond a reasonable doubt. Davis v. State, 598 So. 2d 1054 (Ala. Cr. App. 1992). Thus, '[t]he role of appellate courts is not to say what the facts are. [Their role] is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (1978) (emphasis original)."

Ex parte Woodall, 730 So. 2d 652, 658 (Ala. 1998).

> "Section 13A–5–40(a)(7) makes capital the offense of '[m]urder done for pecuniary or other valuable consideration or pursuant to a contract or for hire' (emphasis added). We do not adhere to the appellant's position that to prove a prima facie case of the offense charged the state must show that the appellant was in actual possession of the gain for which the appellant allegedly committed the offense. It is enough to show that he acted in anticipation of receiving pecuniary gain. See Henderson v. State, 584 So. 2d 841, 859 (Ala. Crim. App. 1988), where we stated, ' "[P]ecuniary gain" does not refer to the fruits of the offense, but to the situation where one is hired or paid to commit the offense.' "

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Gospodareck v. State, 666 So. 2d 835, 842 (Ala. Crim. App. 1993) (footnote omitted).

> " ' "In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution." ' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998) (quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985)). ' "The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt." ' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997) (quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)). ' "When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision." ' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998) (quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990)). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978)."

***32** McGlocklin v. State, 910 So. 2d 154, 156 (Ala. Crim. App. 2005).

Here, at the conclusion of the State's case, Graham moved for a judgment of acquittal. She argued that the State had failed to prove that any money exchanged hands for the murder. (R. 3991.) A lengthy discussion was held on this issue. Graham repeatedly argued that the State had failed to prove that any money exchanged hands. The circuit court stated that "it doesn't have to necessarily be money" and denied the motion. (R. 4002.) It relied, in part, on Sockwell v. State, 675 So. 2d 4 (Ala. Crim. App. 1993), and Henderson v. State, 584 So. 2d 841 (Ala. Crim. App. 1988).

The circuit court cited Sockwell and Henderson when denying Graham's motion for a judgment of acquittal. This Court in Sockwell stated:

> "The corpus delicti may be established by circumstantial evidence. Spear v. State, 508 So. 2d 306, 308 (Ala. Crim. App. 1987), cert. denied, 537 So. 2d 67 (Ala. 1988); Johnson [v. State], 473 So. 2d [607] at 610 [(Ala. Crim. App. 1985)]. The evidence in this case established that the victim's wife, codefendant Louise Harris, stood to gain thousands of dollars in insurance proceeds as a result of her husband's death. This fact was stipulated to by the parties in this case. The appellant argues, however, that there was no independent evidence that he would gain any money or other consideration as a result of the victim's death. However, Patterson testified that after the voice on the pager stated that the victim was leaving and again after the shooting when the appellant returned to Hood's vehicle and said that 'he was gonna get his money.' Clearly, this circumstantial evidence coupled with the other evidence that McCarter had been trying to hire someone to kill the victim was sufficient to establish that the appellant shot the victim for pecuniary gain."

Sockwell, 675 So. 2d at 21 (emphasis added).

In Henderson, this Court addressed the definition of "pecuniary gain" in § 13A-5-40(a)(7) and stated:

> "In Alabama, while 'pecuniary gain' is not defined by the Code, the similar term 'pecuniary benefit' is defined under the article dealing with bribery and corrupt influence, in § 13A-10-60(b)(2), [Ala. Code 1975,] as follows:
>
> > " 'Benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. ...'
> >
> > "....
>
> "In construing the term 'hire,' as encompassed in 'murder for hire,' we will first look to the terms's ordinary meaning. ' "Webster defines the noun hire as 'the price, reward, or compensation paid, or contracted to be paid for ... personal service, or for labor.' It is also defined as 'the price or compensation for labor and services.' 29 C.J. 756." ' State v. Kenyon, Inc., 153 S.W.2d 195 (Tex. Cir. App. 1941). See also State v. Welch & Brown, 187 Okl. 470, 471, 103 P.2d 533, 534 (1940).
>
> > " ' "The element of price or reward is inherent in the word 'hire.' A contract of hire, therefore, would be a most unusual undertaking if it did not involve something by way of recompense; and we think that no such unusual use of words was intended by the legislature in this instance.' "

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

***33** "Evans v. Phoenix Insurance Co., 175 So. 2d 425, 430 (La. Ct. App. 1965)."

Henderson, 584 So. 2d at 859.

Moreover, this Court in Haney v. State, 603 So. 3d 368 (Ala. Crim. App. 1991), held: "[T]he state did not have to prove that appellant benefitted financially from the commission of the offense, only that the crime itself was committed for pecuniary gain." 603 So. 2d at 381.

> "We agree with the State that § 13A-5-40[(a)](7), Code of Alabama 1975, requires proof (1) of an intentional murder, and (2) that the murder was committed for pecuniary gain, pursuant to a contract, or for hire. The statute does not require the State to establish that the appellant, himself, rather than his accomplices, received the pecuniary gain, only that the murder was committed for pecuniary gain. In this case, the parties stipulated that Louise Harris stood to receive thousands of dollars in insurance proceeds as a result of her husband's death."

Sockwell, 675 So. 2d at 24-25 (emphasis added).

The Indiana Supreme Court in Norton v. State, 273 Ind. 635, 408 N.E.2d 514 (1980), considered the definition of "hire" as that term applied to Indiana's murder-for-hire statute. The court stated:

> "Appellant contends that, to constitute a hiring under this statute,[13] there must be an actual exchange of something of value for a service. He asserts that a promise of money in exchange for a killing is not a sufficient hiring.
>
> "We disagree. Appellant's proposed definition of 'hire' covers a much narrower range of activity than we think the legislature intended. We note, for example, that Black's Law Dictionary defines 'hire' as: 'To purchase the temporary use of a thing, or to stipulate for the labor or services of another.' 'The words the legislature chose are not to be given strict connotations within the narrow parameters of the statutory definitions of crimes.' Carson v. State, (1979) [271] Ind. [203], 391 N.E.2d 600, 602. A murder for hire under this statute has been committed when one offers or promises compensation to another for performing a killing, and the other person commits the murder pursuant to or in response to this offer or promise. We are not persuaded that 'money or something of value' must, in fact, change hands before or after the killing, for there to have been a 'hiring.' An intervening factor, such as the apprehension or surrender of the perpetrator after the killing, would not alter the fact that a murder pursuant to a hiring had been committed. Likewise, if, subsequent to the killings, the offeror refused to pay the perpetrator as he had promised, this refusal would not alter the fact that the perpetrator had been hired before the killing."

273 Ind. at 670-71, 408 N.E.2d at 537 (emphasis added).

Based on the cases cited and quoted above, the "pecuniary gain" in § 13A-5-40(a)(7) may be a gain to the hirer in the form of insurance proceeds or other financial benefits. See Sockwell, supra. The "pecuniary gain" to the hiree may be in a form other than money, i.e., goods, property, etc. See Henderson, supra. Also, the fact that Walton had received no benefit before the murder did not negate the application of § 13A-5-40(a)(7). See Norton, supra. Moreover, given this Court's holding in Harris, the State was not required to prove every definition of capital murder listed in § 13A-5-40(a)(7) because the indictment, which mirrored the statute, defined alternative methods of proving the same capital offense. See Harris, supra.

***34** Here, during Walton's direct examination, the following occurred:

> "[Prosecutor]: Mr. Walton, who fired the shots that killed Shea Graham?
>
> "[Walton]: I did.
>
> "[Prosecutor]: Why did you do it?
>
> "[Walton]: Because [Graham] asked me to do her a favor.
>
> "[Prosecutor]: Did she -— other than asking you to do her a favor, did -— did she in any way offer you anything in return for doing that?
>
> "[Walton]: She told me I owed her this favor because I had been covering up for her husband seeing my cousin.
>
> "[Prosecutor]: What -— what -— what did that mean to you, that you had been covering up for her husband and your cousin?
>
> "[Walton]: I mean I had been hiding stuff from her and she wanted me to do her a favor by killing her daughter in return.
>
> "[Prosecutor]: Anything else?

"[Walton]: I shot and killed her.

"[Prosecutor]: Well, my question is, did she promise you or offer you anything else?

"[Defense counsel]: Judge, we are going to object to leading.

"The Court: It's been asked and answered, but I will let you pursue it. Rephrase it.

"[Prosecutor]: Did you expect anything else?

"[Walton]: Yes, sir. She never said what she was going to give me, but she said if I needed anything, just call her."

(R. 2945-46.)

Walton testified that he expected to receive "something" for killing Shea in addition to the favor that Graham promised him. In her statement, Graham said: "[I]n all honesty, [I] told [Walton] I'd give anything, and I didn't quote a number, if somebody would just do something with Shea." (C. 1201.) Graham also stated during her conversation with her husband that Walton had telephoned her to ask her to "make his bond" and that Graham had not said no but had asked "how much" was the bail. Stephen Hemilburger also testified that Graham had offered him $5,000 to kill Shea. (R. 3480.) There was also evidence indicating that the Grahams had provided a cash bond for Shea in the amount of $100,000 [14] when Shea was arrested and charged with a drive-by shooting and that Graham had feared that that money would be forfeited because of Shea's bad conduct. [15] (C. 1303.) It is clear from the testimony at trial and Graham's statements to police that Walton did not commit the murder for nothing and that he expected some type of benefit from Graham, that Graham believed that getting rid of Shea would save her a great deal of money, and that Shea's murder would keep the Grahams from forfeiting the $100,000 cash bond that had been posted for Shea. There was sufficient evidence for the jury to conclude, beyond a reasonable doubt, that Graham had "hired" Walton to kill Shea and that Walton had expected some remuneration in return.

Moreover, there was no variance, fatal or otherwise, between the indictment and the proof at trial.

"A fatal variance between allegations in an indictment and proof of those allegations presented at trial exists when the State fails to adduce any proof of a material allegation of the indictment or where the only proof adduced is contrary to a material allegation in the indictment. Johnson v. State, 584 So. 2d 881, 884 (Ala. Crim. App. 1991). 'Alabama law requires a material variance between the indictment and the proof adduced at trial before a conviction will be overturned. Ex parte Collins, 385 So. 2d 1005 (Ala. 1980).' Brown v. State, 588 So. 2d 551, 558 (Ala. Crim. App. 1991)."

***35** Bigham v. State, 23 So. 3d 1174, 1177 (Ala. Crim. App. 2009).

"A variance in the form of the offense charged in the indictment and the proof presented at trial is fatal if the proof offered by the State is of a different crime, or of the same crime, but under a set of facts different from those set out in the indictment. Ex parte Hightower, 443 So. 2d 1272, 1274 (Ala. 1983)."

Ex parte Hamm, 564 So. 2d 469, 471 (Ala. 1990).

There was no proof at trial that a different crime was committed from the one charged in the indictment; therefore, there was no fatal variance in this case. Thus, Graham is due no relief on this claim.

XI.

Graham next argues that the prosecutor's misconduct in the guilt phase denied her a fair trial. Specifically, Graham argues that the prosecutor asked improper questions of witnesses and made improper arguments in closing. We consider each claim individually.

A.

First, Graham argues that the prosecutor improperly bolstered the credibility of two state witnesses during their testimony.

" 'Generally, the proponent of a witness may not bolster the credibility of a witness by showing that he made similar statements on prior occasions. Marcum v. State, 39 Ala. App. 616, 107 So. 2d 899 (Ala. Cr. App. 1958.)' " Snyder v. State,

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

893 So. 2d 488, 524 (Ala. Crim. App. 2003), quoting Varner v. State, 497 So. 2d 1135, 1137 (Ala. Crim. App. 1986).

1.

First, Graham argues that the circuit court erred in allowing Rachel Cunningham to testify that she had previously testified in Graham's first trial and that her testimony at the second trial was consistent with that testimony. The following occurred:

> "[Prosecutor]: And this is the second time you have come to testify. Is that correct?
>
> > "[Defense counsel]: Judge, we are going to object. That's not relevant.
> >
> > "The Court: Overruled. He can ask that.
>
> "[Prosecutor]: You have testified before in this case, did you not?
>
> "[Cunningham]: Yes, sir.
>
> "[Prosecutor]: Okay. Did you -– did you testify as to the same thing then that you testified to now?
>
> "[Cunningham]: Yes, sir."

(R. 3473.) At trial, Graham made a different objection than the argument she makes on appeal. Graham objected that the testimony was not relevant, but on appeal Graham argues that the evidence was elicited to bolster Cunningham's credibility. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Graham relies on Varner v. State, 497 So. 2d 1135 (Ala. Crim. App. 1986), to support her argument. In Varner, we stated: "Generally, the proponent of a witness may not bolster the credibility of a witness by showing that he made similar statements on prior occasions. Marcum v. State, 39 Ala. App. 616, 107 So. 2d 899 (Ala. Cr. App. 1958)." 497 So. 2d at 1137. "The reasons for this rule is that such evidence is hearsay and is inadmissible unless an exception can be found." People v. Henry, 569 N.Y.S.2d 905, 906, 150 Misc. 2d 700, 702 (1991).

The above-quoted testimony was elicited on redirect examination after Cunningham's credibility had been attacked on cross-examination. The contents of her prior testimony were not admitted, merely the fact that she had previously testified consistent with her trial testimony. The State asserts that this testimony was not hearsay pursuant to Rule 801(d)(1)(B), Ala. R. Evid., and was admissible. That rule provides that a statement is not hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication, or improper influence or motive. ..."

***36** Regardless of whether the above testimony meets the requirements of Rule 801(d)(1)(B), we find no error that rises to the level of plain error. "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).

Moreover, if any error did occur, we are confident that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). For these reasons, we find no plain error. Graham is due no relief on this claim.

2.

Graham also challenges the following testimony that occurred during Sheriff Taylor's examination.

> "[Prosecutor]: Did [Walton], in fact, act out for you, if you will, at one point what he did at that -–down there on Bowden Road?
>
> "[Sheriff Taylor]: He did.
>
> "[Prosecutor]: And the things he told you about what happened on Bowden Road, did they comport with the evidence as you knew it?
>
> > "[Defense counsel]: Judge, we are going to object at this point to his supposition, as far as what he thought Kenny Walton told him being true or not true.
> >
> > "The Court: Well, --
> >
> > "[Prosecutor]: Judge --
> >
> > > "The Court: -– he didn't say that. He just said did it comport to the other evidence that he is -– so overruled."

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(R. 3841-42.)

Sheriff Taylor never answered the now-challenged question. "Since the questions were not answered, reversible error does not appear." Embrey v. State, 283 Ala. 110, 116, 214 So. 2d 567, 573 (1968). "[T]he witness did not answer, consequently, under the rule of our cases, reversible error is not shown in this connection." Woodard v. State, 253 Ala. 259, 263, 44 So. 2d 241, 244 (1950). "[R]eversible error cannot be predicated upon the overruling of an objection to a question which is not answered." Haisten v. State, 50 Ala. App. 504, 506, 280 So. 2d 209, 211 (1973). Thus, Graham is due no relief on this claim.

B.

Graham next argues that the prosecutor's closing arguments in the guilt phase were erroneous. When reviewing a prosecutor's challenged remarks made in closing, we keep in mind the following:

> "Wide discretion is allowed the trial court in regulating the arguments of counsel. Racine v. State, 290 Ala. 225, 275 So. 2d 655 (1973). 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, ... each case must be judged on its own merits,' Hooks v. State, 534 So. 2d 329, 354 (Ala. Cr. App. 1987), aff'd, 534 So. 2d 371 (Ala. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citations omitted) (quoting Barnett v. State, 52 Ala. App. 260, 264, 291 So. 2d 353, 357 (1974)), and the remarks must be evaluated in the context of the whole trial, Duren v. State, 590 So. 2d 360 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991). 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' Mitchell v. State, 480 So. 2d 1254, 1257–58 (Ala. Cr. App. 1985) (citations omitted). 'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.' Twilley v. State, 472 So. 2d 1130, 1139 (Ala. Cr. App. 1985) (citations omitted)."

Coral v. State, 628 So. 2d 954, 985 (Ala. Crim. App. 1992).

***37** "Criminal trials are adversary proceedings ... and not social affairs. Argument of counsel should not be so restricted as to prevent reference, by way of illustration, to historical facts and public characters, or to principles of divine law or biblical teachings." Wright v. State, 279 Ala. 543, 550-51, 188 So. 2d 272, 279 (1966).

> "[C]ounsel is afforded broad latitude in closing argument. This latitude, set out by the Court in Nelms & Blum Co. v. Fink, 159 Miss. 372, 382-383, 131 So. 817, 820 (1930), has been referred to in the context of capital cases. In Nelms, we stated that '[c]ounsel may draw upon literature, history, science, religion, and philosophy for material for his argument.' Id. at 382-384, 131 So. 817. See Hansen v. State, 592 So. 2d 114, 139-140 (Miss. 1991); Shell v. State, 554 So. 2d 887, 899 (Miss. 1989), vacated on other grounds, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990); Johnson v. State, 416 So. 2d 383, 391 (Miss. 1982)."

Carr v. State, 655 So. 2d 824, 853 (Miss. 1995).

> "The test of a prosecutor's legitimate argument is that whatever is based on facts and evidence is within the scope of proper comment and argument. Kirkland v. State, 340 So. 2d 1139 (Ala. Cr. App. [1976]), cert. denied, 340 So. 2d 1140 (Ala. [1977]). Statements based on facts admissible in evidence are proper. Henley v. State, 361 So. 2d 1148 (Ala. Cr. App.), cert. denied, 361 So. 2d 1152 (Ala. 1978). A prosecutor as well as defense counsel has a right to present his impressions from the evidence. He may argue every legitimate inference from the evidence and may examine, collate, sift, and treat the evidence in his own way. Williams v. State, 377 So. 2d 634 (Ala. Cr. App. 1979); McQueen v. State, 355 So. 2d 407 (Ala. Cr. App. 1978)."

Watson v. State, 398 So. 2d 320, 328 (Ala. Crim. App. 1980). "Claims of prosecutorial misconduct are subject to harmless-error analysis." Bonner v. State, 921 So. 2d 469, 473 (Ala. Crim. App. 2005).

1.

First, Graham argues that the prosecutor improperly made the following argument in closing:

> "I want you to also remember when you think about that, that Kevin Graham testified here, that he heard [Graham] admit to Papa [Warren Thompson] that she took the gun to him and asked him to clean it."

(R. 4067.) In her brief, Graham argues: "The prosecutor sought to prove Ms. Graham's consciousness of guilt by arguing that she asked Warren Thompson to clean her gun the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

day after Shea's death." (Graham's brief at p. 70.) However, in the challenged argument the prosecutor did not state that Graham had given the gun to be cleaned the day after Shea was killed.

There was evidence indicating that the gun was given to Thompson for him to clean. Kevin stated in his conversation with Graham: "Papa [Thompson] said you brought him the gun Friday [the day after Shea's body was found] and it had rust on it." (R. 1110.) Walton also testified that Thompson got the gun he used in order to clean it. Sergeant Costello testified that the police retrieved the gun from Thompson. (R. 2847.) Clearly, the prosecutor's remarks were based on the evidence and did not constitute error.

2.

Graham also argues that the following argument was erroneous: "That cell phone [Graham's cellular telephone] has never been found in this whole investigation. It's never been located." (R. 4170.) After this argument was made, defense counsel then stated:

> ***38** "Judge, we are going to object to him arguing matters that are not in evidence. And I have tried to be lenient when he argued the first time, but we object to him arguing matters that are not in evidence."

(R. 4170-71.) The circuit court overruled the objection. After this discussion, the prosecutor then made the following comments:

> "If I say anything to you that you think is not right, then you should trust your memory. That's my memory that Sheriff Taylor said they never found the phone. If you remember something different that's what you should do."

(R. 4171-72.)

Graham's cellular telephone had never been located despite the fact that a thorough search had been conducted of Graham's home. Certainly, this argument was a legitimate inference that could have been drawn from the evidence and was a proper comment.

C.

Graham next argues that the prosecutor's improper arguments constituted an "improper exhortation [for the jury] to convict." (Graham's brief at p. 73.) Specifically, Graham challenges the following argument made in the prosecutor's rebuttal:

> "The only thing that is necessary for evil to prevail is for men and women of goodwill to do nothing. [16]
>
> "What you do here speaks to the community about how we feel about justice and law in Russell County, Alabama. You speak for the community. There are -–history is replete with instances in which evil did prevail because men and women of goodwill did nothing. If you look at this town in the 19 -– early 1950s and 40s and 50s, it was a lawless town. It was run by a local mob. The gamblers, corrupt police, ran this town.
>
> "It only changed -– it only changed because the Grand Jury, composed of people just like you, returned indictments and said this is going to stop. One of those men had his house burned. Two of them --
>
> > "[Defense counsel]: Judge, we are going to object at this point to –- to this line -- indictments never --
> >
> > "The Court: Well --
> >
> > > "[Defense counsel]: -– stopped anything. I mean, we -– we object. We think it's improper."

(R. 4203-04.)

"It is improper for a prosecutor to 'seek justice beyond the parameters of the case.' " State v. Powers, 654 N.W.2d 667, 679 (Minn. 2003). In People v. Clemons, 89 P.3d 479 (Colo. App. 2003), the court addressed the propriety of a similar argument and stated:

> "We agree with defendant that the prosecutor's use of this quotation was an improper attempt to persuade the jurors to convict defendant in order to combat evil for the community. However, this quotation was an isolated incident in an otherwise proper closing argument in which the prosecutor repeatedly urged the jury to apply the rules of law to the evidence adduced at trial. Accordingly, we are convinced that this error was harmless. See Loaiza v.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

State, 186 Ga. App. 72, 74, 366 S.E.2d 404, 406 (1988)(no reversible error where trial court sustained defendant's objection to prosecutor's use of this Burke quote in closing argument, but denied mistrial motion); Commonwealth v. Davis, 38 Mass. App. Ct. 932, 934, 646 N.E.2d 1093, 1095 (1995)(prosecutor's use of this Burke quote in closing argument, to which defendant objected, did not require reversal); People v. Williams [434 Mich. 894], 453 N.W.2d 675 (Mich. 1990)(prosecutor's use of this Burke quote in closing argument did not require reversal); State v. Stufflebean, 329 N.W.2d 314 (Minn. 1983)(prosecutor's use of this Burke quote not reversible error); cf. State v. Prevatte, 356 N.C. 178, 264, 570 S.E.2d 440, 488 (2002)(prosecutor's use of this Burke quote in closing argument was proper); see also Trujillo v. State, 44 P.3d 22, 26 (Wyo. 2002)(prosecutor's use of this Burke quote in closing argument was an inappropriate rhetorical device but not plain error). But see State v. Mills, 57 Conn. App. 202, 213, 748 A.2d 318, 325 (2000)(reversing defendant's conviction where prosecutor used this Burke quote in closing argument, but also emphasizing numerous other instances of serious misconduct in the prosecutor's closing argument)."

***39** 89 P.3d at 483-84. See also People v. Ortega, 370 P.3d 181, 190 (Colo. App. 2015).

"The quotation from Burke is more troubling, however, because it was an improper call for justice beyond the parameters of the case. Nonetheless, in State v. Stufflebean, 329 N.W.2d 314, 318 (Minn. 1983), this court held substantially similar language to be 'technically improper' but not warranting reversal. We reiterate the improper nature of such arguments, but we conclude that those comments do not warrant reversal."

State v. Powers, 654 N.W.2d at 679. For the foregoing reasons, we find no reversible error in the prosecutor's comments.

Moreover, "[t]he standard of review is not whether the defendant was prejudiced, but whether the comment 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 169, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)." Gobble v. State, 104 So. 3d 920, 970 (Ala. Crim. App. 2010). Certainly, that standard was not met in this case. Graham is due no relief on this claim.

XII.

Graham next argues that the circuit court failed to instruct the jury that Graham had to have the specific intent to kill Shea before she could be convicted of capital murder. Specifically, Graham argues that the circuit court erroneously instructed the jury that they could convict Graham of murder for hire even if the person that Graham intended to kill was not her daughter.

Graham challenges the following part of the circuit court's lengthy instructions:

"That the Defendant, Lisa Graham, caused the death of Stephanie Graham or Shea Graham by soliciting or contracting with or requesting or commanding or importuning Kenneth R. Walton to cause the death of Stephanie or Shea Graham by shooting Stephanie Graham.

"Third element

"That in committing the act which caused the death of Stephanie Graham or Shea Graham, the Defendant intended to kill the deceased or another person.

"A person acts intentionally when it is her purpose to cause the death of another person. The intent to kill must be real and specific."

(R. 4228) (emphasis added).

At the conclusion of the instructions, the court asked if the parties had any exceptions. The following occurred: "The Court: Anything from the defense?

"[Defense counsel]: Well, I think –– I think what [the prosecutor] said is exactly correct. You have the particularized intent on Stephanie Shea Graham for capital murder. But not for murder. And that's what I tried to bring up before we went into these charges, because what you charged on capital murder, in –– in my estimation at the number three element of capital murder is incorrect. And –– and the reason it's incorrect --

"....

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"The Court: Now, that's straight -– you had -– that's straight from the charge. That's straight from the pattern charge.

"....

"The Court: Well -– now, if you want me to, I will bring them back here and go back over the element three. But I mean, they -– I mean, I pulled it right out of the pattern jury instructions.

***40** "[Defense counsel]: Well, Judge, I mean, we just -– the Court has charged the jury what you did. We think under this set of circumstances that it's more particularized because of the solicitation being the --

"....

"The Court: And that's what they want us to use. So I am -– I am going to deny it on that and let them go."

(R. 4253-61.)

Graham argues that by using the three words "or another person" the court instructed the jury that they could rely on the doctrine of transferred intent to find Graham guilty of capital murder. She asserts that this instruction, in essence, amended the indictment. Graham said in one of her statements that she had given her gun to Walton so that he could kill his cousin -- Ieisha Hodge. Graham asserts that Hodge was her husband's "suspected lover."

Graham further argues that the doctrine of transferred intent has no application to capital cases where the intent to kill must be real and specific. Graham cites Ex parte Woodall, 730 So. 2d 652 (Ala. 1998), to support this argument.

The State argues in its brief:

"Graham attempts to establish reversible error by focusing on three words in the court's verbatim reading of the pattern instructions, that does not entitle her to relief for at least two reasons. First, 'no reversible error will be found when the trial court follows the pattern jury instructions adopted by this Court.' Snyder v. State, 893 So. 2d 488, 553 (Ala. Crim. App. 2003). Second, although Graham claims that the court's reading the phrase 'or another person' allowed the jury to convict her of capital murder, based on her comments that she 'gave [Walton] her gun in order to kill Ieisha Hodge,' there was no evidence that Graham solicited Walton to murder Ieisha. Although Graham did tell both Kevin and Lt. Taylor that she loaned her gun to Walton to kill Ieisha, she never claimed that she either hired or asked Walton to kill Ieisha. Additionally, Graham did not maintain her ruse about loaning her gun to Walton to kill Ieisha -– she admitted that she gave Walton her gun to 'get rid of' Shea. Thus, the evidence presented at trial established that Graham solicited Walton to murder only one person: Shea."

(State's brief at pp. 17-18.)

" 'A trial court has broad discretion when formulating its jury instructions....' Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999) (citing Williams v. State, 710 So. 2d 1276, 1305 (Ala. Crim. App. 1996)). 'When reviewing a trial court's jury instructions, [this Court] must view [the instructions] 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)."

Miller v. State, 63 So. 3d 676, 701 (Ala. Crim. App. 2010). See also Johnson v. State, 820 So. 2d 842 (Ala. Crim. App. 2000).

Here, at the beginning of the jury instructions, the court read the indictment to the jury. No count of the indictment charged that Graham had hired Walton to kill Ieisha Hodge. During closing arguments Graham's counsel did not mention Hodge. The jury charges did not mention Hodge. In fact, there was no testimony that Hodge was dead. Also, the circuit court stated that the first element of the charges was that "Shea Graham is dead." (R. 4227.) The court further instructed: "To convict, the State must prove that Lisa L. Graham had particularized intent to kill Stephanie S. Graham. A person acts intentionally when its his or her purpose to caused the death of another person. The intent to kill must be real and it must be specific." (R. 4241.) The circuit court did not instruct on the issue of transferred intent because it had no application to the facts of this case.

***41** The Pattern Jury Instructions, adopted by the Alabama Supreme Court on July 30, 2010, for use in capital cases, [17] state that the intent instructions for use in a capital-murder trial should read: "A person commits an intentional murder if he causes the death of another person, and in performing the act or acts that cause the death of that person, he intends to kill that person (or another person)." (Emphasis added.) [18]

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

This Court must examine the challenged instructions as a reasonable juror would and not in isolation. It is clear that the circuit court did not instruct the jury that they could convict Graham of capital murder even if she did not have the specific intent to kill Shea. Graham's interpretation of the instructions is strained and not supported by the entire instructions. [19]

We note that the jury instructions in Ex parte Phillips, [Ms. 1160403, October 19, 2018] ––– So. 3d ––––, –––– (Ala. 2018), stated: "To convict, the State must prove beyond a reasonable doubt each of the following elements of intentional murder of two or more persons ... that in committing the act that caused the deaths of both [Erica] and Baby Doe, the defendant intended to kill the deceased or another person." (Emphasis added.) In Ex parte Phillips, the defendant was charged with the capital offense of killing two or more persons. The Phillips Court instructed the jury that the defendant had to have the specific intent to kill only the mother, and not the baby, to be convicted of capital murder. The Supreme Court in Phillips also held that the circuit court's instructions were not an amendment to the indictment.

Based on our review of the instructions in this case, it is clear that the jury was properly instructed that to convict Graham of capital murder they had to find beyond a reasonable doubt that Graham had the specific intent to kill Shea. Accordingly, we find no error in the circuit court's instructions.

***42** Moreover, even if the three words in the instructions "or another person" were erroneous, that error would be harmless beyond a reasonable doubt. The circuit court instructed the jury that to find Graham guilty of capital murder it had to find that Graham had a specific intent to kill Shea.

> " '[W]e acknowledged that faulty jury instructions are subject to harmless error review. [State v. Beamon, 347 Wis. 2d 559, 830 N.W.2d 68 [681] (2013)], ¶ 24 (citing Hedgpeth v. Pulido, 555 U.S. 57, 61, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008); Neder v. United States, 527 U.S. 1, 11, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Harmless error review applies both to jury instructions that have omissions and to jury instructions that place an additional burden on the State. Id., ¶¶ 24–25. "Therefore, where a jury instruction erroneously states the applicable statute, we must determine whether, under the totality of the circumstances, the erroneous instruction constituted harmless error." Id., ¶ 27 (citing [State v.] Harvey, 254 Wis. 2d 442, ¶ 46, 647 N.W.2d 189 [(2002)]).' "

Bohannon v. State, 222 So. 3d 457, 509 (Ala. Crim. App. 2015), quoting State v. Williams, 364 Wis. 2d 126, 148, 867 N.W.2d 736, 746 (2015).

For the above reasons, we find no reversible error in the circuit court's jury instructions on intent. Nor did the instructions amend the indictment. Graham is due no relief on this claim.

XIII.

Graham next argues that she was entitled to a jury instruction on "valuable consideration." Without such an instruction, Graham says, the jury was free to "convict without proof of some economic gain expected by Mr. Walton." (Graham's brief at p. 35.)

The State argues that when the jury returned with a question, the circuit court asked if Graham had an instruction on "valuable consideration." Graham responded that she did. The court agreed to instruct the jury based on Graham's requested charges. The State argues that any error was invited by Graham's actions and is waived because it does not rise to the level of plain error.

The record shows that the jury returned with the following question: "Please explain the fourth element of capital murder charge in more detail." (R. 4262.) The following discussion then occurred:

> "The Court: Okay. Of course, you can't really -–the fourth element is: The murder was committed by the defendant for other valuable consideration or for hire. So -– now, I will read for them defense charge number two which says: The element of price or award inherent in the word hire -– is inherent in the word hire, a contract of hire, therefore, would be a most unusual undertaking if it did not involve some -–something by the way of recompense."

(R. 4265.) The circuit court indicated that it was going to read the fourth element as the jury had previously been instructed and then give them Graham's requested charge number two. (R. 4266.) Graham requested that the court read her requested charges one, two, and three. The court agreed to do so. Graham indicated that she was satisfied with the court's resolution of the jury's question. (R. 4271.) The court reinstructed the jury as requested by Graham as follows:

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"The murder was committed by [Graham] for other valuable consideration or for hire.

"That Lisa Graham is charged with the capital murder offense -– with the offense of capital murder pursuant to Code Section 13A-5-47, which requires the State to prove beyond a reasonable doubt that the murder of Stephanie S. Graham by Kenneth R. Walton was committed by Kenneth R. Walton, and that Lisa L. Graham promised or agreed to give Kenneth R. Walton an unspecified sum of United States currency or other valuable consideration pursuant to a contract or for hire.

***43** "The element of price or reward is inherent in the word hire, a contract of hire, therefore, would be a most unusual undertaking if it did not involve something by way of recompense.

"And to define recompense for you and this is -–that means:

> "To pay or to reward. And then also: The State must prove beyond a reasonable doubt that the payment of an unspecified sum of United States currency or other valuable consideration was impetus for the murder."

(R. 4273-74.) The circuit court asked both parties if they were satisfied, and both the State and defense counsel indicated that they were satisfied. (R. 4275.)

The State argues that if any error did occur it was invited by defense counsel's actions. We agree. "The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error." Snyder v. State, 893 So. 2d 488, 518 (Ala. Crim. App. 2003).

The State also argues that the circuit court's instructions were accurate and did not constitute error because the term "valuable consideration" was a term that was easily understood and that a circuit court does not err in failing to define every term in its jury instructions.

"In a criminal case ... the trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-explanatory." State v. O'Donnell, 142 Wash. App. 314, 325, 174 P.3d 1205, 1211 (2007). " 'Jury instructions need not specifically define '[t]erms of common usage and meaning.' " Law v. State, 249 Ga. App. 253, 254, 547 S.E.2d 784, 786 (2001).

> " 'When a term, word, or phrase in a jury instruction is one with which reasonable persons of common intelligence would be familiar, and its meaning is not so technical or mysterious as to create confusion in jurors' minds as to its meaning, an instruction defining [that term, word, or phrase] is not required.' "

People v. Esparza-Treto, 282 P.3d 471, 480 (Colo. App. 2011), quoting People v. Thoro Prods. Co., 45 P.3d 737, 745 (Colo. App. 2001).

> "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))."

***44** DeBlase v. State, [Ms. CR-14-0482, November 16, 2018] ––– So. 3d ––––, –––– (Ala. Crim. App. 2018).

We agree with the State that the circuit court did not commit error by failing to define the term "valuable consideration." The court's instructions were sufficient and consistent with Alabama law. Graham is due no relief on this claim.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Penalty-Phase Issues

XIV.

Graham next argues that she cannot be sentenced to death because, she says, the jury failed to find an aggravating circumstance to support the death penalty. Specifically, Graham argues that it was error for the circuit court to instruct the jury in the penalty phase that its verdict of guilty, in the guilt phase, automatically established the aggravating circumstance that the murder was committed for "pecuniary gain." See § 13A-5-49(a)(6), Ala. Code 1975 (aggravating circumstance that murder was committed for pecuniary gain). She argues that the circuit court's application of this aggravating circumstance is too broad and is contrary to this Court's holding in Henderson v. State, 584 So. 2d 841 (Ala. Crim. App. 1988).

This Court in Henderson stated:

> "The appellant argues that proof of murder for hire, pursuant to § 13A–5–40(a)(7) does not suffice to automatically establish the aggravating circumstance that the capital offense was committed for pecuniary gain, pursuant to § 13A–5–49(6). The appellant bases his argument on the fact that he was indicted under the 'for hire' portion of the subsection rather than the 'for pecuniary or other valuable consideration' portion of § 13A–5–40(a)(7).
>
> "While it is clear that the aggravating circumstance, that the offense was committed 'for pecuniary gain,' can be applied to a capital offense under § 13A–5–40(a)(7), Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1978); Ashlock v. State, 367 So. 2d 560, 561 (Ala. Cr. App. 1978), writ denied, 367 So. 2d 562 (Ala. 1979); Johnson v. State, 399 So. 2d 859, 867 (Ala. Cr. App. 1979), we can find no authority for the proposition that this aggravating circumstance is automatically to be applied to the capital offense of murder for hire. Therefore, we must look to the definition and application of 'hire,' as encompassed in 'murder for hire,' and 'pecuniary gain,' as encompassed in the aggravating circumstance.
>
> "....
>
> > "Because we feel that 'pecuniary gain' in the context of an aggravating circumstance of capital murder includes more than strictly money, and can encompass other valuable consideration or economic gain, and because 'murder for hire' was intended by the legislature to include some sort of consideration, we hold that the aggravating circumstance of 'pecuniary gain' automatically applies to a 'murder for hire' situation wherein the 'hiree' is charged with the offense."

Henderson, 584 So. 2d at 859. In Henderson, the defendant was the "hiree" and not the "hirer" as in this case.

The State argues that in Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991), this Court noted that "our capital murder statute contemplates that certain aggravating circumstances will be established by certain capital verdicts." 603 So. 2d at 379. We further stated:

> ***45** "[W]e conclude that the aggravating circumstance that '[t]he capital offense was committed for pecuniary gain' was established, as a matter of law, by appellant's conviction of the capital crime of murder for hire, [§ 13A-5-40(a)(7)] and the trial court correctly so charged the jury.
>
> "In so holding, we necessarily find that the aggravating circumstance was correctly applied to [the defendant] even though she was the hirer and not the person hired and was convicted of the crime pursuant to the complicity statute, § 13A-2-23. We think the aggravating circumstance should be considered as established where the defendant is convicted of the capital offense as an accomplice-hirer. We do not think the legislature intended to make a distinction between the hirer and the person hired in a murder for hire or contract for hire situation. The statute does not distinguish between the hirer and the hiree, but simply provides that the aggravating circumstance arises if the 'offense was committed for pecuniary gain.' Here the offense was clearly committed for pecuniary gain. In the eyes of the law, the hirer is as much to be abhorred as the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> hiree, and, here, appellant is as guilty as her brother-in-law, who received the money and who actually did the killing. Accordingly, we read § 13A-5-45(e) to mean that, where a defendant has been convicted of the capital offense of murder for hire even though that person was the hirer and was convicted of the offense as an accomplice pursuant to the complicity statute, the aggravating circumstance that the capital offense was committed for pecuniary gain is established as a matter of law."

Haney, 603 So. 2d at 380.

Based on this Court's holding in Haney, this aggravating circumstance was correctly applied after the jury found beyond a reasonable doubt, in the guilt phase, that Graham was guilty of violating § 13A-5-40(a)(7), Ala. Code 1975. Graham is due no relief on this issue.

XV.

Graham next argues that her sentence of death is unconstitutional because, she says, she is "intellectually disabled" and her death sentence violates the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and Hall v. Florida, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). At the very least, Graham argues, she was entitled to an Atkins hearing.

The United States Supreme Court in Atkins v. Virginia held that it is unconstitutional to sentence an intellectually disabled individual to death.[20] In Hall v. Florida the United State Supreme Court held that "a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70." Moore v. Texas, 581 U.S. ——, ——, 137 S.Ct. 1039, 1048, 197 L.Ed.2d 416 (2017).

In Ex parte Perkins, 851 So. 2d 453 (Ala. 2002), the Alabama Supreme Court adopted the most liberal definition of intellectually disabled as defined by those states that had adopted legislation prohibiting the execution of an intellectually disabled defendant. The defendant must: (1) have significantly subaverage intellectual functioning (an IQ of 70 or below); (2) have significant defects in adaptive behavior; and (3) those two factors must have manifested themselves before the defendant attained the age of 18.

***46** The record shows that, after the jury recommended a sentence of death, the following occurred:

> "The Court: Now, looking through the file, there has not been no type of mental evaluation done in this case. And so pursuant to Rule 26.4 [, Ala. R. Crim. P.,] based on what's contained in the pre-sentence report, I feel it's incumbent upon the Court to order a mental evaluation and delay sentencing in this case."

(R. 4380-81.) After delaying the sentencing hearing before the circuit court, a mental evaluation was conducted and Dr. Glen King, a clinical and forensic psychologist, examined Graham. Dr. King testified that, based on the seven intelligence tests that he conducted on Graham, he found that "Ms. Graham is not mentally disabled, but, rather, functions intellectually well above that." (R. 4392-93.) Graham's full scale IQ, Dr. King said, was 77. When asked by defense counsel about Graham's ability to "act reasonably," Dr. King testified:

> "The Atkins decision really has to do with the establishment of diagnosis of previously mental retardation, which we are using ... today for purposes of understanding that. It requires actually a determination that an individual meets three qualifications. One is on an established IQ test, they have an IQ that is 70 or below, which [Graham] does not meet. In addition, there has to be a determination that a individual has adaptive skills that are deficient in at least two out of ten areas. And as measured by the adaptive skills tests, that is a score of three or below. [Graham] had no deficient areas on the adaptive skills test. And, thirdly, that there is a determination that there is an onset of mental retardation before the age of eighteen. And there are no records that indicate that [Graham] was ever diagnosed with mental retardation or mental disability before the age of eighteen. So [Graham] doesn't meet any of the requirements to be diagnosed with mental retardation."

(R. 4402-03.)

> "In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty. See Morrow v. State, 928 So. 2d 315, 323 (Ala. Crim. App. 2004); see also Holladay v. Campbell, 463 F. Supp. 2d 1324, 1341 n. 21 (N.D. Ala. 2006) (interpreting Alabama law to require that the defendant prove mental retardation by a preponderance of the evidence)."

Smith v. State, 213 So. 3d 239, 252 (Ala. 2007).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Here, no Atkins hearing was held because Graham never challenged her intellectual functioning. In fact, at the conclusion of the sentencing hearing, defense counsel stated:

> "Judge, we would just like to reiterate what evidence is before the Court for sentencing at this point. ... In looking at Atkins, certainly I can't stand up here and say my client is mentally retarded because I don't think that the testing shows that."

(R. 4424.) The circuit court in an abundance of caution had Graham evaluated, and evidence pertaining to that evaluation was presented to the court.

The record clearly establishes that Graham is not intellectually disabled as that term was defined by the Alabama Supreme Court in Perkins. Indeed, Graham meets none of the three factors discussed in Perkins. Thus, Graham failed to show that her sentence of death is barred because she is intellectually disabled.

XVI.

***47** Graham next argues that the prosecutor's arguments in the penalty phase denied her a fair trial.

> "Wide discretion is allowed the trial court in regulating the arguments of counsel. Racine v. State, 290 Ala. 225, 275 So. 2d 655 (1973). 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, ... each case must be judged on its own merits,' Hooks v. State, 534 So. 2d 329, 354 (Ala. Cr. App. 1987), aff'd, 534 So. 2d 371 (Ala. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citations omitted) (quoting Barnett v. State, 52 Ala. App. 260, 264, 291 So. 2d 353, 357 (1974)), and the remarks must be evaluated in the context of the whole trial, Duren v. State, 590 So. 2d 360 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991). 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' Mitchell v. State, 480 So. 2d 1254, 1257–58 (Ala. Cr. App. 1985) (citations omitted). 'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.' Twilley v. State, 472 So. 2d 1130, 1139 (Ala. Cr. App. 1985) (citations omitted)."

Coral v. State, 628 So. 2d 954, 985 (Ala. Crim. App. 1992).

A.

First, Graham argues that the following argument was improper because, she says, it was a comment on the fact that she did not testify.

> "It is beyond comprehension to me that this woman could do what she did, and if -– I submit to you that if you watched her during the course of this trial she has shown no remorse."

(R. 4338.)

This Court addressed this same issue in Thompson v. State, 153 So. 3d 84 (Ala. Crim. App. 2012), and stated:

> "In Hunt v. Commonwealth, 304 S.W.3d 15 (Ky. 2009), the prosecutor commented that Hunt had shown a 'total and complete lack of remorse or regret over anything that occurred.' In finding no reversible error, the Kentucky Supreme Court stated:
>
> > " 'Rather than a comment on Hunt's silence, we construe the statements as relating to his courtroom demeanor. A prosecutor is entitled to comment on the courtroom demeanor of a defendant. Woodall v. Commonwealth, 63 S.W.3d 104, 125 (Ky. 2001). We find no error in the comments cited.'
>
> "304 S.W.3d at 38. 'The conduct of the accused or the accused's demeanor during the trial is a proper subject of comment.' Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981). This Court has held that 'remorse is ... a proper subject of closing arguments.' Ex parte Loggins, 771 So. 2d 1093, 1101 (Ala. 2000).
>
> > "The prosecutor's comments were within the wide scope of proper prosecutorial argument and did not constitute error."

153 So. 3d at 175. There was no error in the prosecutor's argument because the remarks were comments on Graham's

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

demeanor during trial and her failure to exhibit any sign of remorse. Graham is due no relief on this claim.

B.

Second, Graham argues that the following argument was improper because, she says, it "denigrated mitigating evidence":

> "The Judge will tell you that there are -– that you may consider some mitigating factors. Ms. Brown outlined some of those for you. So if you were -– if imagine that my hands represent a scale, and you had mitigating factors on one side of the scale, you know, if you had five, they might push the scale down this far. And we only have one aggravating factor, and that is, this woman hired a man to kill her daughter. We have only got one, but that one, ladies and gentlemen, if in your mind it outweighs the fact that she took -– she took a lot of drugs. A number of them being controlled substances. She worked. She ran a business. She went to the library everyday and studied genealogy. That one factor, that is what's in the indictment. That is, what she did can outweigh all of those mitigating factors."

***48** (R. 4335-36.)

> " 'The relevant question is whether the prosecutor's comments "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, 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). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So. 2d 360, 364 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992)."

Simmons v. State, 797 So. 2d 1134, 1162 (Ala. Crim. App. 1999).

Clearly, the prosecutor's argument was not that the jury should ignore mitigating evidence but that the jury should not rely on the mitigating evidence that Graham presented. Graham had presented evidence indicating that she was on medication for depression and anxiety and that one of the drugs she was taking is a controlled substance. There was no error in the above argument made by the prosecutor in closing. Graham is due no relief on this claim.

XVII.

Graham next argues that the circuit court erred in failing to "meaningfully consider" a mitigating circumstance. Specifically, Graham argues that it was error for the circuit court not to find Graham's borderline mental functioning as a mitigating circumstance.

The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), held that a court must consider all evidence submitted by a capital-murder defendant in mitigation. " 'While Lockett and its progeny require consideration of all evidence as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.' Bankhead v. State, 585 So. 2d 97, 108 (Ala. Cr. App. 1989)." Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996). "Lockett does not require that all evidence offered as mitigating evidence be found to be mitigation." Ex parte Ferguson, 814 So. 2d 970, 976 (Ala. 2001). See also Snyder v. State, 893 So. 2d 488 (Ala. Crim. App. 2003). "The circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance." Calhoun v. State, 932 So. 2d 923, 975 (Ala. Crim. App. 2005). Nor is the "the trial court ... required to specify in its sentencing order each item of proposed nonstatutory mitigating evidence offered that it considered and found not to be mitigating." Williams v. State, 710 So. 2d 1276, 1347 (Ala. Crim. App. 1996).

The circuit court's order shows that it specifically considered Graham's mental health as a possible mitigating circumstance. When considering the application of § 13A-5-51(5), Ala. Code 1975, or whether Graham was under the influence of extreme mental or emotional disturbance at the time of the offense, the circuit court stated:

> "The defense did not raise this circumstance as a mitigating circumstance at the sentencing phase. However, the pre-sentence report indicated that [Graham] had been diagnosed with Post-Traumatic Stress Disorder. Based on this diagnosis, the Court ordered a mental evaluation pursuant to Ala. R. Crim. P. 26.4 to aid the Court in determining a sentence. The mental evaluation was performed by Dr. Glen King of Kirkland and King in Montgomery, Alabama. This evaluation took place in the Russell Detention Facility on September 15, 2015. Dr. King prepared a report that he filed with the Court on October 8,

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> 2015. However, Dr. King found that while [Graham] was suffering from depression at the time of the evaluation, she suffered from no extreme mental or emotional disturbance at the time of the offense. Therefore, the Court finds that this mitigating circumstance does not exist."

***49** (C. 42.)

The circuit court's order clearly shows that it complied with Lockett and considered all evidence that had been presented in mitigation. "Merely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact." Harrell v. State, 470 So. 2d 1303, 1308 (Ala. Crim. App. 1984). The circuit court was within its discretion in declining to find the proffered evidence to be mitigating. Graham is due no relief on this claim.

XVIII.

Graham last argues that constitutional errors in the proceedings undermined the reliability of her conviction and sentence in violation of state and federal law.

A.

First, Graham argues that the circuit court lessened the jury's responsibility by referring to its verdict in the penalty phase as a recommendation.

> "We have repeatedly stated that a trial court does not diminish the jury's role by stating that its verdict in the penalty phase is a recommendation or an advisory verdict. Taylor v. State, 666 So. 2d 36 (Ala. Cr. App. 1994), on remand, 666 So. 2d 71 (Ala. Cr. App. 1994), aff'd, 666 So. 2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); Burton v. State, 651 So. 2d 641 (Ala. Cr. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995); White v. State, 587 So. 2d 1218 (Ala. Cr. App. 1990), aff'd, 587 So. 2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992)."

Smith v. State, 795 So. 2d 788, 837 (Ala. Crim. App. 2000). Based on long-established caselaw there was no error in the court's reference to the jury's verdict in the penalty phase as a recommendation. Graham is due no relief on this claim.

B.

Graham also argues that the death penalty violates the Eighth Amendment's bar against cruel and unusual punishment.

" 'The United States Supreme Court has held that the penalty of death, if constitutionally applied, does not constitute cruel and unusual punishment.' " Ex parte Burgess, 723 So. 2d 770, 771 (Ala. 1998), quoting Ex parte Harrell, 470 So. 2d 1309, 1317 (Ala. 1985). Moreover, in Ex parte Belisle, 11 So. 3d 323 (Ala. 2008), the Alabama Supreme Court held that Alabama's method of execution, lethal injection, does not constitute cruel and unusual punishment. Graham is due no relief on this claim.

XIX.

Last, as required by § 13A-5-53, Ala. Code 1975, this Court must review the propriety of Graham's conviction and sentence of death. Graham was indicted and convicted of hiring Kenneth Walton to murder her daughter, an offense defined as capital by § 13A-5-40(a)(7), Ala. Code 1975, thereby punishable by death. The jury, by a vote of 10 to 2, recommended that Graham be sentenced to death. Our review of the record shows that Graham's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The circuit court found as an aggravating circumstance that the murder was committed for pecuniary gain, see § 13A-5-49(6), Ala. Code 1975. The circuit court found, as statutory mitigating circumstances, that Graham had no previous history of criminal activity, see § 13A-5-51(1), Ala. Code 1975, and that Graham's capacity to "appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired," see 13A-5-51(6), Ala. Code 1975. However, the circuit court gave the mitigating circumstance in § 13A-5-51(6) "little weight." Pursuant to § 13A-5-52, Ala. Code 1975, the circuit court also specifically stated that it had considered all evidence offered for both statutory mitigation and nonstatutory mitigation. The circuit court then stated:

> ***50** "The Pre-Sentence Investigation Report was prepared by Officer Rachel Hopkins and ... states that [Graham] has a mental disability of Post-Traumatic Stress Disorder ('PTSD'). [Graham] is prescribed three

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> medications to treat PTSD including Prozac, Visteril, and Latuda. Based on the information contained in the report, the Court ordered a mental evaluation by Dr. Heather Rowe, M.D., and Dr. Glenn King, Ph.D., pursuant to Ala. R. Crim. P. 26.4 on June 4, 2015. The purpose of these evaluations was to aid the Court in sentencing [Graham]. In response to this Court's order, Dr. Rowe informed the Court that [Graham] has been receiving treatment from East Alabama Mental Health Center on a regular basis since February 2013, and was last seen on June 3, 2015. Dr. Rowe informed the Court that [Graham] has a diagnosis of Major Depressive Disorder and Borderline Personality Disorder. Included within Dr. Rowe's letter was a list of prescribed medication including Latuda, Doxipin, Prozac, Lamitrigine, and Prozosin. Dr. Lammons testified in the past he had prescribed psychiatric medication for [Graham] such as Xanax and Seroquel."

(C. 44-45.) The circuit court also considered that Graham's son was called by Graham to testify in the sentencing hearing and asked that Graham's life be sparred. (C. 45.)

According to § 13A-5-53(b)(2), Ala. Code 1975, this Court must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Graham's death sentence. After independently weighing the factors, we are convinced that death is the appropriate sentence in this case.

As required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must determine whether Graham's death sentence was disproportionate to the sentences imposed in similar cases. Graham's sentence was not. See Sockwell v. State, 675 So. 2d 4 (Ala. Crim. App. 1993); Harris v. State, 632 So. 2d 503 (Ala. Crim. App. 1992); Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991).

Last, we have searched the record for any error that may have adversely affected Graham's substantial rights and have found none. See Rule 45A, Ala. R. App. P.

For the foregoing reasons, we affirm Graham's capital-murder conviction and her sentence of death.

AFFIRMED.

Minor, J., concurs specially, with opinion, which Windom, P.J., and McCool, J., join. Cole, J., recuses himself.

MINOR, Judge, concurring specially.

I concur fully in the main opinion. I write separately to note my agreement with Chief Justice Stuart's special concurrence in Ex parte Phillips, [Ms. 1160403, Oct. 19, 2018] ––– So. 3d ––––, –––– (Ala. 2018) (Stuart, J., concurring specially), in which she, along with Justices Main and Wise, stated that the Alabama Supreme Court should overrule Ex parte Bankhead, 585 So. 2d 112 (Ala. 1991), and subsequent cases that have applied plain-error review in evaluating a claim under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

All Citations

--- So.3d ----, 2019 WL 3070058

Footnotes

1 In a separate action, Walton pleaded guilty to Shea's murder and was sentenced to life imprisonment.

2 "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." DeBlase v. State, [Ms. CR-14-0482, November 16, 2018] ––– So. 3d ––––, –––– (Ala. Crim. App. 2018). Section 13A-5-47.1, Ala. Code 1975, specifically provides that "Sections 13A-5-45, 13A-5-46, and 13A-5-47 shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017." Graham was sentenced to death in 2015.

3 However, at least one state -- Kentucky -- has not embraced this view.

> "[T]his Court ... has measured the pertinent period of delay from the time of arrest to the time of the final trial, treating mistrials as reasons for delay to be considered in the speedy trial calculus. ... The United States Fourth Circuit Court of Appeals has undertaken a similar method to measure delay in the context of a speedy trial violation in a case with multiple mistrials. U.S. v. Hall, 551 F.3d 257 (4th Cir. 2009). We conclude that this latter approach is appropriate because the four-

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

factor Barker analysis allows for full and proper consideration of intervening mistrials under the second factor, the reasons for delay."

Goncalves v. Commonwealth, 404 S.W.3d 180, 199 (Ky. 2013).

4 The merits of this substantive claim will be addressed later in this opinion.

5 Graham's trial counsel even stated at a pretrial hearing: "We have completed the suppression hearing at the time of the mistrial. You know, I don't know whether you are going to revisit -– I don't know where -– where that's going to go." (R. 30-31.)

6 To protect the anonymity of the prospective jurors, we use their initials.

7 The Alabama Supreme Court has noted the difficulties of reviewing a Batson claim for plain error. As we recently noted: "In Ex parte Phillips, [Ms. 1160403, October 19, 2018] ––– So. 3d –––– (Ala. 2018), Chief Justice Stuart, writing in a special concurrence joined by two members of the Alabama Supreme Court, stated: 'For the reasons set forth above, I would overrule Ex parte Bankhead[, 585 So. 2d 112 (Ala. 1991),] and its progeny in this regard and now hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for the first time on appeal.' ––– So. 3d at ––––." Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ––– So. 3d ––––, –––– n. 7 (Ala. Crim. App. 2019).

8 Our numbers include the strikes of the alternate jurors. "Rule 18.4(g)(3), Ala. R. Crim. P., provides that the last person or persons struck shall be the alternates. Thus, for purposes of Batson we view the alternate jurors as having been struck." Thompson v. State, 153 So. 3d 84, 124 n. 11 (Ala. Crim. App. 2012).

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

10 The exceptions to this privilege are contained in Rule 504(d), Ala. R. Evid., which reads:

"There is no privilege under this rule:

"(1) Parties to a Civil Action. In any civil proceeding in which the spouses are adverse parties.

"(2) Furtherance of Crime. In any criminal proceeding in which the spouses are alleged to have acted jointly in the commission of the crime charged.

> "(3) Criminal Action. In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either, or (D) a third person if the crime is committed in the course of committing a crime against any of the persons previously named in this sentence."

Those exceptions have no application in this case.

Section 12-21-227, Ala. Code 1975, states: "The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do."

11 "[W]e will apply the long-standing rule that, in considering whether the trial court properly overruled a defendant's motion to suppress an extrajudicial confession or other inculpatory statement, a reviewing court may consider both the evidence presented at the pretrial suppression hearing and the evidence presented at trial." Ex parte Price, 725 So. 2d 1063, 1067 (Ala. 1998).

12 The circuit court stated at the conclusion of the suppression hearing that McKoon had been hired by the Grahams to represent Shea on pending charges in Muscogee County, Georgia. (R. 2711.)

13 The Indiana murder-for-hire statute has been amended since 1980.

14 Kevin Graham said that Graham did not want to pay the bond for Shea because she was tired of bailing Shea out.

15 It appears that Shea was arrested for driving under the influence when she was on bail.

16 This argument is based on a quote from Edmond Burke, a British statesman, which states: "The only thing necessary for the triumph of evil is for good men to do nothing."

17 Section 13A-5-40(a)(7), Ala. Code 1975, is not specifically listed in those Pattern Jury Instructions amended in 2010. The Pattern Jury Instructions specifically mention § 13A-5-40(a)(2), (a)(10), (a)(11), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18).

18 The State erroneously argues that this Court in Snyder v. State, 893 So. 2d 488, 553 (Ala. Crim. App. 2003), held that following a pattern jury instruction will not constitute reversible error. In Snyder, we cited this Court's holding in Smith v. State, 795 So. 2d 788 (Ala. Crim. App. 2000), and held that "following an accepted pattern jury instruction weighs heavily

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

against any finding of plain error." In fact, in Ex parte Wood, 715 So. 2d 819 (Ala. 1998), the Alabama Supreme Court held that, "[w]hile most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those pattern charges would be misleading or erroneous." 715 So. 2d at 824.

19 In her brief, Graham argues that the doctrine of transferred intent does not apply in capital-murder cases. However, the Alabama Supreme Court in Ex parte Phillips, [Ms. 1160403, October 19, 2018] ––– So. 3d –––– (Ala. 2018), held to the contrary. "It is clear that transferred intent is included within § 13A-6-2(a), Ala. Code 1975, and that Alabama's murder statute is incorporated into § 13A-5-40(a)(10), which criminalizes the murder of two or more persons. ––– So. 3d at ––––. The Supreme Court clearly found that the doctrine of transferred intent may be applicable in certain capital-murder cases.

20 "The Court in Atkins v. Virginia used the term 'mentally retarded.' That term has since been replaced with 'intellectually disabled.' See Brumfield v. Cain, 576 U.S. ––––, –––– n. 1, 135 S.Ct. 2269, 2274 n. 1, 192 L.Ed.2d 356 (2015)." Ex parte Lane, [Ms. 1160984, September 14, 2018] ––– So. 3d ––––, –––– n. 1 (Ala. 2018).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

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

September 13, 2019

CR-15-0201 **Death Penalty**

Lisa Leane Graham v. State of Alabama (Appeal from Russell Circuit Court: CC07-686)

NOTICE

You are hereby notified that on September 13, 2019, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Jacob A. Walker, III, Circuit Judge
Hon. Jody B. Sellers, Circuit Clerk
Margaret Young Brown, Attorney
Claudia Beatriz Flores, Attorney
Charlotte Morrison, Attorney
Robert Poole, Attorney
Audrey K. Jordan, Asst. Attorney General

Appendix B

IN THE SUPREME COURT OF ALABAMA

January 17, 2020

1181043

Ex parte Lisa Leane Graham. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Lisa Leane Graham v. State of Alabama) (Russell Circuit Court: CC07-686; Criminal Appeals : CR-15-0201).

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 January 17, 2020:

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

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

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

Witness my hand this 17th day of January, 2020.

Julia Jordan Weller

Clerk, Supreme Court of Alabama