APPENDIX A

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Court of Criminal Appeals of Alabama.

Justice Jerrell KNIGHT
v.
STATE of Alabama

CR-16-0182
|
Aug. 10, 2018

Synopsis

Background: Defendant was convicted in the Henry Circuit Court, Nos. CC-16-111, CC-16-112, CC-16-113, of three counts of capital murder, specifically, murder made capital for taking victim's life during course of first-degree kidnapping, murder made capital for taking victim's life during course of first-degree robbery, and murder made capital for taking victim's life through use of deadly weapon while victim was in a vehicle, and was sentenced to death, based on allegations that defendant killed victim in order to steal victim's income-tax refund. Defendant appealed.

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

jurors' repeated observations of defendant in identifiable jail clothing and physical restraints did not violate his right to fair trial;

trial court's remedy for prosecutor's *Batson* violation, specifically, removing two jurors and placing prosecutor's last two strikes onto jury, did not constitute abuse of discretion;

defendant failed to carry burden on his *Batson* motion to show that State's race-neutral reasons for exercising peremptory strikes against two prospective jurors were sham or pretextual;

trial court did not abuse its discretion in denying defendant second evaluation of his competency to stand trial;

evidence was sufficient to support finding that defendant abducted and restrained victim, as required for conviction for murder made capital because it was committed during course of first-degree kidnapping;

defendant's right to fair trial was not violated by displays of emotional distress by victim's family; and

death was appropriate sentence.

Affirmed.

Burke, J., concurred in result.

Appeal from Henry Circuit Court (CC-16-111; CC-16-112; CC-16-113). Brady E. Mendheim, Jr., Judge

Attorneys and Law Firms

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Steve Marshall, atty. gen., and John A. Seldon, asst. atty. gen., for appellee.

Opinion

WINDOM, Presiding Judge.

***1** Justice Jerrell Knight appeals his convictions for three counts of capital murder. Knight was convicted of one count of murder made capital for taking the life of Jarvis Daffin during the course of a first-degree kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975; a second count of murder made capital for taking Daffin's life during the course of a first-degree robbery, see § 13A-5-40(a)(2), Ala. Code 1975; and a third count of murder made capital for taking Daffin' life through the use of a deadly weapon while Daffin was in a vehicle, see § 13A-5-40(a)(17), Ala. Code 1975. The jury recommended, by a vote of 11 to 1, that Knight be sentenced to death for his capital-murder convictions. The circuit court accepted the jury's recommendation and sentenced Knight to death.

Facts

In early 2012 Daffin and Knight were awaiting their anticipated income-tax refunds. The two friends had made plans to use the funds to purchase vehicles. Daffin desired a Pontiac Grand Am automobile and had given a seller,

Steve Carlisle, a $50 deposit on one, while Knight sought a Chevrolet El Camino coupe-utility vehicle and had located a seller in Florida. When Charlotte King, Daffin's and Knight's tax preparer, contacted the men about their refunds, the news was mixed. King informed Daffin that she had a refund totaling $6,653 for him; Knight, however, was told that he had not received a refund because the Internal Revenue Service had initiated an audit of his return. King testified that Knight was upset upon learning of the development.

Knight drove Daffin to King's office to pick up Daffin's refund on February 3, 2012, and then to a local grocery store in Dothan to cash them. Peggy Reynolds, an employee of the grocery store, recalled cashing Daffin's checks that day; she added that she saw Knight "peeping" inside from the door of the grocery store. It was Reynolds's impression that Knight was watching to ensure that Daffin "was doing his transaction." (R. 483.) Reynolds also noted the presence of Antwain Wingard, commonly known as "Duke," in the grocery store that day, who she also believed was watching the transaction. Although Duke was several years younger than Knight, Knight knew the teenager because he was close to the Wingard family.

Daffin placed $1,000 in a front pocket of his pants and placed the remainder in a back pocket. Now flush with cash Daffin planned to complete his purchase of the Grand Am, which was located at Carlisle's auto-repair shop in Headland. Duke joined the two friends on their trip to Carlisle's shop. Upon reaching Headland early that afternoon, Daffin telephoned Carlisle to let him know that he was 15 minutes away. Daffin, however, never arrived at Carlisle's shop.

The vehicle Knight had been driving that day was a black Kia Optima automobile that belonged to Comeshia Wingard, Duke's mother. Comeshia lived with Duke; her mother, Gwendolyn Wingard; her brother, Manguel Wingard; and Manguel's girlfriend, Porscha Copeland. Knight returned the Optima to the Wingard residence that evening. Knight attempted to give the keys to Porscha, but she declined to take them because of Knight's nervousness. Knight telephoned Manguel, who was at work, and told him: "Hey, bro. I'm sending you my gun by your momma. You can get rid of it or you can keep it, sell it. It went down and it didn't go down right. You can do whatever you want to do with the gun." (R. 726.) Knight informed Manguel that he intended to get a new cell phone and to travel to Miami. Knight also telephoned Gwendolyn, telling her that she could find a pistol under her pillow on her bed and asking her to give the pistol to Manguel. Gwendolyn retrieved the pistol but placed the pistol in her vehicle.

***2** That evening Gwendolyn traveled to her deceased mother's residence in Goshen; she abruptly returned home the following day, though, as the result of a telephone call from Comeshia. Comeshia directed her mother's attention to her Optima. Gwendolyn saw that the passenger seatbelt was missing, that there were what appeared to be bloodstains on the passenger seat, and that there was a hole in the lid of the glove compartment. Gwendolyn spoke to Duke and, after consulting with a friend and praying, contacted law enforcement. Responding officers searched Gwendolyn's house and received from her the pistol Knight had left under her pillow.

That evening officers, along with Duke and Comeshia, traveled to some farmland in rural Henry County. Once there officers were able to follow tire tracks and apparent drag marks to Daffin's body, which had been left in a wooded area and covered with debris. Detective John Crawford of the Dothan Police Department testified that there were two distinct sets of shoe prints with the drag marks leading to Daffin's body. When his body was found, Daffin was not wearing pants and had only one shoe. An autopsy of Daffin's body showed that Daffin had been killed by a gunshot wound to the back left of his head. The bullet traveled through his brain and exited through his right nostril.

The next day, February 5, 2012, Duke again spoke with Gwendolyn and gave his grandmother $920. Following the conversation Gwendolyn walked to the house of Janet Trice, where Knight lived, and looked in her garbage can. Inside she saw blue jeans and a shoe that appeared to be stained with blood. Gwendolyn testified that she recalled Daffin's wearing blue jeans on February 3. Gwendolyn summoned law enforcement and directed them to Trice's garbage can. Detective Crawford testified that the shoe found in the garbage can matched the shoe found near Daffin's body. During a search of Trice's house, officers recovered a pair of Knight's shoes that appeared to have a similar tread pattern to the shoe prints that led to Daffin's body.

Through the course of the investigation, law enforcement learned that on the afternoon of February 3, Knight had been seen in Dothan at an O'Reilly Auto Parts store, where he purchased fabric dye, fabric cleaner, air fresheners, and rags, and at Coastal Car Wash, where surveillance footage captured him cleaning the interior of Comeshia's Optima.

Officers recovered a shell casing from a trash bin at the car wash. Forensic testing determined that the shell casing had been fired from the pistol Gwendolyn had given to law enforcement.

Duke was arrested on February 7, but law enforcement could not locate Knight. With the assistance of the United States Marshals Service, Knight was apprehended near Miami on February 20. After being returned to Alabama, Knight made a statement to Detective Crawford. Knight admitted to being involved in Daffin's murder, but said that he participated under duress. Knight alleged that Duke shot Daffin without warning and then threatened to kill Knight if he did not help dispose of Daffin's body. Forensic evidence, however, strongly indicated that it was Knight, not Duke, who shot Daffin. Specifically, swabs taken from the grip and trigger of the pistol had DNA that included Knight as a contributor but excluded Duke.

Standard of Review

This Court has explained:

> " 'When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' Ex parte Perkins, 646 So.2d 46, 47 (Ala. 1994); '[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence,' Bradley v. State, 494 So.2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So.2d 772 (Ala. 1986); and we make ' "all the reasonable inferences and credibility choices supportive of the decision of the trial court." ' Kennedy v. State, 640 So.2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley, 494 So.2d at 761."

***3** State v. Hargett, 935 So.2d 1200, 1203 (Ala. Crim. App. 2005). A circuit court's "ruling on a question of law[, however,] carries no presumption of correctness, and this Court's review is de novo." Ex parte Graham, 702 So.2d 1215, 1221 (Ala. 1997). Thus, "[w]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment." Ex parte Jackson, 886 So.2d 155, 159 (Ala. 2004).

Further, because Knight has been sentenced to death, according to Rule 45A, Ala. R. App. P., this Court must search the record for "plain error." Rule 45A states:

> "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."

(Emphasis added.)

In Ex parte Brown, 11 So.3d 933 (Ala. 2008), the Alabama Supreme Court explained:

> " ' "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:
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> > " 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 (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 [(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.'
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> "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))."

11 So.3d at 938. "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 Knight'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).

I.

Knight argues that the jurors' repeated observations of him in identifiable jail clothing and physical restraints violated his right to a fair trial. Knight complains that, despite the circuit court's being aware of the issue, the judge took no ameliorative action to prevent such observations from reoccurring. Knight asserts that he is entitled to a reversal of his conviction because he was likely prejudiced by the jurors' observing him in jail clothing and physical restraints.

***4** The issue was first raised by the circuit court on the morning of the third day of Knight's trial. The circuit court stated to the parties that there was "a likelihood that the jurors have seen the defendant in apparent custody of the sheriff's office." (R. 655.) This appeared to be based on the circuit court's own observations of Knight's walking across the street from the jail to the courthouse while in the custody of the sheriff and wearing handcuffs. The circuit court admitted that, because of the small size of the courthouse, avoiding all contact between the jurors and Knight would be difficult. The sheriff clarified that Knight had been cuffed and shackled only for the purpose of transportation, adding that Knight had not been cuffed or shackled in the courtroom. (R. 663.)

The circuit court asked the jurors if any of them had seen Knight "outside of the courtroom, either in the halls here of the courthouse, out on the square, [or] walking down the street." (R. 690.) Multiple jurors responded that they had seen Knight in the hallways of the courthouse, while another had seen Knight walking across the street and another had seen Knight in a courthouse elevator. (R. 690-91, 696.) The circuit court gave the following instruction to the jury:

> "I want to be clear on this, particularly since it's been mentioned that he was in the custody of the deputy or the sheriff. Typically, we make every effort to make sure that jurors, when we're trying any case, do not know that a defendant is in custody. Mr. Knight is in custody.
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> "Under our law, someone charged with this offense is remanded to the custody of the sheriff of the county where the case is to be tried until the trial. That in no way means that he is guilty of this charge. Does everyone understand that?"
>
> "....
>
> "You have to presume that he is innocent of the charge. I've discussed that with you. I think you're all good Americans. And that's just as fundamental to being an American as the right to vote and freedom of religion and the right to raise your family and these other rights that we enjoy. Every American, regardless of personal issues, political beliefs, religious beliefs, agrees on those fundamentals.
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> "But I want to be very clear. You cannot hold that against him in any way. You cannot go back in your deliberations and discuss the fact that he is in custody and somehow is responsible for this offense. It cannot have any bearing at all on what your verdict is in this case, whether guilty or not guilty or guilty of any lesser offenses. And you can't discuss it during your deliberation. Okay?"

(R. 692-93.) The circuit court asked the jurors collectively and individually if they could follow his instructions and all jurors responded affirmatively. Later that day defense counsel moved for a mistrial based on the jury's seeing Knight in jail clothing and physical restraints. (R. 970-71.) The circuit court denied the motion for a mistrial.

Defense counsel raised the issue again at the beginning of the penalty phase, asserting to the circuit court that he believed the jurors had seen Knight that morning wearing an orange jumpsuit and shackles. Defense counsel argued to the circuit court that Knight had been prejudiced by his contact with the jurors and that he "object[ed] to that." (Penalty R. 5-6.) Without ruling on defense counsel's objection, the circuit court questioned the jurors as to whether they had seen Knight that morning in jail clothing and physical restraints. Four responded that they had seen Knight that morning; a fifth responded that he had seen a person in an orange jumpsuit that morning but that he was unsure if that person was Knight. The circuit court again instructed the jurors that they could not

hold against Knight his being in custody. All jurors responded that they could follow the circuit court's instructions.

***5** Although Knight moved for a mistrial, he did not do so in a timely fashion. "It is well settled that '[t]o be timely, a motion for a mistrial must be made immediately after the grounds alleged to warrant the mistrial become apparent.' " Garzarek v. State, 153 So.3d 840, 851-52 (Ala. Crim. App. 2013) (quoting Culver v. State, 22 So.3d 499, 518 (Ala. Crim. App. 2008)). Here, the grounds alleged to warrant a mistrial were apparent when the issue was raised by the circuit court; Knight, however, did not move for a mistrial at that time. On appeal Knight characterizes his objection raised at the beginning of the penalty phase as a motion for a mistrial, but defense counsel did not specifically request a mistrial. Regardless, the circuit court did not make an adverse ruling on Knight's objection. " '[I]t is incumbent upon counsel to obtain an adverse ruling to preserve an issue for appellate review.' " Lucas v. State, 204 So.3d 929, 939 (Ala. Crim. App. 2016) (quoting Pettibone v. State, 91 So.3d 94, 114 (Ala. Crim. App. 2011)). Consequently, this issue will be reviewed for plain error only.

"The presumption of innocence ... is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Accordingly, "courts must be alert to factors that may undermine the fairness of the fact-finding process." Id. It has been recognized, for example, that compelling a defendant to stand trial before a jury in identifiable prison attire violates a defendant's presumption of innocence. See, e.g., United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985). "This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." Estelle, 425 U.S. at 504-05, 96 S.Ct. 1691 (citing Turner v. Louisia, 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)). Likewise, "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." Deck v. Missouri, 544 U.S. 622, 630, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (citing Estelle, 425 U.S. at 503, 96 S.Ct. 1691).

Here, though, there is no allegation that Knight stood trial while in jail clothing or physical restraints. It appears from the record that Knight was in jail clothing and physical restraints only while being escorted from the jail to the courtroom. This Court has held that it is not a "ground for a mistrial that an accused felon appears in the presence of the jury in handcuffs when such appearance is only a part of going to and from the courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried." White v. State, 900 So.2d 1249, 1256 (Ala. Crim. App. 2004) (citations and quotations omitted). " ' "A sheriff who is charged with the responsibility of safely keeping an accused has the right in his discretion to handcuff him when he is bringing him to and from the courtroom, when the handcuffs are removed immediately after he is taken into the courtroom." ' " Id. (quoting Young v. State, 416 So.2d 1109, 1112 (Ala. Crim. App. 1982), quoting in turn Moffett v. State, 291 Ala. 382, 384, 281 So.2d 630, 632 (1973)).

Further, the circuit court properly instructed the jury at both the guilt phase and penalty phase that it could not consider in its deliberations Knight's jail clothing or physical restraints, and all jurors indicated that they could follow the instructions. " '[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary." ' " Thompson v. State, 153 So.3d 84, 158 (Ala. Crim. App. 2012) (quoting Ex parte Belisle, 11 So.3d 323, 333 (Ala. 2008)).

This Court finds no error, much less plain error, in the circuit court's actions. As such, this issue does not entitle Knight to any relief.

II.

***6** Knight argues that the circuit court made multiple errors in addressing his motion raised pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Knight raised a Batson motion with respect to the prosecutor's striking of four black veniremembers -- I.K., A.B., M.C., and N.N. The circuit court granted the motion as to A.B. and N.N. and denied the motion as to I.K. and M.C. Knight argues that the circuit court erred: a) in its remedy of the prosecutor's Batson violation and b) in denying his Batson motion with respect to two of the struck veniremembers.

Batson and its progeny prohibit discrimination based on race or gender in jury selection. See Ex parte Trawick, 698 So.2d 162, 167 (Ala. 1997). The Supreme Court of the United States has delineated a three-step, burden-shifting process for evaluating a Batson claim:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson v. Kentucky,] 476 U.S. [79,] 96–97, 106 S. Ct. 1712[, 1723 (1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97–98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98."

Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

> "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed. 2d 395 (1991). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' Id. '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judges's province." ' Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869.

Allen v. State, 659 So.2d 135, 147 (Ala. Crim. App. 1994).

Discussions surrounding Knight's Batson motion were meandering, wandering back and forth between the merit of the motion itself and the parties' proposed solutions. This Court will summarize the events necessary for an understanding of the circuit court's actions.

Following the striking of the jury, defense counsel raised a timely Batson motion. Specifically, defense counsel asserted that the State's first four peremptory strikes were used to remove black veniremembers, leaving only two blacks to serve on the jury. This Court has consistently held that " '[s]tatistics and opinion alone do not prove a prima facie case of discrimination. See Johnson v. State, 823 So.2d 1 (Ala. Crim. App. 2001).' " Johnson v. State, 120 So.3d 1130, 1224 (Ala. Crim. App. 2009) (quoting Banks v. State, 919 So.2d 1223 (Ala. Crim. App. 2005)). Nevertheless, the circuit court found that defense counsel had met its burden to make a prima facie showing of discrimination.

> "Where, as in this case, the trial court requires the opposing counsel to state reasons for the peremptory strikes without first requiring that a prima facie case of discrimination be established, this Court will review those reasons and the trial court's ultimate decision on the Batson motion without determining whether the moving party met its burden of proving a prima facie case of discrimination."

***7** Harris v. State, 705 So.2d 542, 545 (Ala. Crim. App. 1997) (citing McLeod v. State, 581 So.2d 1144 (Ala. Crim. App. 1990)).

I.K. was the first struck black veniremember to be discussed. The prosecutor explained that I.K. had been struck because "she had a son related to the Knight family," she "had problems with the death penalty[,] [n]erves, not sleeping, [and] worr[ying]." (R. 304.) The circuit court found that the record was "pretty clear" on I.K. (R. 304.)

The prosecutor explained that A.B. had been struck because she had a brother and a nephew who had been charged with murder.[1] The circuit court asked the prosecutor if he had struck other similarly situated veniremembers. The prosecutor responded that he had and began searching through the juror questionnaires. As the search was ongoing, the circuit court stated that if the prosecutor had struck everyone who was similarly situated, then the prosecutor's explanation would be race-neutral.[2] The circuit court then turned to defense counsel and asked if he was "alleging that there's anybody else that fits within that category that was not struck by the State." (R. 308-09.) Defense counsel answered, "I'm not aware of any other ones, Judge." (R. 309.) The prosecutor named six white veniremembers he had struck who had a friend or relative who had been charged with a crime. The circuit court asked defense counsel if he had further argument on his Batson motion with respect to A.B. and defense counsel answered, "No, sir." The circuit court declared the prosecutor's given reason to be race-neutral and moved to the next black veniremember struck by the prosecutor, M.C. The prosecutor, though, interrupted the circuit court, stating that he had found two whites, M.W. and S.P., who were not struck but who had a relative who had been charged with a crime.[3] The circuit court stated to the prosecutor that unless he could articulate a distinction between A.B. and the whites who were not struck from the venire, his given reason for A.B. would not be race-neutral.

***8** The prosecutor declared that he had no problem with "booting off" M.W. and S.P. so that all similarly situated veniremembers would be struck. (R. 318.) Defense counsel sought clarification on the proposal: "Well, just from a practical standpoint, if we do that, you're putting the two alternates on. So, we're going forward for a week[-long] trial without any alternates. Is that practically what we're doing?" (R. 319.) The circuit court responded that it was required to maintain two alternates and sought a proposed solution from defense counsel. Defense counsel requested that the improperly struck black veniremembers be placed on the jury.

The circuit court then circled back to the remaining black veniremembers who were the subject of Knight's Batson motion -- N.N. and M.C. The prosecutor offered that N.N. had been struck because her ex-husband was serving a prison sentence for murder, which was similar to the charges against Knight, and that M.C. had been struck because she "gave a response when I was calling out those names [of potential witnesses]" and because she had served on a criminal jury but could not remember her verdict. (R. 325-26.)

The circuit court found the prosecutor's given reasons for striking I.K. and M.C. to be race-neutral, but stated that he was still questioning the prosecutor's reasons for A.B. and N.N. The prosecutor offered the following:

> "I'm saying the two that he raises, the two white people, I'm saying take them off. Take them off. What my last strikes were -- take those two off and make them alternates, or one alternate, and put the last two people I struck. That remedies putting those people, whatever their race is."

(R. 327.) Defense counsel countered that he believed the remedy was to place on the jury the improperly struck black veniremembers. This solution found disfavor with the prosecutor, who asked for a restriking of the jury.

The circuit court pivoted to defense counsel, asking, "Do you want to restrike or can you come up with another option?" (R. 332.) The circuit court stated that the prosecutor's proposal was to remove the white jurors similarly-situated to A.B. and N.N., to place the current alternates on the jury, and to replace the alternates. Defense counsel demurred and reiterated that he believed the remedy was to place on the jury the improperly struck black veniremembers. The circuit court disagreed, but stated he would not force the prosecutor's proposal onto the defense. (R. 333-34.)

Following a brief recess to discuss their options, defense counsel stated that he was "against putting the last two strikes from the defense and the State back on the jury, because [his] last strike was [M.E.], who answered she knows Marsha in the D.A.'s office." (R. 334-35.) Defense counsel continued, "You asked me if I had another solution to it. My solution is this. These are the State's two that's being questioned here. Why should the defense lose a strike?" (R. 335.) Defense counsel stated he wanted "[t]he State's last two strikes" placed on the jury. (R. 335.) The circuit court asked the prosecutor his thoughts on the counter-proposal, and the prosecutor responded, "No. Restrike then." (R. 336.)

The circuit court accepted the prosecutor's answer and informed the parties that they were staying late that night to restrike the jury. The circuit court then held an off-the-record bench conference with the parties. When the parties returned to the record, defense counsel moved to dismiss the charges based on an alleged violation of Knight's right to a speedy trial. A brief hearing on the motion was held, after which the circuit court brought the venire into the courtroom. The circuit court explained that he had found a violation in jury selection, which would "require that two jurors that are currently in the jury box ... be taken off the jury and two jurors that are currently out in the audience ... be placed into the jury box." (R. 339.) The circuit court announced that M.G. and K.G. -- who were the State's last two strikes -- would be added to the jury and that S.W. and S.P. would be removed. [4]

A.

***9** Knight argues that the circuit court erred in its remedy of the prosecutor's Batson violation. After much discussion, the circuit court removed two jurors and placed the prosecutor's last two strikes onto the jury. Knight asserts that the circuit court's solution did not "respond to the equal protection concerns articulated in Batson," and also violated "the excluded jurors' right to equal protection." (Knight's brief, at 27-28.)

Knight asserts repeatedly in his brief that the circuit court accepted the prosecutor's proposed solution. Indeed, the prosecutor was the first to mention removing the white jurors who had a friend or relative who had been charged with a crime and replacing them with the "last two strikes that I used." (R. 319.) For whatever reason, both the circuit court and the parties construed the prosecutor's suggestion as an

offer to replace the two white jurors with the two alternates. (R. 319, 332, 334.) Further, the remedy that was eventually employed was suggested by defense counsel:

> Defense: "You asked me if I had another solution to it. My solution is this. These are the State's two [strikes] that's being questioned here. Why should the defense lose a strike?"
>
> Court: "So, you're proposing let the defense choose which two?"
>
> Defense: "The State's last two strikes."

(R. 335, emphasis added.) The prosecutor was clearly opposed to this remedy, and his apparent acceptance of the circuit court's actions does not appear in the record. (R. 336.)

Determining which party proposed the remedy is unnecessary, however, because both paths lead to the same standard of review. Either defense counsel proposed the remedy or defense counsel agreed to it. In either case, any error in the circuit court's actions would be invited. See Jackson v. State, 177 So.3d 911, 933 (Ala. Crim. App. 2014); Turner v. State, 473 So.2d 665, 666 (Ala. Crim. App. 1985). "Under the doctrine of invited error, 'the appellant cannot allege as error proceedings in the trial court that were invited by [him] or that were a natural consequence of [his] own action.' " Jackson, 177 So.3d at 932 (quoting Inmin v. State, 668 So.2d 152, 155 (Ala. Crim. App. 1995), citing in turn Bamberg v. State, 611 So.2d 450, 452 (Ala. Crim. App. 1992)). "An invited error is waived, unless it rises to the level of plain error." Whitehead v. State, 777 So.2d 781, 806 (Ala. Crim. App. 1999) (citations and quotations omitted). Consequently, this issue will be reviewed for plain error only.

Tucked away in a footnote in Batson, the Supreme Court of the United States offered two possible solutions to a Batson violation:

> "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case ... or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire ...."

Batson, 476 U.S. at 99 n.24, 106 S.Ct. 1712 (citations omitted). Alabama, though, has never construed this footnote in Batson to be an exhaustive list of solutions. In Dorsey v. State, 881 So.2d 460 (Ala. Crim. App. 2001), this Court recognized that courts in Alabama have the discretion to fashion an appropriate remedy:

> ***10** "Alabama is one of the jurisdictions that leave the choice of the method to deal with a Batson violation to the sound discretion of the trial court. See Ex parte Branch, [526 So.2d 609 (Ala. 1987)]. Alabama has never required that the trial court follow a certain procedure. We believe that the method used will depend on the facts presented in each case."

Dorsey, 881 So.2d at 489, rev'd on other grounds, Ex parte Dorsey, 881 So.2d 533 (Ala. 2003).

This Court is unaware of any court that has either approved of or condemned the remedy used here. Consequently, whether the remedy employed in this case was an abuse of discretion would be an issue of first impression in this State. "It is well settled that plain-error review is an inappropriate mechanism to decide issues of first impression or to effectuate changes in the law." See United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that a "court of appeals cannot correct an error [under the plain-error doctrine] unless the error is clear under current law"); United States v. Madden, 733 F.3d 1314, 1322 (11th Cir. 2013) ("For a plain error to have occurred, the error must be one that is obvious and is clear under current law." (citations and quotations omitted)).

Moreover, the circuit court's intent was clear -- to ensure that all veniremembers were treated equally on the basis of race. The circuit court's remedy had the added effect of sanctioning the State by placing the prosecutor's final two strikes onto the jury. Based on the facts presented in this case, the circuit court's remedy did not constitute an abuse of discretion. See Dorsey, 881 So.2d at 489. As such, this issue does not entitle Knight to any relief.

B.

Knight argues that the circuit court erred in denying his Batson motion with respect to I.K. and M.C. Knight asserts that the circuit court ignored the fact that it had found some of the reasons given by the State for strikes in this case pretextual

and that the Houston County District Attorney's Office has a history of Batson violations.[5] Knight also asserts that some of the prosecutor's given reasons for striking I.K. and M.C. are inaccurate and that the basis for those reasons could have been more fully explored had the prosecutor engaged in meaningful voir dire with I.K. or M.C. Finally, Knight asserts that the State displayed overt racial animus in its discussion of a possible restriking of the jury.[6]

The State offered race-neutral reasons for both I.K. and M.C. The prosecutor explained that I.K. had been struck because "she had a son related to the Knight family," she "had problems with the death penalty[,] [n]erves, not sleeping, [and] worr[ying]." (R. 304.) The prosecutor explained that M.C. had been struck because she "gave a response when I was calling out those names [of potential witnesses]" and because she had served on a criminal jury but could not remember her verdict. (R. 325-26.) All these given reasons would be race-neutral. See Butler v. State, 646 So.2d 689, 690 (Ala. Crim. App. 1993) (being acquainted with defendant's family is race-neutral (citing Jackson v. State, 549 So.2d 616 (Ala. Crim. App. 1989)); Council v. State, 682 So.2d 495, 498 (Ala. Crim. App. 1996) (opposition to death penalty is race-neutral); Bohannon v. State, 222 So.3d 457, 482 (Ala. Crim. App. 2015) (concern about serving as a juror over medical conditions is race-neutral); Temmis v. State, 665 So.2d 953, 954 (Ala. Crim. App. 1994) (being acquainted with a witness in the case is race-neutral). Because the circuit court's findings on this issue largely turned on credibility, this Court must give these findings great deference. See Ex parte Branch, 526 So.2d 609, 625 (Ala. 1987) (quoting Batson, 476 U.S. at 98, 106 S.Ct. 1712).

***11** Further, the State's providing race-neutral reasons for its strikes of I.K. and M.C. shifted the burden to Knight to make a showing that those reasons were a sham or pretextual. See Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029. Defense counsel, however, made no such showing at all; Knight's challenges to the prosecutor's reasons for striking I.K. and M.C. on the basis that they were pretextual are being raised for the first time on appeal. As a result, the record does not support his alleged evidence of purposeful discrimination. For example, the veniremembers were presented a list of potential witnesses and were asked if any were familiar to them. Among the names listed were "Julius Roy" and "Dwon or Jwon Roy." (R. 195.) M.C. answered that she knew "Camar Roy." (R. 195.) Camar Roy was not listed by the prosecutor, and Knight asserts for the first time on appeal that the prosecutor's reason for striking M.C. is not supported by the record. Yet this argument ignores the fact that it was Knight's burden to show that the prosecutor's reasons were a pretext or a sham. See Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029. Perhaps the circuit court and the parties were aware of a relationship between Camar Roy and the listed potential witnesses or that "Camar" is another name for one of the listed potential witnesses; the race-neutral reason given by the prosecutor was apparently not suspect enough for defense counsel to challenge it below.

Additionally, this Court points out that, but for the prosecutor's own research and forthrightness with the circuit court, it appears that all of his given reasons would have been found race-neutral by the circuit court. "[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' " Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (quoting Wainwright v. Witt, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing in turn Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)).

Knight has not carried his burden to show that the circuit court's findings with respect to the prosecutor's striking of I.K. and M.C. were clearly erroneous. As such, this issue does not entitle him to any relief.

III.

Knight argues that the circuit court erroneously relied on Knight's own self-evaluation in denying his request for an evaluation of his competency to stand trial. Knight asserts that he has a long history of mental-health issues that should have created a reasonable doubt regarding his competency, thus triggering a competency evaluation. On appeal, Knight cites medical records indicating prior diagnoses of major depressive disorder with psychotic features, schizoaffective disorder, and bipolar disorder.

Two weeks before trial, defense counsel moved for a court-ordered mental evaluation. In that motion defense counsel asserted that they questioned Knight's competency to stand trial based on an evaluation performed by Dr. Daniel Grant. The circuit court held a hearing on the motion four days later. Defense counsel presented the circuit court with a two-page report produced by Dr. Grant. After a brief recess to give the circuit court and the State an opportunity to review the report, the circuit court stated:

"I will note from the report that there's nothing in here that indicates to me, under the rules of criminal procedure and the case law as I understand it, that he is currently incompetent to stand trial.

"The final conclusion is, 'All of the above information leads me to question Mr. Knight's ability to logically analyze the plan with forethought and to work with and understand the reasoning and importance of his attorneys' advice and understand the importance of following their advice for the defense.'

"Also, let me note for the record, by reference, in the event of an appeal, for review of this case, I will incorporate by reference all of the records on Mr. Knight's case -- this same case when it was pending in Houston County for, I think, approximately three to four years before it was determined that venue would be proper here.

"I was the trial judge that entire time on the case....

"....

> "So, I have had Mr. Knight in the courtroom before, both here and in Dothan, and he's never exhibited any signs of disrespect to the Court or to me personally or to his attorneys or the prosecutor or anyone else involved in the case. He's always sat respectfully and done, from where I sit, everything that anyone else in any other type of case would do."

***12** (Sept. 16, 2016 R. 6-8.) [7]

Defense counsel represented to the circuit court that after the first day of Dr. Grant's evaluation, Knight informed defense counsel that he no longer desired to participate in the evaluation. Defense counsel stated that he filed the motion based on Knight's withdrawing from the evaluation, Dr. Grant's findings, and what he considered to be illogical decision-making. Here defense counsel referenced Knight's writing letters to the district attorney stating that he was innocent yet wished to plead guilty and Knight's telling defense counsel he did not want a motion filed pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The circuit court pointed out that Knight had already undergone a competency evaluation by Dr. Doug McKeown, who had determined in 2012 that Knight was competent to stand trial. The circuit court also noted that Knight had been continuously incarcerated since his evaluation by Dr. McKeown, which meant that Knight's medical, physical, and nutritional needs had been met. Defense counsel acknowledged to the circuit court that Dr. Grant had not declared Knight incompetent but maintained that Dr. Grant's report raised a question as to Knight's competency.

The State left the hearing so the circuit court could conduct an ex parte hearing with Knight. The circuit court engaged Knight on his mental health. (Sept. 16, 2016 R. 32-42.) Knight made it clear that he was ready for trial and that he was not interested in pursuing any issues as to his competency. When asked about his lack of participation with Dr. Grant, Knight indicated that he believed he had finished Dr. Grant's testing but admitted that he was frustrated with Dr. Grant because he did not see the relevance of some of Dr. Grant's testing. The circuit court encouraged Knight to participate in his defense and asked Knight if he was dissatisfied with defense counsel. Knight answered, "Not at this time." (Sept. 16, 2016 R. 35.) Following the ex parte hearing, the circuit court stated: "With everything discussed on the record, as well as the Frazier [v. State, 758 So.2d 577 (Ala. Crim. App. 1999),] case, as well as what was discussed in the ex parte hearing, I am more than satisfied that we can go forward without any issue, as we sit here today, of his competency to stand trial." (Sept. 16, 2016 R. 43.)

" 'Trial of a person who is incompetent violates the due process guarantees.' " Blankenship v. State, 770 So.2d 642, 643 (Ala. Crim. App. 1999) (quoting Ex parte Janecic, 723 So.2d 725, 728 (Ala. 1997)). Rule 11.1, Ala. R. Crim. P., states: "A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant." Rule 11.6(a), Ala. R. Crim. P., states, in pertinent part:

***13** "After the examinations have been completed and the reports have been submitted to the circuit court, the judge shall review the reports of the psychologists or psychiatrists and, if reasonable grounds exist to doubt the defendant's mental competency, the judge shall set a hearing not more than forty-two (42) days after the date the judge received the report."

In Jackson v. State, 791 So.2d 979 (Ala. Crim. App. 2000), this Court recognized:

> "Clearly, 'a trial court has an independent duty to inquire into an accused's state of mind when there are reasonable grounds to doubt the accused's competency to stand trial.' Ex parte LaFlore, 445 So.2d 932, 934 (Ala. 1983). However, '[i]t is the burden of a defendant who seeks a pretrial competency hearing to show that a reasonable or bona fide doubt as to his competency exists.' Woodall v. State, 730 So.2d 627, 647, (Ala. Cr. App. 1997), aff'd. in relevant part, 730 So.2d 652 (Ala. 1998)(emphasis added). ' "The determination of whether a reasonable doubt of sanity exists is a matter within the sound discretion of the trial court and may be raised on appeal only upon a showing of an abuse of discretion." ' Id. See also Tankersley v. State, 724 So.2d 557, 564 (Ala. Cr. App. 1998).

Jackson, 791 So.2d at 994.

The premise of Knight's argument on appeal -- that the circuit court denied "defense counsel's request for a competency evaluation based on Mr. Knight's own assurances that he was competent to stand trial" -- is misleading. (Knight's brief, at 33.) Indeed, Knight assured the circuit court he was ready for trial and that he was not interested in pursuing any issues related to his competency. But, at the time the circuit court denied defense counsel's request, the circuit court also had before it a detailed forensic-evaluation report prepared by Dr. McKeown. (C. 112-18.) Dr. McKeown determined that Knight was "fully capable of understanding, comprehending, and appreciating the current charges as well as the range and nature of possible penalties"; that Knight was aware of the roles of the judge, jury, defense counsel, and district attorney; that Knight "demonstrate[d] a reasonable ability to understand and appreciate court procedure and behavior"; that Knight was "spending time in the law library doing some of his own research"; that Knight was capable of sharing details from his perspective on his charged offenses; that Knight was capable of recognizing the planning of legal strategies; and that Knight demonstrated a "fully reasonable capacity for interacting [with] and relating to defense counsel." (C. 116-17.) In short, Dr. McKeown concluded that Knight was "capable of assisting defense counsel and assuming the role of a defendant in a judicial proceeding." (C. 117.) The circuit court also cited its extensive interactions with Knight, which had occurred over several years before his trial.

Dr. Grant, whose report is included in the record on appeal, wrote that his interactions with Knight, coupled with Knight's treatment history, led him "to question Mr. Knight's ability to logically analyze, to plan with forethought and to work with, understand the reasoning and importance of his attorneys['] advice and underst[an]d the importance of following their advice for his defense." (C. 1599.) As the circuit court noted, Dr. Grant did not conclude that Knight was incompetent to stand trial.

***14** The circuit court's judgment was supported by an expert report and its own extensive interactions with Knight. This Court cannot say that the circuit court abused its discretion in denying Knight a second competency evaluation. See Frazier v. State, 758 So.2d 577, 585-93 (Ala. Crim. App. 1999). As such, this issue does not entitle Knight to any relief.

IV.

Knight argues that he was denied a fair trial because, he says, half the jurors expressed a racial bias against black defendants. Veniremembers were presented with the following questions on their juror questionnaires: "Do you think blacks are more likely to be involved in crime than whites?" and "Do you think blacks are more likely to be involved in crimes of violence than whites?" Six selected to Knight's jury answered these questions in the affirmative. Knight did not raise this claim below. Consequently, it will be reviewed for plain error only.

Knight asserts that these six jurors, through their answers on the juror questionnaires, displayed an "unambiguous racial bias" against blacks. (Knight's brief, at 44.)[8] This Court disagrees. Instead, the jurors' answers indicate merely their own perception of criminal demographics. The jurors did not indicate, for example, that they believed a black person was more likely to be involved in crime or violent crime because he or she was black. Further, all jurors who sat in judgment of Knight indicated on their juror questionnaires that they understood it was their role to determine the facts, that they believed Knight was innocent until proven guilty, that they could follow the instructions of the circuit court, and that they could render an impartial verdict based solely on the evidence.

Knight has made no showing of racial bias on the part of the jurors. This Court finds no evidence or error, plain or otherwise, in the circuit court's actions. As such, this issue does not entitle Knight to any relief.

V.

Knight argues that the circuit court erred in admitting allegedly inadmissible hearsay statements through his recorded statement. Specifically, Knight asserts that the officers conducting the interview repeated statements to Knight that were originally made to them by nontestifying witnesses. Knight also argues that the presentment to the jury of these statements violated the Confrontation Clause. Knight made multiple motions for a mistrial with respect to the recording, which were denied.

Knight states in his brief on appeal that defense counsel "repeated[ly] object[ed] to the videotaped statement in its entirety and the specific inadmissible hearsay statements." (Knight's brief, at 49.) Although Knight's assertion is true, a careful review of the record shows that Knight's claim on appeal is entitled to a review for plain error only. Knight filed a pretrial motion to suppress the statements on the grounds that his statements to law-enforcement officers were in violation of the Fourth, Fifth, and Fourteenth Amendments, that his statements were involuntary, and that all evidence had been seized illegally. (C. 639.) The circuit court conducted a suppression hearing in the middle of trial. (R. 603-47.) Defense counsel did not present any argument at the hearing, instead stating: "Judge, we would just like to have our objection down ... if [the prosecutor] plans on introducing [the statement] at trial." (R. 646-47.) Based on the line of questioning from defense counsel and the circuit court's ruling, it appears Knight was challenging the voluntariness of his statement and whether he was denied his right to counsel. (R. 646.)

***15** At trial Knight made the following objection as the State was preparing to admit Knight's statement:

> "Judge, I reviewed that statement again last night. And I've had the suppression issue that I understand has been overruled. However, in that statement, on page -- I believe on the transcript, on page 25, if I'm not mistaken, 25 or 26, in that statement, John Crawford says [Duke Wingard] says certain things. I'm going to object to a co-defendant -- what a co-defendant said coming in."

(R. 1505-06.) The circuit court initially ruled that the statement cited by defense counsel was not hearsay and stated that it would give the jury a limiting instruction. Before the statement was presented to the jury, however, the circuit court reconsidered its ruling. The circuit court recommended to the State that it redact that portion of Knight's statement; the State readily agreed, and the parties discussed the logistics of editing the recording and the typed transcript. (R. 1519.) The parties resolved to mute the recording during the objectionable statement and to remove from the transcript the page -- page 25 -- that contained it. The parties subsequently agreed to remove pages 34 and 41 and the bottom of page 46. The circuit court then gave defense counsel an opportunity to review the redacted transcript before playing the recording for the jury. (R. 1530.) During the playing of the recording, defense counsel twice objected to portions of the recording after the jury had already heard the allegedly inadmissible statements; defense counsel had not previously objected to those portions of the recording. In both instances, defense counsel requested a mistrial. The circuit court denied the motions but did provide the jury with instructions to disregard the statements to which defense counsel had objected. After the recording had concluded, defense counsel objected to additional portions of the recording and again moved for a mistrial, which was denied.

Knight filed a motion to suppress his statement, but did so on grounds distinct from those raised on appeal. " 'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So.2d 880, 882 (Ala. 1987)." Ex parte Coulliette, 857 So.2d 793, 794 (Ala. 2003). Before the recording was played, defense counsel raised an objection regarding multiple portions of the recording. Each objection was either sustained by the circuit court or rendered moot by the State's agreeing to remove the offending statements. See Knight v. State, 936 So.2d 544, 546 (Ala. Crim. App. 2005) (a party must obtain an adverse ruling to preserve an issue for appeal). Defense counsel acknowledged to the circuit court that he had reviewed the transcript the night before, and he was then given an opportunity to review the transcript immediately before it was played for the jury: "Whereupon, [defense counsel] reviewed the transcripts, after which time the jury entered the courtroom." (R. 1530.) Also, defense counsel agreed with the prosecutor that the jury would be shown a recording of Knight's statement "[w]ith the stipulations we have." (R. 1531.) Consequently, any error in the admission of the recording was invited by defense counsel. See Fountain v. State, 586 So.2d 277, 282 (Ala. Crim. App. 1991) ("[A] party cannot allege as error proceedings in the trial court that were invited by him or were a natural consequence of his own actions." (emphasis added)). As such, this issue will be reviewed for plain error only.

***16** Knight argues on appeal that the circuit court erred in denying his motions for a mistrial.

> " 'A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice.' Hammonds v. State, 777 So.2d 750, 767 (Ala. Crim. App. 1999) (citing Ex parte Thomas, 625 So.2d 1156 (Ala. 1993)), aff'd, 777 So.2d 777 (Ala. 2000). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So.2d 130, 135 (Ala. Crim. App. 1991). 'The decision whether to grant a mistrial rests within the sound discretion of the trial court and the court's ruling on a motion for a mistrial will not be overturned absent a manifest abuse of that discretion.' Peoples v. State, 951 So.2d 755, 762 (Ala. Crim. App. 2006)."

Garzarek v. State, 153 So.3d 840, 852 (Ala. Crim. App. 2013).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. Hearsay is not admissible unless it falls within an exception to the hearsay rule. Rule 802, Ala. R. Evid. Hearsay is generally inadmissible "because it violates the right of confrontation and cross-examination guaranteed by the Sixth Amendment to the United States Constitution." James v. State, 723 So.2d 776, 779 (Ala. Crim. App. 1998).

> "The Confrontation Clause, found in the Sixth Amendment to the United States Constitution, provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' The United States Supreme Court 'has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial and that "a primary interest secured by [the provision] is the right of cross-examination." ' Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed. 2d 597 (1980), quoting Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed. 2d 934 (1965) (footnote omitted). This Court has previously held that 'evidence which would normally be admissible under an exception to the hearsay rule may still be inadmissible because it violates the confrontation clause of the Sixth Amendment.' Grantham v. State, 580 So.2d 53, 55 (Ala. Cr. App. 1991).

Barnes v. State, 704 So.2d 487, 494 (Ala. Crim. App. 1997). Additionally,

> " 'It is well settled that[, when offered for the truth of the matter asserted,] a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible against the accused; it does not fall within any recognized exception to the hearsay rule and ... [it] violates the accused's confrontation rights. See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 2d 514 (1986); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968); R.L.B. v. State, 647 So.2d 803 (Ala. Crim. App. 1994); Ephraim v. State, 627 So.2d 1102 (Ala. Crim. App. 1993).'
>
> "Jackson v. State, 791 So.2d 979, 1024 (Ala. Crim. App. 2000)."

Turner v. State, 115 So.3d 939, 944 (Ala. Crim. App. 2012).

A.

***17** During the playing of Knight's recorded statement, the jury heard Detective Crawford say: "You took his money 'cause all that [Duke Wingard] got was a thousand dollars that you gave him ... to keep quiet about it the best that he could, which that lasted about ... twenty-four hours." (C. 1920.) Defense counsel first challenged this specific statement after the entire recording had been played, arguing that the information came from Duke's statement. (R. 1554-55.) Knight moved for a mistrial, which was denied by the circuit court.

Knight argues that this evidence was hearsay and that it could have come only from Duke. Detective Crawford, though, did not identify the source of the information; as the circuit court found, this information could have been reasonably inferred from other sources -- specifically, Gwendolyn Wingard, who testified that Duke had given her $920 the day after Daffin's murder, which she had subsequently given to law enforcement. Further, the statement by Detective Crawford was not hearsay because it was not offered for the truth of the matter asserted. Instead, the statement was an interrogation tactic used to elicit a confession. See Wilson v. United States, 995 A.2d 174, 184 (D.C. 2010) ("We think it would have been apparent to the jury that Thompson's statements about appellant committing the murder were made to elicit a confession or other incriminating information from appellant, and that Thompson's statements were not themselves evidence that appellant committed the murder."); see also Smith v. State, 246 So. 3d 1086, —— (Ala. Crim.

App. 2017) (holding that assertions of officer regarding co-defendants' statements were not hearsay because they were offered to explain the course of the investigation). Because the statement at issue did not constitute hearsay, the admission of the statement did not violate Knight's right to confront the witnesses against him. See White v. State, 179 So.3d 170, 213 (Ala. Crim. App. 2013) (" '[T]he Confrontation Clause ... has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.' " (quoting Williams v. Illinois, 567 U.S. 50, 57-58, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012))). There was no error, plain or otherwise, in the circuit court's denying Knight's motion for a mistrial.

B.

During the playing of Knight's recorded statement, the jury heard Detective Crawford ask Knight: "Did you not tell somebody -- did you not show somebody that pistol and say that you were gonna put a cap in [Daffin's] ass ... if he did not pay you twenty-five hundred dollars?" (C. 1925.) Knight denied making the statement. Knight moved for a mistrial, which was denied by the circuit court.

Here, Detective Crawford's question was not hearsay because there was no assertion, either express or implied. See Rule 801(c), Ala. R. Evid.; Ex parte Hunt, 744 So.2d 851, 856-58 (Ala. 1999). Moreover, after denying the motion for a mistrial, the circuit court instructed the jury as follows:

> "Go back up from just a second ago on 36, a little ways up, where it said, 'And say that you were gonna put a cap in his -- if he did not pay you $2500.00." You need to strike that out and disregard it. There is no evidence -- the parties agree there will be no evidence introduced to you on that. And you need to completely disregard it. And it cannot in any way be part of your deliberations or have any influence on your verdict. Can everyone do that?"

(R. 1546-47.) All jurors indicated they could follow the circuit court's instruction. See Crews v. State, 202 So.3d 759, 764 (Ala. Crim. App. 2015) ("A mistrial is properly denied if an error can be cured by an instruction." (citing Ex parte Lawrence, 776 So.2d 50, 55 (Ala. 2000))). " '[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary." ' " Thompson v. State, 153 So.3d 84, 158 (Ala. Crim. App. 2012) (quoting Ex parte Belisle, 11 So.3d 323, 333 (Ala. 2008), quoting in turn Cochran v. Ward, 935 So.2d 1169, 1176 (Ala. 2006)). There was no error, plain or otherwise, in the circuit court's denying Knight's motion for a mistrial.

C.

***18** During the playing of Knight's recorded statement, the jury heard Detective Crawford state the following to Knight:

> "I'm tired of listening to your poor, pitiful me story. Which is the same thing that Ms. Loise [Taylor] said you were gonna do. And so did your mama[, Janice Trice]. He's gonna do everything he can to make you think that he ain't got nothing to do with it, but ... I can look you right in the eye and I'm gonna tell you this, truthfully. They believe one hundred and ten percent -- one hundred and ten percent -- that you are one hundred percent involved in the murder of Jarvis Daffin, your friend."

(C. 1922-23.) Knight moved for a mistrial, which was denied. On appeal, Knight reasserts his claims raised below that the statement was hearsay and that it violated his right to confront the witnesses against him. Knight adds an argument on appeal that the statement was inadmissible because it goes to the ultimate issue.

Again, the statement by Detective Crawford was not hearsay because it was not offered for the truth of the matter asserted. Instead, the statement was an interrogation tactic used to elicit a confession. See Wilson, 995 A.2d at 184.

Moreover, the circuit court instructed the jury as follows with respect to Detective Crawford's statement:

> "Ladies and gentlemen, you need to disregard -- it's at the top part of the transcript on 33. It was just stated, words to the effect, 'This is the same thing that Ms.' -- I guess that's Louise or Loise -- 'said you were going to do, and so did your momma' and the following statements after that. That would be hearsay and inadmissible, and you need to regard [sic] that portion. Okay? Do not consider it. Can everybody do that?"

(R. 1542.) All jurors indicated they could follow the circuit court's instruction. See Crews, 202 So.3d at 764 ("A mistrial is properly denied if an error can be cured by an instruction." (citing Ex parte Lawrence, 776 So.2d at 55)). " '[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary." ' " Thompson, 153 So.3d at 158 (quoting Ex parte

Belisle, 11 So.3d at 333, quoting in turn Cochran, 935 So.2d at 1176).

Knight's claim that the statement was inadmissible because it went to the ultimate issue is likewise without merit. Rule 704, Ala. R. Evid., provides that "testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." " 'An ultimate issue has been defined as the last question that must be determined by the jury. See Black's Law Dictionary [1522 (6th ed. 1990)].' Tims v. State, 711 So.2d 1118, 1125 (Ala. Crim. App. 1997)." Whatley v. State, 146 So.3d 437, 464 (Ala. Crim. App. 2010). Here, the ultimate issues were whether Knight, with intent to kill Daffin, participated in killing Daffin, and, if so, whether the killing occurred during the course of a first-degree kidnapping or first-degree robbery, or was accomplished through the use of a deadly weapon while Daffin was in a vehicle. The alleged statements of Taylor and Trice did not address any of those issues. Instead, Taylor and Trice were alleged to have asserted that Knight was "involved." Additionally, Knight told Detective Crawford that he was driving when Duke shot Daffin, that he helped Duke dispose of Daffin's body, and that he helped Duke clean the vehicle. In other words, Knight admitted he was, at the very least, "involved" in Daffin's murder. Consequently, even if this Court were to find error in the circuit court's admitting the statement, the error would be harmless. See Whatley, 146 So.3d at 464 ("The admission of cumulative evidence constitutes harmless error." (citing Dawson v. State, 675 So.2d 897, 900 (Ala. Crim. App. 1995))).

***19** There was no error, plain or otherwise, in the circuit court's denying Knight's motion for mistrial.

D.

During the playing of Knight's recorded statement, the jury heard Detective Crawford tell Knight that his mother and grandmother had told law enforcement that a few days before Daffin's murder Knight had shown them a new gun he had recently purchased. (C. 1903.) Defense counsel first challenged this specific statement after the entire recording had been played. (R. 1550.) Knight raised a motion for a mistrial, which the circuit court denied.

The circuit court instructed the jury as follows with respect to Detective Crawford's statement:

> "Okay. During the break, the lawyers pointed out there are a couple more passages, very brief -- I tabbed three of them -- in the transcript where, again, it includes some information that's not been proven by the evidence and the lawyers don't anticipate to be proven that you'll need to disregard. So, if you'll flip over to page 12, down towards one of the last couple of lines, coming up. 'JC' for John Crawford, it starts out, 'And this would have to be one of the same -- close to the same time that you came in and showed Ms. Loise' -- and then the answer is 'Right.' And then, 'Loise and Ms. Trice your new gun.' He says, 'No. Not my new gun.' Those passages need to be -- and also the next one. 'I'm just telling you what they say.' 'Not my new gun.' All that needs to be stricken out. That's inadmissible. It's not going to be supported or proven by the evidence. The lawyers agree on that on both sides."

(R. 1562-63.) All jurors indicated they could follow the circuit court's instruction. See Crews, 202 So.3d at 764 ("A mistrial is properly denied if an error can be cured by an instruction." (citing Ex parte Lawrence, 776 So.2d at 55)). " '[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary." ' " Thompson, 153 So.3d at 158 (quoting Ex parte Belisle, 11 So.3d at 333, quoting in turn Cochran, 935 So.2d at 1176). There was no error, plain or otherwise, in the circuit court's denying Knight's motion for a mistrial.

VI.

Knight argues that the circuit court erred in denying his motion for a judgment of acquittal. Specifically, Knight argues that the State failed to present any evidence to sustain his conviction for murder made capital because it was committed during the course of a first-degree kidnapping. Knight asserts that Daffin went with him willingly and that there was no evidence indicating that he had restricted Daffin's movements or interfered with his liberty.

Regarding the sufficiency of the evidence, this Court has held:

> "In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So.2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes

a prima facie case. Gunn v. State, 387 So.2d 280 (Ala. Cr. App.), cert. denied, 387 So.2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So.2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So.2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So.2d 843 (1969); Willis v. State."

***20** Breckenridge v. State, 628 So.2d 1012, 1018 (Ala. Crim. App. 1993). "Further, because intent is a state of mind, it is rarely susceptible of direct or positive proof." Pilley v. State, 930 So.2d 550, 564 (Ala. Crim. App. 2005). "Instead, the element of intent must usually be inferred from the facts testified to by the witnesses together with the circumstances as developed by the evidence." Id. (citing Seaton v. State, 645 So.2d 341, 343 (Ala. Crim. App. 1994), quoting in turn McCord v. State, 501 So.2d 520, 528-29 (Ala. Crim. App. 1986)).

"A person commits the crime of kidnapping in the first degree if he abducts another person with intent to [a]ccomplish or aid the commission of any felony or flight therefrom." § 13A-6-43(a)(3), Ala. Code 1975. To "abduct" is to "restrain a person with intent to prevent his liberation by either [s]ecreting or holding him in a place where he is not likely to be found, or [u]sing or threatening to use deadly physical force." § 13A-6-40(2), Ala. Code 1975. "Thus, in order to be abducted, a person must be restrained." Grayson v. State, 824 So.2d 804, 816 (Ala. Crim. App. 1999). To "restrain" is to

> "intentionally or knowingly restrict a person's movements unlawfully and without consent, so as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved. Restraint is 'without consent' if it is accomplished by ... deception."

§ 13A-6-40(1)a., Ala. Code 1975.

In Grayson, this Court discussed restraint through deception:

> "[I]n order to restrain and kidnap a person, it must be without consent; thus, the person's participation is not voluntary. However, it is not necessary that this element exist from the beginning of the course of conduct as long as it is present during the course of conduct. ... Such a situation, where the initial consent is withdrawn and the victim becomes an involuntary participant, would be true particularly where the victim, as was the case here, was a hitchhiker. Moreover, where the initial consent is obtained by fraud, such as agreeing to take the hitchhiker to a particular destination with no intent of doing so, then the consent was never lawful."

Grayson, 824 So.2d at 816 (emphasis added). The State's evidence suggested that Daffin willingly entered the vehicle with Knight to travel to Carlisle's auto-repair shop. Daffin even telephoned Carlisle to tell him that he would be at the shop in 15 minutes. Nonetheless, the State presented evidence from which the jury could have reasonably inferred that Daffin's consent to go with Knight was fraudulently obtained. Specifically, the State presented evidence indicating that Knight wanted Daffin's tax-refund money. As such, it would have been reasonable for the jury to conclude that Knight never intended to allow Daffin to reach the shop; after all, once there, Daffin would have spent a large portion of his money on a vehicle Carlisle was selling. That Knight had a preexisting plan to rob Daffin could also be inferred from Manguel Wingard's testimony. Manguel Wingard testified that Knight telephoned him on the afternoon of February 3, stating: "It went down and it didn't go down right." (R. 726.)

The State's evidence was sufficient to show that Knight abducted and restrained Daffin. See Grayson, 824 So.2d at 816. As such, the circuit court did not err in denying Knight's motion for judgment of acquittal.

VII.

***21** Knight argues that the circuit court erred in denying his requested jury instruction on a lesser-included offense. Specifically, Knight argues it was error to deny his request for an instruction on felony murder as a lesser-included offense of murder made capital because it was committed through the use of a deadly weapon while the victim was in a vehicle.

> " 'It has long been the law in Alabama that a [circuit] court has broad discretion in formulating jury instructions,

provided those instructions are accurate reflections of the law and facts of the case.' Culpepper v. State, 827 So.2d 883, 885 (Ala. Crim. App. 2001) (citing Knotts v. State, 686 So.2d 431, 456 (Ala. Crim. App. 1995)). The circuit court's broad discretion, however, is fettered by a defendant's 'right to have the court charge on the lesser offenses included in the indictment, when there is a reasonable theory from the evidence supporting his position.' Jones v. State, 514 So.2d 1060, 1063 (Ala. Crim. App. 1987) (citing Wiggins v. State, 491 So.2d 1046 (Ala. Crim. App. 1986); Chavers v. State, 361 So.2d 1106 (Ala. 1978); and Fulghum v. State, 291 Ala. 71, 277 So.2d 886 (Ala. 1973))."

Barrett v. State, 33 So.3d 1287, 1288 (Ala. Crim. App. 2009).

" 'A felony-murder is committed when a person commits or attempts to commit one of several enumerated felonies, and, in the course of or in furtherance of the crime or in flight from the crime, that person causes another person's death.' " Morton v. State, 154 So.3d 1065, 1081 (Ala. Crim. App. 2013) (quoting Knotts v. State, 686 So.2d 431, 457 (Ala. Crim. App. 1995)). Knight argues that there was evidence to support a charge of felony murder, with the underlying felony of discharging a firearm into an occupied automobile. See § 13A-11-61, Ala. Code 1975. Knight cites Morton for the proposition that " '[f]elony murder committed by shooting into an occupied vehicle is a lesser included offense to the capital offense of "[m]urder committed by or through the use of a deadly weapon while the victim is in a vehicle." § 13A–5–40(a)(17), Ala. Code, 1975.' Mitchell v. State, 706 So.2d 787, 800 (Ala. Crim. App. 1997)." Morton, 154 So.3d at 1081. Indeed, that was true under the particular facts of Morton and the case quoted in Morton, Mitchell. The instant case is distinguishable, however.

Section 13A-11-61(a) prohibits, among other things, "shoot[ing] or discharg[ing] a firearm ... into any occupied ... automobile." "Into" is used as a "function word to indicate entry, introduction, insertion, superposition, or inclusion." Merriam-Webster's Collegiate Dictionary 613 (10th ed. 1997).

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So.2d 344, 346 (Ala. 1992).

In both Morton and Mitchell, there was evidence indicating that the shooter was standing outside the vehicle and firing at an occupant inside the vehicle. There was no such evidence here. All the evidence indicated that Daffin was shot by a person sitting in the backseat of the vehicle. A person cannot shoot "into" a vehicle while he or she is already inside of it. Because there was no reasonable theory of the evidence to support Knight's requested charge, the circuit court did not abuse its discretion in denying his request.

***22** Moreover, even if this Court were to hold that the circuit court's denial of the requested instruction was an abuse of discretion, any error would be harmless. In addition to charging the jury on three counts of capital murder, the circuit court also charged the jury on felony murder-robbery and felony murder-kidnapping. (R. 1775-1780.) The jury's verdict of guilty on all three counts of capital murder was an express rejection of Knight's defense that he lacked the intent to kill Daffin. Therefore, the circuit court's denying Knight's requested felony-murder charge had no affect on the outcome of the case, and any error would have been harmless beyond a reasonable doubt. See McNabb v. State, 887 So.2d 929, 977-78 (Ala. Crim. App. 2001).[9] As such, this issue does not entitle Knight to any relief.

VIII.

Knight argues that the circuit court erred in admitting unauthenticated copies of social-media pages. The State's theory of the case involved Knight's stealing Daffin's tax-refund money so that he could purchase a Chevrolet El Camino vehicle. The State offered screen shots of what purported to be Knight's social-media profile on the Facebook social-media platform that contained pictures of the El Camino. Knight argues that the exhibit was not properly authenticated because there was no evidence indicating that Knight operated the Facebook account.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So.2d 1148, 1191 (Ala. Crim. App. 2000) (citing Arthur v. State, 711 So.2d 1031, 1077 (Ala. Crim. App. 1996)). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient

to support a finding that the matter in question is what its proponent claims." Rule 901, Ala. R. Evid.

The State offered the challenged exhibit through Detective Crawford. Detective Crawford testified that he searched Facebook for Knight's social-media profile, finding a page under the name of "J.J. Knight." "J.J.," according to Detective Crawford, is Knight's nickname, and the profile included various pictures of Knight. The screen shots also contained a picture of an El Camino, which dovetailed with Knight's own admission to Detective Crawford that he wanted an El Camino. (C. 1913.) Finally, Detective Crawford testified that the screen shots had not been marked, altered, or changed in any way.

Rule 901 requires only a showing sufficient to indicate that the evidence is what it is purported to be. The circuit court found that the State made a sufficient showing, and this Court holds that there was no abuse of discretion in that finding. Knight's arguments on appeal are better addressed to the weight of the evidence, not its admissibility. See Stout by Stout v. Jefferson Cty. Bd. of Educ., 882 F.3d 988, 1008 (11th Cir. 2018) ("Of course, the Gardendale Board was free to challenge the weight given to the Facebook posts, but they were plainly admissible." (Emphasis in original)). As such, this issue does not entitle Knight to any relief.

IX.

Knight argues that the circuit court erred in admitting testimony during the guilt phase that he was dangerous and threatening. Specifically, Knight challenges several statements made by Charlotte King and her son Jetavian Bryant. King testified that she was "afraid" of Knight and that she "was concerned [for her safety] with Justice." (R. 544, 550.) Bryant admitted during his testimony that he was "concerned" for his mother's safety following a conversation he had had with her the day after Daffin's murder and that he was concerned for his own safety while testifying. (R. 885-86, 929.) Knight argues that the testimony was inadmissible as evidence of future dangerousness and as evidence of his bad character. Knight also argues that the prejudicial impact he suffered in the guilt phase from the testimony carried into the penalty phase, making the jury more likely to sentence him to death.

***23** Although defense counsel objected to some of the challenged testimony, he did not do so on the grounds advanced on appeal. " 'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So.2d 880, 882 (Ala. 1987)." Ex parte Coulliette, 857 So.2d 793, 794 (Ala. 2003). Accordingly, this issue will be reviewed for plain error only.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor, 808 So.2d at 1191 (citing Arthur, 711 So.2d at 1077). Evidence of future dangerousness is inadmissible in the guilt phase because this type of evidence could "easily shift[ ] the focus of the jury's attention [away from the defendant's guilt] to the issue of punishment." Berard v. State, 486 So.2d 476, 479 (Ala. 1985). Evidence of a defendant's other crimes, wrongs, or acts is inadmissible if offered only to demonstrate the defendant's bad character. Rule 404(b), Ala. R. Evid.

The testimony cited by Knight was neither evidence of his future dangerousness nor was it offered only to demonstrate his bad character. King's testimony was couched in the past tense, and it was offered to explain King's perception of Knight's reaction to learning he would not be receiving an income-tax refund. Bryant's testimony about being concerned for King's safety was similarly couched and offered for the same purpose. This evidence was relevant to proving Knight's state of mind and his motive for robbing Daffin. See Rule 401, Ala. R. Evid. (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Bryant's testimony that he was concerned for his safety while testifying was likewise relevant and admissible. The record clearly demonstrated Bryant's reticence to testify about Knight -- Bryant initially declined to be sworn in, was cautioned by the circuit court about committing perjury, and repeatedly testified that he could not remember details of his interactions with Knight or statements he had made to law enforcement. On re-direct examination the State asked Bryant, "As you sit there on the stand today, are you concerned for your own safety? Yes or no?" (R. 929.) Bryant answered that he was. Bryant's acknowledging his fear of testifying was relevant because it reflected on his own bias and credibility as a witness. "Bias, which may be induced by self-interest or by fear of testifying for any reason, is almost always relevant because it is probative of witness credibility." State v. McArthur, 730 N.W.2d 44, 51 (Minn. 2007) (citing State v. Clifton, 701 N.W.2d 793, 797 (Minn.

2005)). Additionally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. See Rule 403, Ala. R. Evid.

There was no error, plain or otherwise, in the circuit court's admitting the testimony. As such, this issue does not entitle Knight to any relief.

X.

Knight argues that the circuit court erred in admitting an expert's report from a pretrial examination. Knight underwent a pretrial, court-ordered mental evaluation, which was conducted by Dr. Doug McKeown. Dr. McKeown was tasked with determining Knight's mental state at the time of the offense and his competency to stand trial, and he issued a report of his findings. The report was offered into evidence during the penalty phase and was admitted by the circuit court. (Penalty R. 293.) The State reasoned that Dr. McKeown's report was admissible because Dr. Daniel Grant, Knight's mental-health expert, testified during the penalty phase that he had reviewed Dr. McKeown's report.

***24** Knight argues on appeal that the report was inadmissible because, he says, its admission violated Rule 11.2, Ala. R. Crim. P., because he did not make a knowing and voluntary waiver of his Fifth Amendment privilege against self-incrimination and because it violated his right to confront Dr. McKeown, who did not testify during the penalty phase. Knight did not object to the admission of the report. Therefore, this issue will be reviewed for plain error only.

Rule 11.2(b) governs the admissibility of mental examinations:

> "(1) The results of examinations conducted pursuant to subsection (a)(1) of this rule, Rule 11.3, or Rule 11.4 on the defendant's mental competency to stand trial shall not be admissible as evidence in a trial for the offense charged and shall not prejudice the defendant in entering a plea of not guilty by reason of mental disease or defect.
>
> "(2) The results of mental examinations made pursuant to subsection (a)(2) of this rule and the results of similar examinations regarding the defendant's mental condition at the time of the offense conducted pursuant to Rule 11.4 shall be admissible in evidence on the issue of the defendant's mental condition at the time of the offense only if the defendant has not subsequently withdrawn his or her plea of not guilty by reason of mental disease or defect. Whether the examination is conducted with or without the defendant's consent, no statement made by the defendant during the course of the examination, no testimony by an examining psychiatrist or psychologist based upon such a statement, and no other evidence directly derived from the defendant's statement shall be admitted against the defendant in any criminal proceeding, except on an issue respecting mental condition on which the defendant has testified."

Dr. McKeown's examination of Knight was performed pursuant to Rules 11.2(a)(1) and 11.2(a)(2); thus, both Rules 11.2(b)(1) and 11.2(b)(2) apply to the admission of Dr. McKeown's findings. In Woodward v. State, 123 So.3d 989, 1036 (Ala. Crim. App. 2011), this Court held that, where the appellant did not testify, it was error to admit the findings of the appellant's pretrial mental examination at the sentencing hearing. Because the appellant in Woodward failed to object, this Court evaluated the claim for plain error. Here, Knight's "failure to object weighs heavily against him in our review for plain error. Roberts v. State, 735 So.2d 1244 (Ala. Crim. App. 1997)." Woodward, 123 So.3d at 1036.

> " '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. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." See Ex parte Price, 725 So.2d 1063 (Ala. 1998); Burgess v. State, 723 So.2d 742 (Ala. Crim. App. 1997), aff'd, 723 So.2d 770 (Ala. 1998); Johnson v. State, 620 So.2d 679, 701 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So.2d 709 (Ala. 1993), on remand, 620 So.2d 714 (Ala. Crim. App. 1993).'
>
> "Hall v. State, 820 So.2d 113, 121–22 (Ala. Crim. App. 1999), aff'd, 820 So.2d 152 (Ala. 2001)."

Woodward, 123 So.3d at 1036.

As in Woodward, Knight cannot establish that the admission of Dr. McKeown's report was plain error. In Lewis v. State, 889 So.2d 623, 666 (Ala. Crim. App. 2003), this Court held that the "apparent purpose behind the prohibition in Rule 11.2, and the suggested prohibition in the Committee Comments to that rule, is to prevent a jury from confusing a defendant's competence to stand trial with his sanity at the time of the

offense and from using a defendant's competence to negate his insanity defense." This confusion is not an issue when, as here, the guilt phase has concluded. Rule 11.2(b)(2) is clearly concerned with a defendant's statements being used against him or her. Again, Knight suffered no prejudice in this respect. In the report Dr. McKeown references statements by Knight about the offense: "[Knight] provides information indicating that [Duke] was the person who caused the death of the victim and that he did assist [Duke] in moving the corpse." (C. 1946.) In other words, Knight's statements to Dr. McKeown about the offense were no more incriminating than his statements lawfully entered at trial. Additionally, Dr. Grant testified that he had reviewed Dr. McKeown's report and Dr. McKeown's report was listed as a source on Dr. Grant's report. (R. 212, C. 2490.) Finally, it does not appear that the circuit court gave any weight to Dr. McKeown's report in imposing sentence on Knight. (Supp. C. 22-30.) This Court holds that "the introduction of the report was not particularly egregious and it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings." Woodward, 123 So.3d at 1037. There was no plain error in the circuit court's admission of Dr. McKeown's report. As such, this issue does not entitle him to any relief.

XI.

***25** Knight argues that he was denied his right to the assistance of conflict-free counsel. On the Friday before trial, Jetavian Bryant was added to the State's list of witnesses under subpoena. Tilden Haywood, one of Knight's defense counsel, had represented Bryant in a criminal matter six or seven years earlier. Haywood was concerned with the ethical ramifications of representing Knight, given his attorney-client relationship with a material witness. Haywood consulted with counsel at the Alabama Bar Association, who advised him to seek permission to withdraw from his representation of Knight. On the morning of the second day of trial, Haywood informed the circuit court of the recommendation he had received. Knight moved for a mistrial, and the circuit court engaged the parties in possible solutions to the conflict. Afterwards, the circuit court stated that the parties had not explained to him any possible prejudice to Knight and asked that Haywood again contact the Alabama Bar Association to explain that he was involved in a capital case and that jeopardy had already attached.

Following a recess Haywood stated to the circuit court:

> "[T]he fact scenario as I explained to [counsel for the Alabama Bar Association], he doesn't believe that there's even a conflict that is there based on Rule 1.9, [Ala. R. Prof. Conduct,] specifically sub[section] (b), talking about former clients.
>
> "Unless I'm going to use or I have obtained confidential information through my representation of that former client that would be used against him, adversely to him, that would be the only way a conflict would occur.
>
> "And based on my representation of Mr. Bryant, I have no confidential information that would be used against him. In fact, the charge can't even be used against him for impeachment purposes, because it was dismissed.
>
> "So, he did advise that if there was [a] potential conflict, that my current client would be made aware of it. There's a disclosure to him. Which he clearly is, because he's been sitting here in the courtroom and has heard everything. And he has the right to ask for me to continue representing him, knowing that that's the case.
>
> "And he's indicated to me and [the other defense counsel] in the back that he's fine with going forward. He desperately wants the case to be tried, as well. He wants me to go forward with it since I've been working with him."

(R. 371-72.) Knight indicated that he agreed with Haywood's assessment. (R. 372.)

Knight argues on appeal that Haywood had a conflict based on his prior representation of Bryant. Specifically, Knight argues that defense counsel "cross-examined Bryant under the belief that he was ethically bound to avoid subjects that might involve confidential information from his time as Mr. Bryant's attorney." (Knight's brief, at 77-78.) Knight admits that defense counsel cross-examined Bryant about his prior criminal record, but suggests that he could have cross-examined Bryant about his drug use and its possible effect on his perception.

This Court addressed conflicts of interest in Molton v. State, 651 So.2d 663 (Ala. Crim. App. 1994):

"It is 'a basic constitutional precept' that those prosecuted for criminal offenses have a right to the assistance of counsel during the proceedings. Pinkerton v. State, 395 So.2d 1080, 1085 (Ala. Cr. App. 1980), cert. denied, 395 So.2d 1090 (Ala. 1981). 'Where a constitutional right to counsel exists, [the United States Supreme Court's] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.' Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed. 2d 220 (1981). '[T]he importance of ensuring that defense counsel is not subject to any conflict of interest which might dilute loyalty to the accused has been long and consistently recognized.' Douglas v. United States, 488 A.2d 121, 136 (D.C. App. 1985). More than 45 years ago, the United States Supreme Court declared: 'The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.' Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948) (emphasis added). The right to conflict-free counsel applies whether counsel is appointed or retained. See Cuyler v. Sullivan, 446 U.S. 335, 343-45, 100 S.Ct. 1708, 1715-16, 64 L.Ed. 2d 333 (1980).

***26** "Just as there is no per se constitutional violation in '[r]equiring or permitting a single attorney to represent codefendants,' Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed. 2d 426 (1978), 'there is no per se rule prohibiting representation of the defendant by counsel who has previously represented a government witness,' United States v. Bowie, 892 F.2d 1494, 1502 (10th Cir. 1990). However, where counsel who has previously represented a prosecution witness subsequently represents the defendant against whom the witness is to testify, the potential for a conflict of interests exists in 'that defense counsel may not be able to effectively cross-examine the witness for fear of divulging privileged information.' Id. at [1501]."

Molton, 651 So.2d at 668-69.

" 'In order to demonstrate a violation of his Sixth Amendment rights, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance.' Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed. 2d 333 (1980). 'An actual conflict of interest exists when an attorney owes loyalty to a client whose interests are adverse to another client.' Self v. State, 564 So.2d 1023, 1033 (Ala. Crim. App. 1989), cert. quashed, 564 So.2d 1035 (Ala. 1990)."

Dallas v. State, 711 So.2d 1101, 1111 (Ala. Crim. App. 1997).

Here, there was no actual conflict of interest -- Haywood specifically disclaimed to the circuit court the existence of any interests of Bryant's adverse to Knight's, and the record does not support an inference otherwise. Because no actual conflict of interest existed, Knight bears the burden of demonstrating prejudice. See Dallas, 711 So.2d at 1111 ("Because no actual conflict of interest existed in this case, prejudice is not presumed."). This he has failed to do. Defense counsel cross-examined Bryant on his multiple drug-related convictions. Knight's assertion that defense counsel could have effectively cross-examined Bryant further on his drug use is wholly speculative. Further diminishing the possibility of prejudice was Bryant's apparent inability to recall previous events and statements he had made.

The record does not support an inference that Haywood's representation of Knight was hindered in any way. As such, this issue does not entitle Knight to any relief.

XII.

Knight argues that his right to a fair trial was violated by displays of emotional distress by the victim's family. Knight cites several incidents as being prejudicial -- Daffin's mother's crying, Daffin's family members' wearing T-shirts in memory of him, and Daffin's father allegedly mouthing the word "coward" at Knight. At one point Knight filed a motion for a mistrial, which was denied. Knight also requested a jury instruction on the issue, and that too was denied.

" '[A]s a general rule, a demonstration by, or the misconduct of, a bystander or spectator during a criminal trial -- including even a disturbance having a tendency to influence or disturb the jury -- is not deemed to be sufficient reason for the granting of a new trial unless it appears that the rights of the accused were prejudiced thereby, and, generally, in the absence of a showing to the contrary, it will be assumed that the jury was not prejudiced; similarly, manifestations of grief by spectators related to the victim of a crime, as a general matter, will not alone furnish good ground for a new trial, a showing being required that the case of the accused was prejudiced by such conduct.'

"Annot., 31 A.L.R.4th 229, 234–35 (1984)."

McNair v. State, 653 So.2d 320, 329-30 (Ala. Crim. App. 1992). Further,

> ***27** " 'A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice.' Hammonds v. State, 777 So.2d 750, 767 (Ala. Crim. App. 1999) (citing Ex parte Thomas, 625 So.2d 1156 (Ala. 1993)), aff'd, 777 So.2d 777 (Ala. 2000). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So.2d 130, 135 (Ala. Crim. App. 1991). 'The decision whether to grant a mistrial rests within the sound discretion of the trial court and the court's ruling on a motion for a mistrial will not be overturned absent a manifest abuse of that discretion.' Peoples v. State, 951 So.2d 755, 762 (Ala. Crim. App. 2006)."

Garzarek v. State, 153 So.3d 840, 852 (Ala. Crim. App. 2013). A circuit court's denial of a requested jury instruction is likewise reviewed for an abuse of discretion. Reynolds v. State, 114 So.3d 61, 149 (Ala. Crim. App. 2010) (citations omitted).

During the voir dire of one of the panels, Daffin's mother began to cry. The circuit court stated, "I know this is difficult, but I can't permit it." (R. 173.) Daffin's mother left the courtroom and voir dire continued.

Before the jury entered on the morning of the fourth day of trial, defense counsel notified the circuit court that one of Daffin's family members was in the audience wearing an "In the memory of Jarvis Daffin" t-shirt that bore a picture of him. The circuit court informed the family member that she could not wear the t-shirt in the courtroom. (R. 1040.) Later that morning defense counsel asked to approach and the circuit court recognized the issue without argument from defense counsel. Addressing individuals on the front row, the circuit court stated that they could not remain in the courtroom while wearing the T-shirts stating "In memory of Jarvis Daffin." The circuit court offered to give the jury an instruction and defense counsel accepted. The circuit court gave the following instruction:

> "We all certainly appreciate the loss of anyone in our society under any circumstances, whether natural or otherwise. And there's no dispute in this case that Mr. Daffin is deceased. And regardless of your verdict, nothing will change that. Obviously, people who knew him and his family are sorry and all of us as moral human beings are sorry about that.
>
> "But, nonetheless, in any case of any matter, people are not allowed in the courtroom with any sort of t-shirts or other devices or instruments that show support or opposition to a litigant in a case or issues to be tried in a case.
>
> "The example I used when someone was here before you came in -- and I asked them, and they complied to take the t-shirts off. But, for instance, if we were trying a civil case involving an accident involving a big truck, I would not allow and it would be inappropriate for someone to sit in a courtroom with a t-shirt on that says 'Truck companies are sued too much' or, you know, 'Truck companies kill people' or anything like that would be inappropriate.
>
> If we're trying a speeding ticket case, it would be inappropriate for someone to sit in the courtroom with an 'I support state troopers' t-shirt on or something anti state troopers on, as well. All that would be inappropriate. So, anyway, please disregard that. I'll ask you, as well, none of that will influence anyone's verdict, will it?"

(R. 1071-72.) All jurors indicated they could follow the circuit court's instructions. " '[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary." ' " Thompson v. State, 153 So.3d 84, 158 (Ala. Crim. App. 2012) (quoting Ex parte Belisle, 11 So.3d 323, 333 (Ala. 2008)).

***28** The issue was again raised after the jury left the courtroom for lunch. Defense counsel represented to the circuit court that, according to Knight, Daffin's father had mouthed the word "coward" at Knight. Defense counsel asserted that if Knight could see the behavior, so could the members of the jury. Defense counsel added that, although Daffin's family members had placed shirts over their offending T-shirts, the image of Daffin on the T-shirts was still visible. At this point, defense counsel moved for a mistrial. The circuit court stated that he had "a pretty good view of the audience" and that he had "not observed anything, but that's not to say it didn't happen." (R. 1210.) The circuit court admonished the audience that there could be no communication with any participants while court was in session: "You cannot mouth words to anyone, including the defendant. You can't shake your head in agreement or disagreement with testimony. You have to sit respectfully throughout the trial." (R. 1211.) The circuit court then threatened audience members who could not follow its

instructions with expulsion or contempt. The circuit court questioned his deputy on the matter, who responded that he had not witnessed anything to substantiate Knight's allegation. The prosecutor offered that Daffin's father denied making any comments to Knight and that he was willing to take the stand on the matter. With respect to the T-shirts, the circuit court stated: "I can't make it -- I mean, I know what it is since I saw the t-shirts this morning. But I can't make out anything. Apparently, it's been reversed. That's okay. So, that, in and of itself, I don't think is a problem." (R. 1212.) The circuit court denied Knight's motion for a mistrial, but stated that it and the deputy would do their best to observe the whole courtroom.

There is no evidence in the record indicating that Daffin's father behaved inappropriately, much less that the jury witnessed any inappropriate behavior on the part of Daffin's father. With respect to the latest complaint about the inappropriate T-shirt, the circuit court stated: "I can't make out anything. So, that, in and of itself, I don't think is a problem." (R. 1212.) Under these circumstances, the circuit court did not abuse its discretion in denying Knight's motion for a mistrial or in failing to re-instruct the jury on the issue.

Toward the end of trial, the circuit court solicited jury instructions from the parties. Knight requested the following instruction to address the conduct of Daffin's family members:

> "You were present in the courtroom and the jury room when there were several emotional outbursts by the victim's family. Those incidents have nothing to do with your responsibility as jurors in this case. I am instructing you to give them or anything that occurred as a part of them absolutely no consideration in your deliberations in these cases. None of that is evidence in these cases. Those incidents have no import or bearing whatsoever on the issues that you are called upon to decide as jurors in these cases. I am specifically instructing you not to consider those incidents and not to give them any weight or any consideration."

(C. 1811.) The circuit court denied Knight's requested instruction, but did instruct the jury that it should "rely on the evidence and the testimony in making [its] verdict" and that it must "consider all of the evidence in this trial without bias, prejudice, or sympathy." (R. 1787.) There is no error in refusing a requested instruction that is adequately covered by the trial court's oral charge. Hammonds v. State, 777 So.2d 750, 773 (Ala. Crim. App. 1999) (quoting White v. State, 410 So.2d 135, 136 (Ala. Crim. App. 1981)).

The record shows that the circuit court took steps at each emotional display to limit any potential prejudice to Knight; thus, the circuit court did not abuse its discretion in denying Knight's motion for a mistrial. Additionally, the circuit court did not abuse its discretion in denying Knight's requested jury instruction. As such, this issue does not entitle Knight to any relief.

XIII.

Knight argues that the prosecutor engaged in multiple acts of prosecutorial misconduct. Specifically, Knight argues that he was unfairly prejudiced by the prosecutor's attesting to the veracity of his witnesses, injecting religion into his closing arguments, commenting on Knight's failure to testify, leading witnesses on direct examination, and using inflammatory language during closing argument.

> " 'There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused .... If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.'

***29** "Dunlop v. United States, 165 U.S. 486, 498, 17 S.Ct. 375, 41 L.Ed. 799 (1897). 'On the other hand, "[w]e must not lose sight of the fact that a trial is a legal battle, a combat in a sense, and not a parlor social affair." Arant v. State, 232 Ala. 275, 280, 167 So. 540, 544 (1936).' Davis v. State, 494 So.2d 851, 853 (Ala. Crim. App. 1986).

> " ' " 'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. Whitlow v. State, 509 So.2d 252, 256 (Ala. Cr. App. 1987); Wysinger v. State, 448 So.2d 435, 438 (Ala. Cr. App. 1983); Carpenter v. State, 404 So.2d 89, 97 (Ala. Cr. App. 1980), cert. denied, 404 So.2d 100 (Ala. 1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as

> delivered in the heat of debate; such statements are usually valued at their true worth and are not expected to become factors in the formulation of the verdict. Orr v. State, 462 So.2d 1013, 1016 (Ala. Cr. App. 1984); Sanders v. State, 426 So.2d 497, 509 (Ala. Cr. App. 1982)." '

"Callahan v. State, 767 So.2d 380, 392 (Ala. Crim. App. 1999) (quoting Bankhead v. State, 585 So.2d 97, 105–07 (Ala. Crim. App. 1989)).

> " ' "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright, 699 F.2d [1031] at 1036 [(11th Cir. 1983)]. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974).'

"Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986).

> " '[P]rosecutors are to be allowed a wide latitude in their exhortations to the jury. Varner v. State, 418 So.2d 961 (Ala. Cr. App. 1982). Statements of counsel and argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict." Orr v. State, 462 So.2d 1013, 1016 (Ala. Cr. App. 1984).'

"Armstrong v. State, 516 So.2d 806, 809 (Ala. Crim. App. 1986)."

Thompson v. State, 153 So.3d 84, 169-70 (Ala. Crim. App. 2012).

A.

Knight argues that the prosecutor improperly attested to the veracity of Gwendolyn Wingard and Manguel Wingard with the following comments: "She told the truth and did what's right. One person in a million in this country does what's right" (R. 1722); "It wasn't easy for her to get on the stand and testify in purple, but she did. She told the truth ... and she was great." (R. 1726); "So, he wants to talk about the Wingards are liars. Who are the ones that got on the stand and told the truth?" (R. 1751); and "They told the truth." (R. 1754). Knight did not object to these comments. Accordingly, this issue will be reviewed for plain error only.

In Murry v. State, 562 So.2d 1348 (Ala. Crim. App. 1988), this Court recognized:

> " 'Counsel may argue to the jury the credibility of witnesses as long as he confines his argument to the evidence and the fair inferences to be drawn therefrom, but he may not go beyond the evidence and state as fact his personal knowledge as to the truthfulness or untruthfulness of the testimony of a witness.'

***30** "Stevens v. State, 506 So.2d 373, 375 (Ala. Cr. App. 1986) (quoting McGhee v. State, 41 Ala. App. 669, 671, 149 So.2d 1, 3 (1962), aff'd, 274 Ala. 373, 149 So.2d 5 (1963))."

Murry, 562 So.2d at 1353.

Knight raised an issue of the credibility of both Gwendolyn Wingard and Manguel Wingard through his cross-examination of them. Knight carried this point to the jury in the guilt-phase closing argument: "And I'm telling you the witnesses that have testified in this case, the Wingard family, Debbie Herring, Manguel Wingard, credibility is certainly an issue." (R. 1744.)

Given the context in which the prosecutor's arguments were made, this Court holds that the arguments did not rise to the level of plain error. Murry, 562 So.2d at 1355. As such, this issue does not entitle Knight to any relief.

B.

Knight argues that the prosecutor improperly injected religion into his closing arguments with the following comments: "[Gwendolyn Wingard] went and prayed. Thank goodness the Lord led her here." (R. 1721); and "Proverbs 27:20, 'Death and destruction are never satisfied and neither are the eyes of man.' " (Penalty R. 301.) Knight did not object to these comments at trial. Accordingly, this issue will be reviewed for plain error only.

> " '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, 550–551, 188 So.2d 272, 279 (1966) (citation omitted). Generally, a prosecutor's reference to religion, God, or the Bible is improper if that reference urges the jury to abandon its duty

to follow the law or to decide the case on an improper basis."

Mitchell v. State, 84 So.3d 968, 983 (Ala. Crim. App. 2010).

The prosecutor's comments did not urge "the jury to abandon its duty to follow the law or to decide the case on an improper basis." Id. No error resulted, plain or otherwise, from the prosecutor's comments. As such, this issue does not entitle Knight to any relief.

C.

Knight argues that the prosecutor improperly commented on his failure to testify during the prosecutor's cross-examination of Dr. Grant in the penalty phase:

State: "How about no remorse for his actions? In other words, he can show that, too, can't he?"

Grant: "Or lack of it."

State: "That's what I'm talking about. Lack of remorse for what he's done in any way."

(Penalty R. 276.) Knight argues that the only way to rebut the allegation that he did not show remorse would have been for him to testify that he felt remorse; thus, the prosecutor's cross-examination was an improper comment on his failure to testify. Knight did not object to these comments. Accordingly, this issue will be reviewed for plain error only.

In Rigsby v. State, 136 So.3d 1097 (Ala. Crim. App. 2013), this Court addressed a prosecutor's commenting on a defendant's right against self-incrimination:

"[I]t is well settled 'that a prosecutor may not comment on a defendant's right against self-incrimination ....' Hereford v. State, 608 So.2d 439, 442 (Ala. Crim. App. 1992) (quoting Ex parte Purser, 607 So.2d 301, 304 (Ala. 1992)). The rule of law prohibiting the State from commenting on a defendant's right against self-incrimination bars comments on a defendant's right not to testify and on his right to plead not guilty. State v. Wiles, 59 Ohio St.3d 71, 88, 571 N.E.2d 97, 118 (1991); see also State v. Landrum, 53 Ohio St. 3d 107, 110, 559 N.E.2d 710, 717 (1990).

***31** " 'Comments by a prosecutor on a defendant's failure to testify are highly prejudicial and harmful, and courts must carefully guard against a violation of a defendant's constitutional right not to testify.' Ex parte Brooks, 695 So.2d 184, 188 (Ala. 1997). 'Where there has been a direct comment on, or direct reference to, a defendant's failure to testify and the trial court does not act promptly to cure the comment, the defendant's conviction must be reversed.' Ex parte Purser, 607 So.2d at 304 (citing Ex parte Wilson, 571 So.2d 1251 (Ala. 1990)); see also Harrison v. State, 706 So.2d 1323, 1325 (Ala. Crim. App. 1997) ('Where there has been a direct comment on a defendant's failure to testify or an indirect comment with a close identification of the defendant as the person who did not become a witness and the trial court does not act promptly to cure the comment, the defendant's conviction must be reversed ....' (citations omitted))."

136 So.3d at 1100-01.

A defendant's lack of remorse is a proper argument in the penalty phase. Jackson v. State, 169 So.3d 1, 48 (Ala. Crim. App. 2010) (citations omitted). Here, though, the prosecutor did not even elicit from Dr. Grant that Knight had shown a lack of remorse. Dr. Grant agreed only that it could be shown. Regardless, the prosecutor's comments certainly were not a direct or even indirect comment on Knight's failure to testify. No error resulted, plain or otherwise, from the prosecutor's comments. As such, this issue does not entitle Knight to any relief.

D.

Knight argues that the prosecutor improperly led witnesses on direct examination. In his brief Knight, however, cites only one leading question. [10] Specifically, Knight cites the following question posed to Loise Taylor:

"That's fine. Okay. That's perfect. Let's go to the evening, then. And I understand you were up and went and paid bills. You were at the house with who besides [Knight]? Who else was there? She's out there on the porch -- on the bench. She was with you when he took the garbage out. Does that help you?"

(R. 1623-24.) Knight objected to the question on the ground of leading, and the circuit court stated that he would give the prosecutor "a little bit of leeway." (R. 1624.) Knight asserts the question was leading because Taylor had not testified that anyone other than Knight was with her at the house.

" ' "Whether to allow or disallow leading questions is discretionary with the trial court and except for a flagrant violation will there be reversible error." ' " Johnson v. State, 120 So.3d 1130, 1168–69 (Ala. Crim. App. 2009) (quoting Ruffin v. State, 582 So.2d 1159, 1162 (Ala. Crim. App. 1991), quoting in turn Jones v. State, 292 Ala. 126, 128, 290 So.2d 165, 166 (1974)). The prosecutor's question did not lead to the admission of illegal evidence. Further, Knight has not alleged how he was prejudiced by the question, and this Court cannot conceive of any possible prejudice. The circuit court did not abuse its discretion in allowing the question. As such, this issue does not entitle Knight to any relief.

E.

Knight argues that the prosecutor improperly used inflammatory language during closing argument. Specifically, Knight refers to the prosecutor's calling him a "psycho." (R. 1726.) Knight did not object to this comment. Accordingly, this issue will be reviewed for plain error only.

***32** In context, the prosecutor was referring to Knight's calmness following the murder -- how "[n]othing affect[ed] him in any manner of fashion." (R. 1726.) "This Court has repeatedly held that the prosecutor may refer to an accused in unfavorable terms, so long as the evidence warrants the use of such terms." McNair v. State, 653 So.2d 320, 341 (Ala. Crim. App. 1992). The prosecutor's referring to Knight as a "psycho" was supported by the evidence. No error, plain or otherwise, resulted from the prosecutor's comment. As such, this issue does not entitle Knight to any relief.

XIV.

Knight argues that the State violated his right to a speedy trial. Knight was originally indicted for capital murder on March 1, 2012, but did not stand trial until September 26, 2016. Knight moved the circuit court to dismiss his indictment on the ground that the State's delay in bringing him to trial was unconstitutional. The circuit court denied the motion. Knight asserts on appeal that the delay was designed either to hamper his defense or to harass him. Knight further argues that he was prejudiced by the delay because his mental health deteriorated during his pretrial incarceration. The circuit court's ruling on Knight's motion will be reviewed de novo. See Ex parte Walker, 928 So.2d 259, 262 (Ala. 2005).

Knight had a right to a speedy trial, guaranteed by the Sixth Amendment to the United States Constitution and by Art. I, § 6, of the Alabama Constitution, 1901. See Walker, 928 So.2d at 263. In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court of the United States identified factors to be assessed in determining whether a defendant's right to a speedy trial has been violated: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. Barker, 407 U.S. at 530, 92 S.Ct. 2182.

Length of the Delay

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530, 92 S.Ct. 2182. "In Alabama, '[t]he length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant -- whichever is earlier -- to the date of the trial.' " Ex parte Walker, 928 So.2d 259, 264 (Ala. 2005) (quoting Roberson v. State, 864 So.2d 379, 394 (Ala. Crim. App. 2002)). Knight was indicted for capital murder in March 2012, and an arrest warrant was subsequently issued; Knight was brought to trial in September 2016. [11] Approximately 55 months passed between Knight's indictment and the start of his trial. Delays of this length, even in capital cases, have been held to be presumptively prejudicial. See Wiggins v. State, 193 So.3d 765, 776 (Ala. Crim. App. 2014), and the cases cited therein. Consequently, this Court must evaluate the remaining Barker factors.

Reason for the Delay

The reason for the delay is the second Barker factor. In Ex parte Walker, the Alabama Supreme Court recognized three categories of delay:

> "The State has the burden of justifying the delay. See Barker, 407 U.S. at 531, 92 S.Ct. 2182; Steeley v. City of Gadsden, 533 So.2d 671, 680 (Ala. Crim. App. 1988). Barker recognizes three categories of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. 407 U.S. at 531, 92 S.Ct. 2182. Courts assign different weight to different reasons for delay. Deliberate delay is 'weighted heavily' against the State. 407 U.S. at 531, 92 S.Ct. 2182. Deliberate delay includes an 'attempt to delay

the trial in order to hamper the defense' or ' "to gain some tactical advantage over (defendants) or to harass them." ' 407 U.S. at 531 & n.32, 92 S.Ct. 2182 (quoting United States v. Marion, 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971)). Negligent delay is weighted less heavily against the State than is deliberate delay. Barker, 407 U.S. at 531, 92 S.Ct. 2182; Ex parte Carrell, 565 So.2d at 108. Justified delay -- which includes such occurrences as missing witnesses or delay for which the defendant is primarily responsible -- is not weighted against the State. Barker, 407 U.S. at 531, 92 S.Ct. 2182; Zumbado v. State, 615 So.2d 1223, 1234 (Ala. Crim. App. 1993) (' "Delays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the balancing test of Barker." ') (quoting McCallum v. State, 407 So.2d 865, 868 (Ala. Crim. App. 1981)).

***33** Walker, 928 So.2d at 265.

Knight asserts on appeal that the delay on the part of the State was deliberate because the State originally chose to bring the case in Houston County. Although it is not clear why the case was originally brought in Houston County, that was not the primary source of delays in the case. In January 2013, the State represented to the circuit court that it would be prepared to try the case that autumn. [12] On September 20, 2013, defense counsel filed a motion to continue, seeking additional time for Knight's newly retained mitigation specialist to investigate his case. (C. 140-41.) The circuit court granted the motion. (C. 150.) On July 10, 2014, defense counsel filed a motion to continue, seeking additional time to locate and to examine mitigation and fact witnesses. (C. 185.) The circuit court granted Knight's motion and set trial for November 3, 2014. (C. 190.) On October 9, 2014, Knight sought and received a continuance to retain his own DNA expert. (C. 332.) The circuit court reset trial for April 20, 2015. (C. 385.) On January 28, 2015, one of Knight's defense counsel withdrew from his representation of Knight due to family medical issues. (C. 454.) Trial was again continued on Knight's motion, this time to October 26, 2015, to allow Knight's new counsel sufficient time to familiarize himself with Knight's case. (C. 473.) On October 28, 2015, Knight's original indictment was dismissed on motion of the State. A preliminary hearing was scheduled for December 7, 2015, but this was twice continued on motions filed by defense counsel asserting scheduling conflicts. (C. 1312-13, 1317.) The preliminary hearing was held on February 2, 2016, and Knight was bound over to the grand jury. (C. 1321.) Following his indictment on March 30, 2016, Knight was arraigned on July 28, 2016, and stood trial beginning on September 26, 2016.

Contrary to Knight's argument on appeal, the delays in this case were neither deliberately nor negligently caused by the State. The continuances granted in this case were sought by Knight. As such, this factor is not weighted against the State.

Assertion of the Right

A defendant's assertion of his right to a speedy trial is the third Barker factor.

"An accused does not waive the right to a speedy trial simply by failing to assert it. Barker, 407 U.S. at 528, 92 S.Ct. 2182. Even so, courts applying the Barker factors are to consider in the weighing process whether and when the accused asserts the right to a speedy trial, 407 U.S. at 528–29, 92 S.Ct. 2182, and not every assertion of the right to a speedy trial is weighted equally. Compare Kelley v. State, 568 So.2d 405, 410 (Ala. Crim. App. 1990) ('Repeated requests for a speedy trial weigh heavily in favor of an accused.'), with Clancy v. State, 886 So.2d 166, 172 (Ala. Crim. App. 2003) (weighting third factor against an accused who asserted his right to a speedy trial two weeks before trial, and stating: ' "The fact that the appellant did not assert his right to a speedy trial sooner 'tends to suggest that he either acquiesced in the delays or suffered only minimal prejudice prior to that date.' " ') (quoting Benefield v. State, 726 So.2d 286, 291 (Ala. Crim. App. 1997), additional citations omitted), and Brown v. State, 392 So.2d 1248, 1254 (Ala. Crim. App. 1980) (no speedy-trial violation where defendant asserted his right to a speedy trial three days before trial).

***34** Walker, 928 So. 2d at 266-67.

Knight argues on appeal that he asserted his right to a speedy trial on multiple occasions. The first, according to Knight, was a letter he sent to the circuit court in October 2014 in which he wrote, "My trial is set for November 3, 2014[,] please don't set it off again." (C. 368-69.) Knight asserts the second occasion was in March 2015 during an ex parte hearing over Knight's possible dissatisfaction with defense counsel. Knight expressed to the circuit court his frustration with the number of continuances that had been granted in his case. Finally, defense counsel made an oral motion for a speedy trial after

trial had commenced; the motion was made after Knight's Batson motion had been resolved. (R. 337.)

Knight's first express assertion of his right to a speedy trial came after his trial had already commenced. "The fact that [Knight] did not assert his right to a speedy trial sooner 'tends to suggest that he either acquiesced in the delays or suffered only minimal prejudice prior to that date.' " Archer v. State, 643 So.2d 597, 599 (Ala. Crim. App. 1991) (quoting Lewis v. State, 469 So.2d 1291, 1294 (Ala. Crim. App. 1984)). To the extent the two prior occasions could be considered assertions of his right to a speedy trial, those occasions were followed by his requests for continuances. This too would weigh against his claim. See Ex parte Anderson, 979 So.2d 777, 781 (Ala. 2007).

Prejudice to Knight

The fourth Barker factor is the prejudice to Knight that resulted from the pretrial delay. "In analyzing the fourth factor, we consider the 'interests of defendants which the speedy trial right was designed to protect. ...: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " Anderson, 979 So.2d at 781 (quoting Barker, 407 U.S. at 532, 92 S.Ct. 2182).

Knight has devoted little argument in his brief to the factor of prejudice, alleging only that Dr. Grant's assessment of Knight indicated that there was "direct evidence" that his "mental health had deteriorated during the nearly five years the case was pending." (Knight's brief, at 91.) Knight did not elaborate on this point, and a review of Dr. Grant's report provides little support. The only hint of deteriorating capabilities in the report would be Dr. Grant's finding in 2016 that Knight's full-scale IQ score was 88, whereas 2 years earlier it had been found to be 100. [13] (C. 1598-99.)

This Court holds the State pursued the accused with reasonable diligence. Thus, "the delay -- however long -- generally is excused unless the accused demonstrates 'specific prejudice to his defense.' " Walker, 928 So.2d at 267 (quoting Doggett v. United States, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). Knight has failed to carry his burden to explain specifically how he was prejudiced by the delay. Consequently, this factor is not weighted against the State.

***35** Applying the Barker factors to Knight's case, this Court holds that the circuit court did not err in denying Knight's motion for a speedy trial. As such, this issue does not entitle him to any relief.

XV.

Knight argues that the venire was not drawn from a fair cross-section of residents in Henry County. Knight raised this issue below following the first striking of the jury. Defense counsel asserted that the initial jury list was composed of 112 veniremembers, 41 of whom were black. With black veniremembers representing 36.6% of the initial jury list, defense counsel announced that he "wasn't going to bring the issue up." (R. 300.) Defense counsel, though, felt compelled to object based on the effects of general jury qualification, which whittled the venire to 59 veniremembers, only 10 of whom were black. With the percentage of black veniremembers reduced to 16.9%, defense counsel argued that the venire was no longer a fair cross-section of Henry County, which defense counsel estimated to be between 30 to 40 percent black. [14] The percentage of black veniremembers was further reduced to 11.5% following strikes for cause, which left only 6 black veniremembers out of 52. Defense counsel argued that, given the percentage of black veniremembers immediately prior to the parties' peremptory strikes, Knight could no longer receive a fair trial.

In Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the Supreme Court of the United States held:

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

Duren, 439 U.S. at 364, 99 S.Ct. 664. The State concedes on appeal that the first factor has been satisfied, but disputes that Knight made the requisite showing of the second and third factors. This Court agrees.

The circuit court stated for the record that the venire was selected by the county's voter-registration roll. (R. 301.) This

Court has held that this method of selection does not violate the fair-cross-section requirement of Duren. See Wesley v. State, 424 So.2d 648, 649 (Ala. Crim. App. 1982). Indeed, this method resulted in a percentage of black veniremembers that defense counsel admitted was not objectionable. (R. 300.) It was only after general jury qualification and strikes for cause that defense counsel argued that the percentage of black veniremembers had fallen to a number that affected the fairness of Knight's trial. However, Knight offered only percentages in his argument, and " '[t]he mere recitation of the percentage disparity between the population of blacks in [Henry] County and the number of blacks on the jury venire is not sufficient to allow us to conclude that blacks were not fairly represented on this jury venire.' " Jackson v. State, 177 So.3d 911, 919 (Ala. Crim. App. 2014) (quoting Stewart v. State, 730 So.2d 1203, 1238 (Ala. Crim. App. 1996)). Knight failed to offer any evidence below to satisfy the second factor of the test established in Duren.

***36** With respect to the third factor, Knight failed to even argue below that the alleged underrepresentation of black people was due to systematic exclusion of the group in the jury-selection process. Knight has pursued this argument on appeal, however. Specifically, Knight asserts that the general jury qualification caused systematic exclusion because many black veniremembers were excused for reasons that apply disproportionately to black people -- being the sole caretaker for another family member, health issues, address changes, and difficulty serving jury summons. Again, Knight presented no evidence below to support these contentions.

Because Knight failed to establish either the second or third factor of the test established in Duren, the circuit court did not err in denying Knight's motion. See Jackson, 177 So.3d at 919. As such, this issue does not entitle Knight to any relief.

XVI.

Knight argues that the circuit court erroneously refused to allow him to argue residual doubt in the penalty phase and incorrectly instructed the jury that residual doubt is not a mitigating circumstance.

In Ex parte Lewis, 24 So.3d 540 (Ala. 2009), the Alabama Supreme Court rejected an identical argument, explaining:

> "Section 13A-5-51, Ala. Code 1975, without limiting possible mitigating circumstances, statutorily defines a number of mitigating circumstances. Residual doubt as to the defendant's guilt is not a statutory mitigating circumstance. Instead, as the State argues, 'all seven statutory mitigating circumstances [in § 13A-5-51, Ala. Code 1975,] relate to the defendant or the circumstances of the crime for which the defendant [has been found guilty] and merely reduce the defendant's culpability for committing that crime.' State's brief, at 29.
>
> "Section 13A-5-52, Ala. Code 1975, allows a capital defendant to offer mitigating circumstances in addition to those enumerated in § 13A-5-51. Specifically, it provides:
>
> > " 'In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstances which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.'
>
> "It is inarguable, as the Court of Criminal Appeals has pointed out on many occasions, that residual doubt is not a factor about the 'defendant's character or record [or] any of the circumstances of the offense.' See, e.g., Melson v. State, 775 So.2d 857, 899 (Ala. Crim. App. 1999), aff'd, 775 So.2d 904 (Ala. 2000). Indeed, as the State argues, residual doubt 'is nothing more than a juror's state of mind and bears directly on the defendant's guilt, [and] is not a fact or situation relating to the defendant's character or record or which reduces the defendant's culpability in the commission of a crime for which guilt is a foregone conclusion.' State's brief, at 25.
>
> "According to Lewis, the language of § 13A-5-52 providing that 'mitigating circumstances shall include ... any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death' is broad enough to allow the consideration of residual doubt at the penalty phase of a capital-murder trial. It is not, however, because residual doubt is not a 'relevant mitigating circumstance.'
>
> "A mitigating circumstance is '[a] fact or situation that does not bear on the question of a defendant's guilt but is considered ... in imposing punishment and esp. in lessening the severity of a sentence.' Black's Law Dictionary 260 (8th ed. 2004). As previously stated in this opinion, residual

doubt bears directly on the question of a defendant's guilt. In fact, Lewis admits as much: 'Residual doubt arises because even though the evidence the juror saw was enough to convict, there is a possibility that ... the defendant is really innocent.' Lewis's reply brief, at 13. Also, residual doubt is not a 'fact or situation.' Instead, it is merely 'a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." ' Franklin v. Lynaugh, 487 U.S. 164, 188, 108 S.Ct. 2320, 101 L.Ed. 2d 155 (1988) (O'Connor, J., concurring). Stated simply, Lewis's arguments find no support in Alabama's statutory provisions addressing mitigating circumstances.

> ***37** "Residual doubt is not a mitigating circumstance. Consequently, the Court of Criminal Appeals was correct in holding that the trial court did not err in denying Lewis's requested jury charge on residual doubt during the penalty phase of Lewis's capital-murder trial."

Ex parte Lewis, 24 So.3d 540, 543-44 (Ala. 2009).

Because residual doubt is not a mitigating circumstance, the circuit court correctly prevented Knight from presenting it as such and properly instructed the jury on the law. Consequently, this issue does not entitle Knight to any relief.

XVII.

Knight argues that the circuit court erroneously denied his motion to require the State to produce criminal records for all the witnesses it would present at trial. This issue is without merit.

In Thompson v. State, 153 So.3d 84, 150 (Ala. Crim. App. 2012), this Court reiterated that a criminal defendant is not entitled to the general disclosure of criminal records of the State's witnesses. Specifically, this Court stated:

> " 'We have held in Alabama in a number of cases that a defendant is not entitled to the general disclosure of the criminal records of the state's witnesses. See, e.g., Davis v. State, 554 So.2d 1094 (Ala. Crim. App. 1984), aff'd, 554 So.2d 1111 (Ala. 1989), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed. 2d 1196 (1991); Wright v. State, 424 So.2d 684 (Ala. Crim. App. 1982) (no absolute right of disclosure of criminal records of state's witnesses); Mardis v. State, 423 So.2d 331 (Ala. Crim. App. 1982); Mack v. State, 375 So.2d 476 (Ala. Crim. App. 1978), aff'd, 375 So.2d 504 (Ala.1979), vacated on other grounds, 448 U.S. 903, 100 S.Ct. 3044, 65 L.Ed. 2d 1134 (Ala. 1980). We have also held that the trial court's refusal to order the prosecution, pursuant to a defendant's discovery motion, to provide the criminal record of each expected witness for the state was not a violation of Brady[v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] and its progeny. Davis v. State, 554 So.2d at 1100.' "

Thompson, 153 So.3d at 150 (quoting Hardy v. State, 804 So.2d 247, 286 (Ala. Crim. App. 1999)).

Because Knight was not entitled to demand that the State provide criminal records for its witnesses, this issue is without merit and does not entitle Knight to any relief.

XVIII.

Knight argues that his death sentence is unconstitutional under Hurst v. Florida, 577 U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court disagrees.

This Court has recently rejected Knight's argument as follows:

> " 'In 2000, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589, 122 S.Ct. 2428. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585, 122 S.Ct. 2428. Thus,

Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence.'

***38** "Ex parte Bohannon, 222 So.3d 525, 528 (Ala. 2016).

"Section 13A–5–45(e), Ala. Code 1975, provides that 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.' See also § 13A–5–50, Ala. Code 1975, stating: 'The fact that a particular capital offense as defined in Section 13A–5–40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A–5–49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.' The jury found Creque guilty of two counts of murder during a robbery in the first degree, a violation of § 13A–5–40(a)(2), Ala. Code 1975, and those verdicts automatically established, beyond a reasonable doubt, the § 13A–5–49(4), Ala. Code 1975, aggravating circumstance —that the capital offense was committed during the commission of a robbery. The jury found Creque guilty of murder of two or more persons pursuant to one scheme or course of conduct, § 13A–5–40(a)(10), and that verdict established, beyond a reasonable doubt, the § 15A–5–49(9) aggravating circumstance—that he intentionally caused the death of two or more persons pursuant to one scheme or course of conduct. Therefore, the requirements of Apprendi and Ring were satisfied.

"In Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed. 2d 504 (2016), the United States Supreme Court held that Florida's capital-sentencing scheme violated Ring and was unconstitutional because it did not require the jury to make any findings regarding the aggravating circumstances. The existence of an aggravating circumstance under Florida law was a determination for the judge, alone, to make. Creque argues that Hurst requires a jury to determine both the existence of an aggravating circumstance that makes a defendant eligible to receive a death sentence, and that any aggravating circumstances it finds to exist outweigh any mitigating circumstances it finds to exist. The Alabama Supreme Court rejected these arguments in Ex parte Bohannon. The Court held:

" 'Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

" 'Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, [859 So.2d 1181 (Ala. 2002),] holding that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or legal judgment that takes into account a theoretically limitless set of facts." 859 So.2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of a aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may "exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute." 530 U.S. at 481, 120 S.Ct. 2348. Hurst does not disturb this holding.'

***39** "Ex parte Bohannon, 222 So.3d at 531–33.

"As discussed above, the jury's three guilty verdicts established that the jury found beyond a reasonable doubt the existence of two aggravating circumstances -- that

the murder was committed during a robbery of Graff and during a robbery of Aguilar, § 13A–5–49(4), Ala. Code 1975; and that Creque intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct, § 13A–5–49(9), Ala. Code 1975. Thus, the jury's unanimous verdicts rendered Creque eligible for the death penalty.

"Creque also argues that his sentence must be reversed because, he says, various other provisions of Alabama's capital-sentencing scheme violate Hurst and constitutional principles. He argues that each of the following provisions of the Alabama sentencing scheme violates constitutional principles: The ultimate decision to impose the death sentence is made by the trial court; the trial court is permitted to consider evidence in addition to that presented to the jury; the jury makes only a recommendation that may be overridden by the trial court, and the jury is informed that its verdict is advisory and that the trial court will impose the sentence; a jury is permitted to recommend a death sentence based on a nonunanimous verdict; and the jury is permitted to consider evidence from the guilt phase as proof of a corresponding aggravating circumstance. Each of Creque's arguments was addressed and rejected in Bohannon; therefore, Creque is not entitled to relief on any of these claims.

"The Bohannon Court held: 'Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment.' 222 So.3d at 532. Following that precedent, we hold that Creque is due no relief on claims that his death sentence must be reversed based on the holdings in Ring, Apprendi, and Hurst.

Creque v. State, [Ms. CR-13-0780, Feb. 9, 2018] —— So. 3d ——, —— (Ala. Crim. App. 2018).

Knight's arguments have been rejected by this Court in Creque and by the Alabama Supreme Court in Bohannon. As such, this issue does not entitle him to any relief.

XIX.

Knight argues that his death sentence is unconstitutional because, he says, he is mentally ill and delusional. Specifically, Knight argues that his mental illness renders his sentence of death to be so disproportionate as to be cruel and unusual punishment.

Evidence regarding Knight's mental health was thoroughly addressed in Part III of this opinion. Additionally, defense counsel withdrew Knight's initial plea of not guilty due to mental disease or defect and also informed the circuit court that there was no indication that Knight is mentally disabled. In short, there is no evidence in the record to support Knight's assertion on appeal that he is suffering from a serious mental illness. As such, this issue does not entitle him to any relief.

XX.

Knight argues that the circuit court erroneously allowed the jury to be death-qualified, which resulted in a conviction-prone jury in violation of his constitutional rights.

***40** This Court has repeatedly rejected such arguments. For instance, in Sockwell v. State, 675 So.2d 4 (Ala. Crim. App. 1993), this Court held:

"In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986), the Supreme Court held that the Constitution does not prohibit states from 'death qualification' of juries in capital cases and that so qualifying a jury does not deprive a defendant of an impartial jury. 476 U.S. at 173, 106 S.Ct. at 1764. Alabama Courts have consistently held likewise. See Williams v. State, 556 So.2d 737 (Ala. Crim. App. 1986), rev'd in part, 556 So.2d 744 (Ala. 1987); Edwards v. State, 515 So.2d 86, 88 (Ala. Crim. App. 1987); Martin v. State, 494 So.2d 749 (Ala. Crim. App. 1985)."

Sockwell, 675 So.2d at 18; see also Revis v. State, 101 So.3d 247, 310-11 (Ala. Crim. App. 2011) (same); McCray v. State, 88 So.3d 1, 76 (Ala. Crim. App. 2010) (same); Vanpelt v. State, 74 So.3d 32, 50 (Ala. Crim. App. 2009) (same).

Because the Constitution does not prohibit death-qualification of the jury in a capital-murder trial, the circuit court committed no error in allowing the prospective jurors to be questioned about their views toward capital punishment. As such, this issue does not entitle Knight to any relief.

XXI.

Knight argues that the circuit court erred by double counting elements of his capital offenses as aggravating circumstances.

He also argues that the circuit court erroneously failed to instruct the jury that their guilt-phase verdict would be considered in the penalty phase of Knight's trial. This Court disagrees.

There is no constitutional or statutory prohibition against double counting certain circumstances as both elements of the offenses and aggravating circumstances, and no requirement that the circuit court inform the jury that its guilt-phase verdict will be considered during the penalty phase. See § 13A-5-45(e), Ala. Code 1975 (providing that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing"). The Supreme Court of the United States, the Alabama Supreme Court, and this Court have all upheld the practice of double counting. See Lowenfield v. Phelps, 484 U.S. 231, 241-46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ("The fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm."); Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."); Ex parte Kennedy, 472 So.2d 1106, 1108 (Ala. 1985) (rejecting a constitutional challenge to double counting); Brown v. State, 11 So.3d 866, 929 (Ala. Crim. App. 2007); Harris v. State, 2 So.3d 880 (Ala. Crim. App. 2007); Jones v. State, 946 So.2d 903, 928 (Ala. Crim. App. 2006); Peraita v. State, 897 So.2d 1161, 1220-21 (Ala. Crim. App. 2003); Coral v. State, 628 So.2d 954, 965-66 (Ala. Crim. App. 1992); Haney v. State, 603 So.2d 368, 379-81 (Ala. Crim. App. 1991). Because double counting is constitutionally permitted and statutorily required, Knight is not entitled to any relief on this issue. § 13A-5-45(e), Ala. Code 1975.

XXII.

***41** Finally, according to § 13A-5-53, Ala. Code 1975, this Court must address the propriety of Knight's convictions and sentence of death.

Knight was convicted of three counts of capital murder: killing Daffin during the course of a first-degree kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975; killing Daffin during the course of a first-degree robbery, see § 13A-5-40(a)(2), Ala. Code 1975; and killing Daffin through the use of a deadly weapon while Daffin was in a vehicle, see § 13A-5-40(a)(17), Ala. Code 1975.

A review of the record shows that Knight's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

As statutory mitigating circumstances, the circuit court found the following: that Knight had no significant history of prior criminal activity and Knight's age at the time of the crime. See § 13A-5-51, Ala. Code 1975. The circuit court then individually set out each nonstatutory mitigating circumstance that Knight had argued to the court and found the following nonstatutory mitigating circumstances to exist: (1) Knight's childhood from his birth to his teens; (2) that Knight's mother was taking illegal drugs and alcohol at the time of his birth; (3) that Knight suffered from fetal alcohol syndrome; (4) that Knight had several psychological diagnoses documented in his childhood requiring prescription medicine; (5) that Knight has a daughter and could maintain a relationship even serving a sentence of life in prison without the possibility of parole; (6) that Knight has family members, siblings and others, and could maintain a relationship even serving a sentence of life in prison without parole; (7) that Daffin did not suffer pre-mortem; (8) that the jury's sentencing recommendation of death was not unanimous; and (9) that his codefendant's age prohibits the imposition of the death penalty on him. The circuit court considered the aggravating circumstance that the capital offense was committed while Knight was engaged in a robbery. The circuit court concluded:

> "After careful, thorough and deliberate consideration of all of the mitigating circumstances that exist, the court assigns significant weight in favor of the following mitigating circumstances: lack of significant prior criminal activity; the defendant's age (20) at the time of the crime; hardships of his childhood. The court has considered the remaining mitigating circumstances outlined above and submitted by the defendant which exist, and finds that these remaining mitigating circumstances are entitled to minimal or no weight at all. Those circumstances entitled to minimum weight, when considered along with the three significant mitigating circumstances enumerated, when weighed together are insufficient to equal or to outweigh the substantial aggravating circumstance of robbery, first degree."

(Supp. C. 29.) Accordingly, the circuit court determined that death was the appropriate sentence in this case.

According to § 13A-5-53(b)(2), Ala. Code 1975, this Court must independently weigh the aggravating and the mitigating circumstances. This Court is convinced, as was the circuit court, that death is the appropriate sentence for Knight's murder of Daffin.

***42** Further, Knight's sentence is not disproportionate or excessive when compared to sentences in other capital-murder cases. See § 13A-5-53(b)(3), Ala. Code 1975.

Also, Rule 45A, Ala. R. App. P., requires this Court to search the record for any error that may have adversely affected Knight's substantial rights. This Court has done so and finds no error that has affected Knight's substantial rights.

For the foregoing reasons, Knight's capital-murder convictions and sentence of death are affirmed.

AFFIRMED.

Welch, Kellum, and Joiner, JJ., concur. Burke, J., concurs in the result.

All Citations

--- So.3d ----, 2018 WL 3805735

Footnotes

1 At this point the circuit court questioned whether the prosecutor had asked the venire if any member had ever been arrested or convicted of any crimes. (R. 305.) Defense counsel later asserted that he could not recall the question being asked, either. (R. 309.) However, the prosecutor did ask the veniremembers to "come up privately if we've ever prosecuted a member of your family, a close social friend, or if you've been arrested for an offense." (R. 184.)

2 In the second step of evaluating a Batson claim, the prosecutor need only to state a race-neutral reason for striking a particular veniremember. Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029. " 'Strikes based on "[p]revious criminal charges, prosecutions, or convictions of the venire-member or a family member ...," have been found not to violate Batson.' Knight v. State, 652 So.2d 771, 773 (Ala. Crim. App. 1994)." Whatley v. State, 146 So.3d 437, 456 (Ala. Crim. App. 2010). It should have then become the defense's burden to prove that the race-neutral reason was a pretext or a sham. Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029. Instead of shifting the burden to the defense in the third step, the circuit court, in effect, required the prosecutor to bear the burden of proving his race-neutral reason was not a pretext or a sham.

3 The prosecutor later found a black juror, D.S., who had answered on her juror questionnaire that she had a friend or relative who had been charged with a crime. D.S. was not removed from the jury. The prosecutor stated, "I'm willing to leave her, to waive that." (R. 328.)

4 S.W. appears to have been removed mistakenly from the jury -- M.W. was the other juror who had a relative who had been charged with a crime. When the circuit court announced that S.P. and S.W. were to be removed, both parties agreed. (R. 340.)

5 This Court notes that the opinions cited by Knight as evidence of racial discrimination in jury selection by the Houston County District Attorney's Office are two decades old or more.

6 This assertion is not supported by the record. The prosecutor merely pointed out to defense counsel that, in the event of a restrike, he could legitimately strike D.S., the black juror who the prosecutor realized had answered on her juror questionnaire that she had a friend or relative who had been charged with a crime. (R. 334.) The prosecutor also said that his strikes would not change except for white jurors S.P. and M.W. (R. 331.)

7 The reporter's transcript on appeal is not numbered continuously. Citations to transcripts of pretrial hearings will be denoted with the date on which the hearing occurred.

8 Knight includes D.S. as one of the jurors having an unambiguous racial bias against blacks. The record on appeal indicates that D.S. is black.

9 In footnote 22 of Knight's brief, he argues that the circuit court erred in charging separate counts of felony murder. See Hardy v. State, 920 So.2d 1117, 1121-22 (Ala. Crim. App. 2005). In light of the jury's verdict, any error was harmless beyond a reasonable doubt.

10 " ' "We in no way condone a party's reliance on the mere citing of page numbers from the record, without a discussion of the pertinent facts from those pages and application of the pertinent law to those facts. We consider such reliance an indication of a lack of merit of the contention the party asserts." ' " Johnson v. State, 120 So.3d 1130, 1169 (Ala. Crim. App. 2009) (quoting Jackson v. State, 791 So.2d 979, 1015 (Ala. Crim. App. 2000), quoting in turn Hardy v. State, 804 So.2d 247, 289 (Ala. Crim. App. 1999)).

11 Knight's original indictment, which was filed in Houston County, was dismissed on motion of the State on October 28, 2015. An arrest warrant was issued in Henry County and executed that same day. Thus, it appears that there was no break in Knight's pretrial incarceration.

12 Had the trial occurred as planned, Knight would have faced a delay of only 19 to 20 months. This Court has held similar delays in capital cases not to be presumptively prejudicial. See Scheuing v. State, 161 So.3d 245, 289 (Ala. Crim. App. 2013).

13 When he was tested as a juvenile during "tumultuous times," he obtained an IQ score of 72. (C. 1599.)

14 Knight asserts on appeal that the 2010 Census determined that black residents constituted 28.6% of the population of Henry County.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
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October 5, 2018

CR-16-0182 **Death Penalty**

Justice Jerrell Knight v. State of Alabama (Appeal from Henry Circuit Court: CC16-111; CC16-112; CC16-113)

NOTICE

You are hereby notified that on October 5, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Todd Derrick, Circuit Judge
Hon. Shirlene Vickers, Circuit Clerk
Ashley Toccara Adams, Attorney
Ryan C. Becker, Attorney
Alicia A. D'Addario, Attorney
Tilden Jeffrey Haywood, Attorney
Billy Shaun McGhee, Attorney
Angela Setzer, Attorney
Thomas Govan, Asst. Attorney General
John Selden, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

January 24, 2020

1180031

Ex parte Justice Jerrell Knight. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Justice Jerrell Knight v. State of Alabama) (Henry Circuit Court: CC-16-111; CC-16-112; CC-16-113; Criminal Appeals : CR-16-0182).

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 24, 2020:

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

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 24th day of January, 2020.

Julia Jordan Weller

Clerk, Supreme Court of Alabama