APPENDIX A

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Court of Criminal Appeals of Alabama.

Ryan Clark PETERSEN

v.

STATE of Alabama

CR-16-0652

|

January 11, 2019

Synopsis

Background: Defendant was convicted in the Houston Circuit Court, Nos. CC-12-878; CC-12-879; CC-12-880; CC-12-881; and CC-12-882, of one count of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, three counts of murder made capital because three people were killed during the course of a burglary, and one count of attempted murder, and was sentenced to death for his capital-murder convictions and to life imprisonment for his attempted-murder conviction, based on incident in which defendant shot and killed three people, and shot and seriously wounded a fourth, at a nightclub. Defendant appealed.

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

trial court's errors, if any, during jury selection were harmless;

State did not act with racially discriminatory purposes during jury selection when it requested removal of African-American prospective jurors;

State's use of 14 of its 18 peremptory strikes to remove women from venire did not establish prima facie case of gender discrimination in violation of *J.E.B. v. Alabama*, 114 S.Ct. 1419;

defendant's purported invocations of his right to counsel during interviews with police investigator were not unequivocal, for purposes of determining whether investigation violated defendant's right to counsel;

evidence was sufficient to support finding that defendant caused death of victim while defendant remained unlawfully on club's premises, as required for conviction for murder made capital because it was committed during commission of second-degree burglary;

trial court acted within its discretion during penalty phase when it declined to give any weight to statutory mitigating circumstance regarding impairment of defendant's capacity to appreciate criminality of his conduct or conform it to law; and

death sentence was appropriate.

Affirmed.

Windom, P.J., and Kellum, J., concurred in result.

Appeal from Houston Circuit Court (CC-12-878; CC-12-879; CC-12-880; CC-12-881; and CC-12-882)

Opinion

JOINER, Judge.

***1** Ryan Clark Petersen was convicted of one count of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975; three counts of murder made capital because three people were killed during the course of a burglary, see § 13A-5-40(a)(4) Ala. Code 1975; and one count of attempted murder, see §§ 13A-6-2 and 13A-4-2, Ala. Code 1975. During the penalty phase of Petersen's trial, the jury recommended by a vote of 10 to 2 that Peterson be sentenced to death on the capital-murder convictions. The circuit court then sentenced Petersen to death for his capital-murder convictions and to life imprisonment for his attempted-murder conviction. This appeal, which is automatic in a case involving the death penalty, followed.[1] See § 13A-5-53, Ala. Code 1975.

Facts and Procedural History

In its sentencing order, the circuit court recited the following facts underlying Petersen's convictions and sentences:

"On August 9, 2012, Ryan Clark Petersen shot and killed Cameron Paul Eubanks, Tiffany Paige Grissett and Thomas Robins, and seriously wounded Scotty Russell at Teasers nightclub in rural Houston County. Petersen used a Glock [brand] 9mm pistol he purchased approximately one month earlier, and had been issued a concealed carry pistol permit by the Coffee County sheriff's department a few days before the shootings.

"Teasers is a lawfully operated nightclub, licensed to sell alcoholic beverages, and features scantily clothed women dancers, also referred to as performers, as entertainers for patrons. Teasers is located on U.S. highway 84 in the rural unincorporated area of Wicksburg in western Houston County. Typically, Teasers requires a 'coverage charge' for entry. But, the evening of August 9, 2012, the nightclub offered a special discount it called 'Tattoo Thursday.' Customers could show their personal tattoo and gain entry for free without paying a cover charge. Teasers and the dancers typically make money by either the customers paying the dancers for dances or customers purchasing drinks for the dancers. Either way, the proceeds are shared between the club and the dancers. Teasers does not accept any form of payment other than cash, and an ATM machine is on the premises. The building is divided into two areas for customers: a larger room that holds a bar, a DJ booth, numerous tables and chairs and dance stages for the dancers, and a smaller room with couches for 'private dances,' also referred to as 'lap dances.' During normal business operation the public areas are dimly lit and feature recorded music and strobe lighting. Teasers has a 'no touch' policy, meaning patrons are not permitted any physical contact with the dancers. Also, state licensing regulations require the dancers to have at least minimal coverage of the breasts [and] pelvic areas. Firearms are not permitted inside the nightclub. Teasers is operated as a private membership club under Alabama law.

***2** "Petersen, an Enterprise resident, traveled alone in his car to Teasers, about fifteen miles east of Enterprise, the evening of August 9, 2012. Petersen entered the club by showing his tattoo and was not charged a fee. He had approximately three-hundred dollars in United States currency with him. Holly Lowery was a waitress who served Petersen. She testified Petersen was served beer and other drinks, and he purchased drinks for the dancers. Petersen remained in the larger dance room. Lowery stated that Petersen was not intoxicated, but that he was 'buzzed.' She also described Petersen as 'rude.' Crystal Sellers was a dancer that night and testified that Petersen was 'drunk' and was talking to everyone and touching other people. She stated he was stumbling, he was referring to himself as 'Clark Kent' and people were laughing at him.

"Bruce Middleton is a co-owner of Teasers (along with Paul Eubanks, Cameron's father). Middleton was working at Teasers on the night of August 9, 2012. An employee came to Middleton in his office and reported that Paige, one of the dancers, was having problems with Petersen. Middleton had Petersen brought to his office. Middleton testified that Petersen did not appear intoxicated, but he was upset over a dispute with a dancer about a 'dollar dance.' Middleton stated that Petersen told him he gave Paige a twenty dollar bill and he was being 'ripped off.' Middleton offered to refund twenty dollars to Petersen, who became belligerent. At this point, Middleton told Petersen he had to leave the club since he had been warned twice earlier in the evening about 'groping' dancers. Middleton stated Petersen began cursing and refused to leave.

"When Petersen refused to leave the office, Middleton and Joe Glow (an employee) grabbed Petersen's wrists and arms and began to forcibly remove him. Cameron Eubanks, also an employee, who was working the entry area, aided the physical removal of Petersen. James Williams, the DJ, came and followed the men removing Petersen. William Gaines, the bartender, testified that Petersen was resisting the men and was 'flailing' and grabbing the door frame in resistance. However, Petersen [was] successfully physically removed with no injury to anyone, including Petersen. A portion of Petersen's removal [was] recorded on video by the nightclub's video surveillance system.

"Lorainne Peacock was in her vehicle in the Teasers parking lot and saw Petersen being forcibly removed through the front door. She testified that she witnessed Petersen calmly walk to his Ford Taurus automobile in the parking lot, and enter the front passenger door. Petersen then got out of the car with a pistol and walked back to the front door of Teasers. Cameron Eubanks was still standing just outside the front door. Petersen approached Eubanks and shot him with the pistol six times: twice in the chest, twice in the abdomen, once in the pelvic region and once in the head.

"Petersen then entered the front door by either stepping over Eubanks's body or around him. As Petersen made entry, a patron, Scotty Russell, was in the club and proceeding towards the front door exit. Russell was not

aware of the murder that just occurred. Russell was suddenly and unexpectedly confronted by Petersen in the narrow hallway just inside the front door. Upon seeing ... Petersen with a handgun Russell instinctively threw his right arm up towards his head and Petersen shot him in the arm. Russell testified that he 'played dead' and heard Petersen say to someone else 'alright bitch it's your turn now' and he heard more shooting. Russell was able to exit the club. Russell spent three days in the hospital for his injury. The gunshot shattered the bone in his right arm, requiring the installation of a rod, plate and three pins in surgery, along with one hundred and thirty (130) stitches and physical therapy. Russell spent five months undergoing physical rehabilitation, and testified his right arm is eighty-eight (88) percent functional and shrapnel remains in his arm. Russell subsequently filed a lawsuit against Teasers in which he alleged, through his attorney, that Petersen was 'visibly intoxicated.'

***3** "Petersen, in the main room of the club, then shot Tiffany Paige Grissett, a dancer, twice in the back, causing her death. Both bullets passed through Grissett's body and at least one lodged in a wall. Petersen then entered the smaller private dance room and fatally shot Thomas Robins, a customer, in the chest. Petersen's gun had ten bullets, and at this point he has used each one in a deadly manner on another human being (eight in the torso, one in the head, one in an arm blocking the head).

"Petersen then left Teasers through the front door into the parking lot. He went around to the rear of the building. By this time, Paul Eubanks, who lived in a home immediately behind Teasers was aware of the shooting in the club. Paul Eubanks [saw] Petersen fleeing to the west behind the club and fire[d] three shots with his own pistol at Petersen, but [did] not hit him. Petersen successfully scale[d] a fence into an adjoining field in the darkness.

"The Houston County sheriff and deputies responded to the club, but [were] unable to locate Petersen during the night. In the early dawn of August 10, 2012, Petersen voluntarily [came] out of the field and [was] arrested. Petersen had visible scrapes and scratches from fleeing into the field. Petersen [was] immediately taken to the Houston County jail. As part of the booking process the jail's physician's assistant, Jason Smoak, examine[d] Petersen for physical injuries and [found] none, other than the scrapes and scratches from the field where he fled after the murders. When Smoak ask[ed] Petersen how he fe[lt], Petersen answer[ed] by saying 'I feel like I just shot three people.' Smoak further stated that Petersen did not appear to be under the influence of any substance, his speech was not slurred, and he responded appropriately to questions.

"Thereafter, on August 10, 2012, Bill Rafferty, an investigator with the Houston County sheriff's department interview[ed] Petersen. Petersen [told] Rafferty that he [was] bipolar and [was] prescribed Seroquel, Klonopin and Zoloft for his mental health condition. Petersen state[d] he was drinking at Teasers and ran out of money, but the dancer nevertheless ordered a drink and wanted him to pay. Petersen also state[d] he was taken to an office and was 'manhandled' out the front door by three men. Petersen [told] Rafferty he then did something 'crazy' and 'without thinking I did something I can't take back' out of anger. Petersen [got] the gun from his car's glove box and admit[ted] to shooting someone, and having gunshots fired at him. He discusse[d] the circumstances of his purchase of the pistol and obtaining a pistol permit. Petersen state[d] he [did] not remember shooting in the club and describe[d] his conduct as 'like an out of body experience.' At one point, Petersen ask[ed] Investigator Rafferty if he shot a girl. Petersen state[d] that it 'drives me crazy' to be touched the way he was by the owner and employees and that he was 'disrespected.' He [went] on to make statements to Rafferty that 'I can't believe I did this shit over that' and 'I don't remember firing in the building' or going to the smaller private dance room. Petersen state[d] that he 'blacked out' and denie[d] wanting or intend[ing] to kill anyone. He state[d] he only remember[ed] killing Eubanks, but not the shooting of Russell, Grissett, and Robins.

"Dr. Alfredo Parades, a state medical examiner of the Alabama Department of Forensic Sciences, performed the postmortem examination of Tiffany Paige Grissett. She was shot twice in the back, with one shot entering her left lower back and exiting through her left side below her breast and the other entering her right middle back and existing through her right upper abdomen. Both gunshots were fatal and struck internally the bottom of her lung, her thoracic aorta and her stomach. Grissett suffered massive internal hemorrhaging. Dr. Parades found gunpowder stippling on her skin, which indicate[d] Petersen was at close range when he shot her, approximately eighteen or twenty-four inches away. Dr. Parades stated Grissett survived long enough to feel pain from her injuries.

***4** "Dr. Steven Denton, a state medical examiner of the Alabama Department of Forensic Sciences, performed a postmortem examination of Thomas Robins and Cameron

Eubanks. Robins was shot once in the lower left chest. The bullet struck Robins's ribs, diaphragm, colon, thoracic aorta and spine, and he lost over half of his body's blood. Dr. Denton recovered the bullet just under the skin of Robins's back. Dr. Denton stated Robins survived for a few minutes before dying.

"Dr. Denton found six bullet wounds in his postmortem examination of Cameron Eubanks. Dr. Denton [could] state the order of the wounds. The gunshots [were] as follows: (1) left chest; no damage to internal organs; bullet exited the body (2) upper abdomen/lower chest; internal wounds to diaphragm, liver, ribs, lower lung, with a large amount of blood loss; no exit wound (3) outer right side of the abdomen; exit right back (4) lower right abdomen; small intestine wounded; bullet penetrated and stopped in the lumbar spine (5) right pelvic-thigh area; exit left buttocks (6) head wound; top of head, with a sharp downward trajectory into and through the brain; immediate loss of consciousness.

"Adam Zeh, an investigator with the Houston County sheriff's department, testified regarding the crime scene at Teasers. Petersen's car was found with the glove box open and the keys were recovered in the front passenger floor. The gun case for the Glock pistol and another clip with ten bullets for the pistol were also found in Petersen's car. A receipt from Publix grocery store in Enterprise for two bottles of cough syrup containing DXM [('dextromethorphan'] was recovered. Zeh testified he recovered a video surveillance system from Teasers nightclub which recorded portions of the events. His investigation determined that Petersen was in Teasers for about three hours and forty-five minutes before he was removed. Petersen began shooting between 11:30 p.m. and 11:35 p.m. Zeh determined Petersen bought the pistol on July 5, 2012, at the Ordnance Depot (a licensed gun dealer) in Daleville, Alabama, for $499.00. Petersen only had some coins and foreign currency in his possession when he was arrested. Also, Petersen's pistol permit expired on August 6, 2013. Zeh also found that Petersen was treated by South Central Mental Health on August 8, 2012, the day before the shooting, and he had mental-health appointments scheduled for September 5, 2012, and September 13, 2012.

"The evidence at trial establishe[d] that Petersen had a variety of mental health issues. At various times prior to the homicides, he was diagnosed with bipolar disorder, depression, anxiety, and mood disorder. On September 30, 2011, Petersen was diagnosed by the South Central Mental Health Board as meeting the criteria of 'seriously mentally ill' and consequently disabled due to mental illness. In March 2012, the Social Security Administration approved Petersen for disability benefits due to his mental-health disability. Evidence at trial indicate[d] Petersen may have used lump sum back payment from the Social Security Administration to purchase his automobile and the Glock 9 mm pistol. Petersen volunteered and was inducted into the United States Navy, but later was involuntarily discharged based on his failure to disclose his mental health condition.

"Petersen was arrested in 2012 for misdemeanor theft of property third degree and placed in the Coffee County sheriff's jail. While in the jail he appeared suicidal and homicidal to jail officers and the commander on February 1, 2012, filed a petition in the Coffee County probate court against Petersen for involuntary commitment. The probate court ordered Petersen committed to the in-patient behavioral medicine unit (BMU) at the Southeast Alabama Medical Center (SAMC) in Dothan for evaluation.

***5** "During his hospitalization at the SAMC a psychiatrist, Dr. Waggoner, diagnosed Petersen as bipolar with psychotic features and polysubstance abuse. Dr. Waggoner found Petersen to pose a danger to himself and to others and recommended to the probate court that Petersen be involuntarily committed to the State of Alabama for long-term psychiatric treatment at Searcy State Hospital. At the final hearing before the Coffee County probate court, with all parties represented by lawyers, an employee of the South Central Mental health Board opposed Dr. Waggoner's recommendation, and instead recommended to the court that Petersen be released to the care of his mother and receive outpatient treatment for his mental illness. The probate court entered judgment denying long-term involuntary commitment to the State of Alabama and released Petersen to his mother with orders that he receive out-patient treatment for his mental illness. On the morning of August 9, 2012, Petersen attended a mental health group meeting, where he was described as irritable, having difficulty with anger control and impulse control, that he 'will snap easily' and has limited family support. Petersen also indicated that he needed more Klonopin. Patricia Huckabee, a therapy group member, testified Petersen was crying at the meeting and stated that he needed to see a doctor.

"Dr. Mark Cunningham is a clinical and forensic psychologist who testified for the defense. He conducted

a thorough and exhaustive review of Petersen's mental health history. Dr. Cunningham gave his opinion that at the time of the shootings Petersen was experiencing Klonopin withdrawal and he was abusing DXM (cough medicine), which can create euphoria, hallucination and a 'high' experience. Dr. Cunningham also gave his opinion that Petersen suffers from a mood disorder with autism spectrum features. Dr. Cunningham testified that at the time of the crimes Petersen was intoxicated. The evidence also showed that Petersen received a psychiatric evaluation of social phobia from Dr. Handal on December 14, 2006, a psychological evaluation from Dr. Fred George on December 29, 2006, diagnosis of social isolation and alienation from Dr. Melanie Cotter on February 5, 2007, and a psychological assessment from Bradford Mental Health on January 12, 2009.

"Dr. Doug McKeown is a clinical and forensic psychologist who conducted an examination of Petersen pursuant to Rule 11.3, Alabama Rules of Criminal Procedure, to render an opinion regarding Petersen's mental state at the time of the crimes and his competency to stand trial. Dr. McKeown testified that Petersen suffers from mood disorder, substance abuse and he is bi-polar. Dr. McKeown also testified that in his opinion there is no evidence Petersen was suffering from severe mental disease or defect at the time of the crimes or any mental disease or defect that would render him unable to appreciate the wrongfulness of his acts. Dr. McKeown stated that Petersen admitted to consuming 'six drinks' at Teasers prior to the murders."

(C. 538-46.)[2]

On December 22, 2016, the jury found Petersen guilty as charged in the indictment. During the penalty phase, the jury found by special verdict forms that the State had established three aggravating factors beyond a reasonable doubt: (1) that Petersen created a great risk of death to many persons; (2) that the capital offense was committed while Petersen was engaged in the commission of, or an attempt to commit, a burglary; and (3) that Petersen intentionally caused the deaths of two or more persons by one act, scheme, or course of conduct. On January 5, 2017, the jury recommended by a vote of 10 to 2 that Petersen be sentenced to death.[3]

***6** On March 24, 2017, the circuit court sentenced Petersen to death for his capital-murder convictions and to life imprisonment for his attempted-murder conviction. In sentencing Petersen to death, the court found that the mitigating circumstances[4] in Petersen's case were substantially outweighed by the aggravating circumstances. Thereafter, Petersen filed a timely notice of appeal.

Standard of Review

On appeal from his convictions and sentence, Petersen raises numerous issues, including some not raised in the circuit court. Because Petersen has been sentenced to death, however, this Court must review the circuit court proceedings under the plain-error doctrine. See Rule 45A, Ala. R. App. P.

" ' "Plain error is defined as error that has 'adversely affected the substantial right of the appellant.' The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L.Ed. 2d 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), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L.Ed. 2d 1012 (1999)." '

"Ex parte Brown, 11 So. 3d 933, 935-36 (Ala. 2008)(quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999)). See also Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007); Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997); Harris v. State, 2 So. 3d 880, 896 (Ala. Crim. App. 2007); and Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)('To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.'). Although the failure to object in the trial court will not preclude this Court from reviewing an issue under Rule 45A, Ala. R. App. P., it will weigh against any claim of prejudice made on appeal. See Dotch v. State, 67 So. 3d 936, 965 (Ala. Crim. App. 2010)(citing Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)). Additionally, application of the plain-error rule

" ' " 'is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' " Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim. App. 1993), aff'd,

651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S. Ct. 1973, 131 L.Ed. 2d 862 (1995).'

***7** "Centobie v. State, 861 So. 2d 1111, 1118 (Ala. Crim. App. 2001)."

Phillips v. State, [Ms. CR-12-0197, December 18, 2015] —— So. 3d ——, —— (Ala. Crim. App. 2015), aff'd, [Ms. 1160403, October 19, 2018] —— So. 3d —— (Ala. 2018). With these principles in mind, we address Petersen's claims on appeal.

Discussion

Pre-Trial Issues

I.[5]

Petersen argues that he was deprived of his right to an impartial jury as a result of the circuit court's failure to remove certain jurors who, he says, were "unfit to serve." (Petersen's brief, p. 24.) It is well settled that

> " '[t]o justify a challenge for cause, there must be a proper statutory ground or " 'some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.' " Clark v. State, 621 So. 2d 309, 321 (Ala. Cr. App. 1992) (quoting Nettles v. State, 435 So. 2d 146, 149 (Ala. Cr. App. 1983)). This Court has held that "once a juror indicates initially that he or she is biased or prejudiced or has deep-seated impressions" about a case, the juror should be removed for cause. Knop v. McCain, 561 So. 2d 229, 234 (Ala. 1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law. Ex parte Taylor, 666 So. 2d 73, 82 (Ala. 1995). A juror "need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it." Kinder v. State, 515 So. 2d 55, 61 (Ala. Cr. App. 1986). Even in cases where a potential juror has expressed some preconceived opinion as to the guilt of the accused, the juror is sufficiently impartial if he or she can set aside that opinion and render a verdict based upon the evidence in the case. Kinder, at 60–61. In order to justify disqualification, a juror " 'must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused' "; " '[s]uch opinion must be so fixed ... that it would bias the verdict a juror would be required to render.' " Oryang v. State, 642 So. 2d 979, 987 (Ala. Cr. App. 1993) (quoting Siebert v. State, 562 So. 2d 586, 595 (Ala. Cr. App. 1989)).'
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> "Ex parte Davis, 718 So. 2d 1166, 1171–72 (Ala. 1998).
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> > " ' "The qualification of prospective jurors rests within the sound discretion of the trial judge." Morrison v. State, 601 So. 2d 165, 168 (Ala. Crim. App. 1992); Ex parte Cochran, 500 So. 2d 1179, 1183 (Ala. 1985). This Court will not disturb the trial court's decision "unless there is a clear showing of an abuse of discretion." Ex parte Rutledge, 523 So. 2d 1118, 1120 (Ala. 1988). "This court must look to the questions propounded to, and the answers given by, the prospective juror to see if this discretion was properly exercised." Knop [v. McCain], 561 So. 2d [229] at 232 [(Ala. 1989)]. We must consider the entire voir dire examination of the juror "in full context and as a whole." Ex parte Beam, 512 So. 2d 723, 724 (Ala. 1987); Ex parte Rutledge, 523 So. 2d at 1120.'
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> ***8** "Ex parte Burgess, 827 So. 2d 193, 198 (Ala. 2000).
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> > " 'Even though a prospective juror may initially admit to a potential for bias, the trial court's denial of a motion to strike that person for cause will not be considered error by an appellate court if, upon further questioning, it is ultimately determined that the person can set aside his or her opinions and try the case fairly and impartially, based on the evidence and the law.'
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> > "Ex parte Land, 678 So. 2d 224, 240 (Ala. 1996).
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> > > " 'A trial judge is in a decidedly better position than an appellate court to assess the credibility of the jurors during voir dire questioning. See Ford v. State, 628 So. 2d 1068 (Ala. Crim. App. 1993). For that reason, we give great deference to a trial judge's ruling on challenges for cause. Baker v. State, 906 So. 2d 210 (Ala. Crim. App. 2001).'
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> > "Turner v. State, 924 So. 2d 737, 754 (Ala. Crim. App. 2002)."
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> Bohannon v. State, 222 So. 3d 457, 473–74 (Ala. Crim. App. 2015).

A.

First, Petersen argues that prospective juror R.D., a former sheriff's deputy, should have been removed for cause because, he says, it was revealed that R.D.: (1) was a convicted felon; (2) "would prefer the defendant to testify"; (3) was "pro death sentence" and believed in a "life for a life"; (4) believed that a person that killed another "should forfeit his life upon conviction"; (5) indicated that he would credit law-enforcement testimony with more importance than other testimony; and (6) did not disclose during voir dire that he had "discussed the case" and "seen local news coverage" before reporting for jury duty. (Petersen's brief, pp. 24-25.) Petersen did not move to remove R.D. for cause; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

During voir dire examination, R.D. was asked to appear before the circuit court separately to answer questions about the responses he had given on his juror questionnaire. During that time, the following occurred:

"[R.D.:] Yesterday, when the defense attorney asked do you know anybody, I didn't raise my hand because I would have had to keep it up.

"THE COURT: Right. Yeah.

"[R.D.:] I know everybody.

"THE COURT: You probably know all the sheriff's employees.

"[R.D.:] I know them all.

"THE COURT: Let me ask you this. The fact that you know them, could you still give both sides a fair trial, or do you think it would be a problem for you?

"[R.D.:] No. I would listen to the evidence.

"THE COURT: So, again, if you think the State has proven guilt beyond a reasonable doubt, would you have any problem voting guilty?

"[R.D.:] No.

"THE COURT: And then, likewise, if you think the State has not proven guilt beyond a reasonable doubt, would you have any problem voting not guilty?

"[R.D.:] No.

"THE COURT: And if you are on the jury and the jury does find him guilty of a capital offense, based on your knowledge of the sheriff's employees as well as your background in law enforcement, could you still follow the law in determining whether to vote for death or life without parole?

***9** "[R.D.:] Yes.

"THE COURT: In other words, you wouldn't--it wouldn't influence you to be more likely to vote for death because the State, through the D.A., through the sheriff and his deputies, are seeking the death penalty? You wouldn't be more likely to lean for death in that circumstance?

"[R.D.:] No.

"THE COURT: And if the evidence and the law supports a verdict of life without parole, you would have no problem returning a verdict of life without parole?

"[R.D.:] No.

"THE COURT: Any questions, [prosecutor]?

"[PROSECUTOR:] No. I saw his response in his thing. I'm satisfied.

"THE COURT: [Defense counsel,] briefly?

"[DEFENSE COUNSEL:] [R.D.], in reference to a couple of things in your questionnaire, first of all, you're a retired police officer?

"[R.D.:] Uh-huh.

"[DEFENSE COUNSEL:] For, I'm assuming, a number of years, a good long time.

"[R.D.:] Yeah.

"[DEFENSE COUNSEL:] I mean, you have a working knowledge of criminal laws.

"[R.D.:] Yes.

"[DEFENSE COUNSEL:] Do you understand that some deaths, depending on the circumstances, aren't capital murder?

"[R.D.:] Yeah.

"[DEFENSE COUNSEL:] There are other charges like manslaughter and things like that.

"[R.D.:] Uh-huh.

"[DEFENSE COUNSEL:] And so, just because someone dies, there's not a capital offense that we could put someone to death for. You already know that? Right?

"[R.D.:] Yes.

"[DEFENSE COUNSEL:] But, in your questionnaire--you know, we were talking about the death penalty--you put in here a life for a life. That kind of implies, you know, if you kill somebody, you must be put to death. Is that your personal feeling on it?

"[R.D.:] I'll listen to the evidence. But, you know, I'm pro death sentence. I mean, I believe in the death sentence.

"[DEFENSE COUNSEL:] But, do you also--are you able to follow the law and consider the mitigating circumstances, the reasons that we get to where we are, and if those mitigating reasons outweigh death, could you vote for life without?

"[R.D.] Yes.

"[DEFENSE COUNSEL:] Even if convicted of capital murder, can you vote for life without?

"[R.D.:] Yes.

"[DEFENSE COUNSEL:] Okay. In another answer, you said when a person takes the life of another and he's found guilty of capital murder, he should forfeit his life upon conviction. And I guess that's what I'm asking. You can amend--are you saying you can amend that belief--

"[R.D.:] I mean, I'll listen to--

"[DEFENSE COUNSEL:] --and consider--

"[R.D.:] I'll consider it and listen to the evidence. But I believe in the death penalty. I'm not going to stand here and tell you I don't.

"[DEFENSE COUNSEL:] Right. And I'm not going to sit here and tell you that I don't, necessarily. But you must agree there are some cases that it's appropriate and some that are not.

"[R.D.:] Yeah.

"[DEFENSE COUNSEL:] You understand that?

"[R.D.:] Yes.

"[DEFENSE COUNSEL:] And I guess that's all I'm asking, is that you would consider the facts of the case and determine whether it's appropriate, not just blanket rule--

"[R.D.:] Yeah.

"[DEFENSE COUNSEL:] --got to have it.

"[R.D.:] Uh-huh.

"THE COURT: That's fine. Thanks."
***10** (R. 860-65.)

R.D. could have been removed for cause under § 12-16-150(5), Ala. Code 1975, because, according to his juror questionnaire, he was convicted of a felony--theft of property; nothing in the excerpts from his voir dire examination quoted above, however, indicate that the court should have sua sponte removed him for cause. Although R.D. did state that he supported the death penalty, he did not indicate that he would automatically vote to impose the death penalty in every capital case. Rather, he indicated that he would consider and would be able to impose a sentence of imprisonment for life without the possibility of parole in an appropriate case. Regardless, because Petersen used one of his peremptory strikes to remove R.D. from the venire, any error in the failure of the court to sua sponte remove R.D. is harmless. See McMillan v. State, 139 So. 3d 184, 258 (Ala. Crim. App. 2010)(citing Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002))(noting that the "the Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike"). To the extent that Petersen is arguing that he should not have been forced to use one of his peremptory strikes to remove R.D. from the venire, this Court has found that the failure of a court to sua sponte remove a juror from the venire does not rise to the level of plain error where there is no indication in the record that the juror could not be fair and impartial. See Lee v. State, 898 So. 2d 790, 845 n.11 (Ala. Crim. App. 2001) (finding that, where there was no indication in the record that the prospective juror could not be fair and impartial, no plain error occurs when a defendant uses a peremptory strike to remove that prospective juror from the venire). Thus, Petersen is due no relief on this claim.

B.

Next, Petersen contends that the circuit court erred in failing to sua sponte remove certain veniremembers--S.D., G.D., and D.G.--who, he says, had "personal and professional relationships with the prosecution." (Petersen's brief, p. 26.) Although it appears from the record that Petersen moved to remove S.D. for cause (R. 952), Petersen did not move to remove either G.D. or D.G. for cause; thus, we review this claim as to G.D. and D.G. for plain error. See Rule 45A, Ala. R. App. P.

First, with regard to S.D., Petersen contends that S.D.'s job as a software engineer for a company contracted by the district attorney's office meant that his "financial well being is associated with his job working" with that office and, thus, that the court should have removed him from the jury. (Petersen's brief, p. 26.) During voir dire, however, S.D. stated that he did not interact with the district attorney and affirmed that he could fair to both sides. (R. 852-55, 858.) He also stated that he did not believe his "financial well-being" would bias his verdict. (R. 857.)

This Court has previously recognized that, where there is no proof that a veniremember would not render a fair, just, and impartial verdict, the fact that he or she was employed by the district attorney's office does not alone impute bias as a matter of law warranting removal. See, e.g., Lowe v. State, 384 So. 2d 1164, 1171 (Ala. Crim. App. 1980). Thus, the court committed no error in failing to remove prospective juror S.D. for cause.

***11** Next, Petersen argues that the court should have sua sponte removed prospective juror G.D. for cause because, during voir dire and on his questionnaire, G.D. indicated that he was related to Captain William Rafferty with the Houston County Sheriff's Department, the primary investigator in this case. (Petersen's brief, p. 27.) The record indicates that G.D.'s niece was married to Cpt. Rafferty. (R. 611.) G.D. was later called back into the courtroom along with a few other veniremembers and asked whether he could set aside any personal beliefs and follow Alabama law concerning the death penalty and whether he could consider recommending a life-imprisonment-without-parole sentence if the evidence supported such a finding. (R. 916-17.) G.D., along with the other veniremembers, indicated that he could. Id. When Petersen's defense counsel was given an opportunity to further question G.D. about his relationship with Cpt. Rafferty, counsel failed to do so. (R. 917-18.) Later on, however, Petersen used one of his peremptory strikes to remove G.D. from the venire; thus, any error in the failure of the court to sua sponte remove G.D. is harmless. See McMillan v. State, 139 So. 3d 184, 258 (Ala. Crim. App. 2010)(citing Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002))(noting that the "the Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike"). Thus, Petersen is due no relief on this claim.

Finally, Petersen contends that the court should have sua sponte dismissed prospective juror D.G. because, during voir dire, he admitted that he had a "personal and professional relationship" with one of the State's key witnesses--former Houston County Sheriff Andy Hughes. (Petersen's brief, pp. 27-28.) According to Petersen, although D.G. stated that he could be fair and impartial, that affirmation was not enough to absolve D.G. of what Petersen says was his "probable prejudice" against his case. (Petersen's brief, p. 28.) Because Petersen used one of his peremptory strikes to remove D.G. from the venire, however, any error in the failure of the court to sua sponte remove D.G. is harmless. See McMillan v. State, 139 So. 3d 184, 258 (Ala. Crim. App. 2010)(citing Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002))(noting that the "the Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike"). Thus, Petersen is due no relief on this claim.

C.

Petersen also asserts that the circuit court erroneously failed to remove prospective jurors who, he says, were "disqualified from service" because they indicated that they would credit the testimony of law enforcement with "more importance than all other testimony." (Petersen's brief, p. 28.) Specifically, Petersen challenges seven veniremembers, each of whom, he says, indicated that he or she would give the testimony of law enforcement more weight than other testimony.[6] (Petersen's brief, p. 29.) Petersen did not move to remove those seven veniremembers for cause below; thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.[7]

After reviewing the questionnaires of those seven prospective jurors, we note that Petersen is correct that they all indicated that they would give "more importance" to the testimony of a law-enforcement officer than any other witness. The

record indicates that A.D. and W.H. served on Petersen's jury. This Court has previously stated, however, that, even when a juror responds that he or she would give more importance to the testimony of a law-enforcement officer, such a response does not indicate that a juror has "an opinion about law enforcement testimony so fixed that he [or she] could not fairly and impartially return a verdict based on the evidence" that would require that juror to be removed from the venire. See Living v. State, 796 So. 2d 1121, 1135 (Ala. Crim. App. 2000). Additionally, Petersen did not explore the alleged biases of A.D. and W.H. during voir dire. This Court does not find plain error to exist as to the circuit court's failure to sua sponte remove A.D. and W.H. for cause on the basis asserted by Petersen.

***12** As to the remaining five prospective jurors, Petersen used his peremptory strikes to remove R.D., J. Bas., R.E., R.G., and D.G., from the venire. The Alabama Supreme Court has previously recognized that forcing a defendant to use his or her peremptory strikes to remove multiple jurors might not be harmless error. In Ex parte Colby, 41 So. 3d 1 (Ala. 2009), the defendant argued that the trial court erred in denying her challenges for cause as to several jurors, forcing her to use 9 of her 17 peremptory strikes to remove those jurors from the venire. 41 So. 3d at 4. The Alabama Supreme Court reversed the judgment after finding that, under its precedent in General Motors v. Jernigan, 883 So. 2d 646 (Ala. 2003), multiple errors by the trial court in denying Colby's challenges for case were not harmless. 41 So. 3d at 5. Specifically, the Alabama Supreme Court found that the jury in that case included " 'jurors who would likely have been the subject of peremptory challenge[s] had such challenges been available' " to Colby. Id. For example, according to the Court, the record indicated that the seated jury included "jurors who knew witnesses for the State, jurors who expressed strong support for the death penalty, and jurors who felt that it was defense counsel's job to prove the defendant's innocence." Id.

When Colby made separate motions for the removal of three of those jurors from the jury, the trial court denied each motion separately. 41 So. 3d at 7. The Alabama Supreme Court found that each of those denials was error based on responses given by those jurors during voir dire that clearly showed they should have been removed from the venire. Id. Although the State argued that those errors were harmless, the Court disagreed and stated " '[i]n each instance in which we have applied the harmless error rule, we have been presented with only one erroneous ruling on a challenge for cause.' " Id. (quoting General Motors, 883 So. 2d at 672). Therefore, the Court held that the errors committed by the trial court were not harmless.

The present case, however, is distinguishable from Colby. First, unlike the defendant in Colby, Petersen did not move to remove any of the jurors at issue. Second, none of the prospective jurors struck by Petersen was a juror who clearly should have been removed. Thus, we see no plain error in the circuit court's failure to sua sponte remove the challenged veniremembers. Petersen is due no relief on this claim.

D.

Petersen argues that the circuit court erred by failing to remove prospective jurors A.D. and D.H. from the venire and allowing them to serve on his jury. (Petersen's brief, pp. 29-30.) Petersen did not challenge either veniremember for cause; thus, his claim is reviewed for plain error. See Rule 45A, Ala. R. App. P.

During voir dire, A.D. disclosed that the Houston County District Attorney's office prosecuted three men in connection with the murder of her brother. (R. 428.) She was not asked any follow-up questions. D.H. disclosed that she had been the victim in a sexual-harassment case when she was 15 years old and that the prosecutors in Petersen's case handled her case. (R. 835.) When asked if this would impact her ability to serve as a juror, D.H. stated that this experience would not prevent her from "giving both sides a fair trial." (R. 835.)

This Court has previously stated:

> " 'To justify a challenge of a juror for cause there must be a statutory ground (Ala. Code Section 12–16–150 (1975)), or some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.' Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App.), aff'd, 435 So. 2d 151 (Ala. 1983). Section 12–16–150 sets out the grounds for removal of veniremembers for cause in criminal cases .... In addition to the statutory grounds, there are other common-law grounds for challenging veniremembers for cause where those grounds are not inconsistent with the statute. Smith v. State, 213 So. 3d 108 (Ala. Crim. App. 2000), aff'd in pertinent part, rev'd in part, 213 So. 3d 214 (Ala. 2003); Kinder v. State, 515 So. 2d 55, 60 (Ala. Crim. App. 1986). Here, we are dealing with the common-law ground for challenge of suspicion of bias or partiality. See discussion of the

common-law grounds for challenge in Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002), remanded for resentencing, 909 So. 2d 283 (Ala. 2003). Ultimately, the test to be applied is whether the veniremember can set aside his or her opinions, prejudices, or biases, and try the case fairly and impartially, according to the law and the evidence. Smith v. State, supra. This determination of a veniremember's absolute bias or favor is based on the veniremember's answers and demeanor and is within the discretion of the trial court; however, that discretion is not unlimited. Rule 18.4(e), Ala. R. Crim. P., provides, in part: 'When a prospective juror is subject to challenge for cause or it reasonably appears that the prospective juror cannot or will not render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse that juror from service in the case.' Even proof that a veniremember has a bias or fixed opinion is insufficient to support a challenge for cause. A prospective juror should not be disqualified for prejudice or bias if it appears from his or her answers and demeanor that the influence of that prejudice or bias can be eliminated and that, if chosen as a juror, the veniremember would render a verdict according to the law and the evidence. Mann v. State, 581 So. 2d 22, 25 (Ala. Crim. App. 1991); Minshew v. State, 542 So. 2d 307 (Ala. Crim. App. 1988)."

***13** McGowan v. State, 990 So. 2d 931, 951 (Ala. Crim. App. 2003). After reviewing the voir dire proceedings in the present case, we conclude that the circuit court did not err in failing to sua sponte remove these jurors from the venire. Although we acknowledge that both A.D. and D.H. had past relationships with the Houston County District Attorney's office, nothing in the record before us indicates that this prevented either of them from serving as a fair and impartial juror. Thus, Petersen is not entitled to relief.

E.

Finally, Petersen asserts that the circuit court erred in failing to remove 10 veniremembers[8] who, he says, indicated that they would automatically impose the death penalty without considering any mitigating circumstances or evidence. (Petersen's brief, p. 31.) According to Petersen, as a result of their responses, those veniremembers were not qualified to serve and should have been removed for cause. Id. Petersen did not move to remove those veniremembers for cause in the court below; thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record indicates that Petersen used his peremptory strikes to remove those 10 prospective jurors from the venire. To the extent that Petersen is arguing that he should not have been forced to use his peremptory strikes to remove those jurors, in light of our discussion of Ex parte Colby in Section I.B. of this opinion, supra, no error occurred in the present case. Thus, Petersen is due no relief on this claim.

II.

Petersen contends that the State used its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986).[9] (Petersen's brief, pp. 33-46.) Petersen also contends that the State used its peremptory strikes against women in violation of J.E.B. v. Alabama, 511 U.S. 127 (1994), and that this Court should remand the case for a hearing to determine whether the State can offer gender-neutral reasons for those strikes. (Petersen's brief, pp. 46-51.)

This Court has previously stated:

"In evaluating a Batson or J.E.B. claim, a three-step process must be followed. As explained by the United States Supreme Court in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed. 2d 931 (2003):

" 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race [or gender]. [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 [or gender-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.'

***14** "537 U.S. at 328-29.

"With respect to the first step of the process ... '[t]he party alleging discriminatory use of a peremptory strike bears the burden of establishing a prima facie case of discrimination.' Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997)(citing Ex parte Branch, 526 So. 2d 609, 622 (Ala. 1987)). 'A defendant makes out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" surrounding a prosecutor's conduct during the defendant's trial.' Lewis v. State, 24 So. 3d 480, 489

(Ala. Crim. App. 2006)(quoting Batson, 476 U.S. at 94, aff'd, 24 So. 3d 540 (Ala. 2009). 'In determining whether there is a prima facie case, the court is to consider "all relevant circumstances" which could lead to an inference of discrimination.' Ex parte Branch, 526 So. 2d at 622 (citing Batson, 476 U.S. at 93, citing in turn Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed. 2d 597 (1976)). In Ex parte Branch, the Alabama Supreme Court specifically set forth a number of 'relevant circumstances' to consider in determining whether a prima facie case of race discrimination has been established:

" 'The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:

" '1. Evidence that the "jurors in question share[d] only this one characteristic–-their membership in the group–-and that in all other respects they [were] as heterogeneous as the community as a whole." [People v.] Wheeler, 22 Cal. 3d [258] at 280, 583 P.2d [748] at 764, 148 Cal. Rptr. [890] at 905 [(1978)]. For instance, "it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions," Wheeler, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. At 905, n.27, indicating that race was the deciding factor.

" '2. A pattern of strikes against black [or female] jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S. Ct. At 1723.

" '3. The past conduct of the state's attorney in using peremptory challenges to strike all blacks [or females] from the jury venire. Swain [v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed. 2d 759 (1965)].

" '4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S. Ct. at 1723; Wheeler, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 905.

" '5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 764, 148 Cal. Rptr. 890 (1978).

" '6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy, 503 So. 2d at 355.

***15** " '7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So. 2d at 355.

" '8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks [or females] from the jury. Batson, 476 U.S. at 93, 106 S. Ct. At 1721; Washington v. Davis, 426 U.S. [229] at 242, 96 S. Ct. [2040] at 2049 [(1976)].

" '9. The state used peremptory challenges to dismiss all or most black [or female] jurors. See Slappy, 503 So. 2d at 354, Turner, supra.'

"Id. at 622-23."

White v. State, 179 So. 3d 170, 198-99 (Ala. Crim. App. 2013).

Additionally, this Court has previously recognized:

" 'While disparate treatment is strong evidence of discriminatory intent, it is not necessarily dispositive of discriminatory treatment. Lynch [v. State], 877 So. 2d [1254] at 1274 [(Miss. 2004)] (citing Berry v. State, 802 So. 2d 1033, 1039 (Miss. 2001)); see also Chamberlin v. State, 55 So. 3d 1046, 1050–51 (Miss. 2011). "Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual." Lynch, 877 So. 2d at 1274 (quoting Berry [v. State], 802 So. 2d [1033] at 1040 [(Miss. 2001)]).

"Hughes v. State, 90 So. 3d 613, 626 (Miss. 2012).

" ' " 'As recently noted by the Court of Criminal Appeals, 'disparate treatment' cannot automatically be imputed in every situation where one of the State's bases for striking a venireperson would technically apply to another venireperson whom the State found acceptable.

Cantu v. State, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992). The State's use of its peremptory challenges is not subject to rigid quantification. Id. Potential jurors may possess the same objectionable characteristics, yet in varying degrees. Id. The fact that jurors remaining on the panel possess one of more of the same characteristics as a juror that was stricken, does not establish disparate treatment."

" 'Barnes v. State, 855 S.W.2d 173, 174 (Tex. App. 1993).

" ' "[W]e must also look to the entire record to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers that would, under the facts of this case, justify the prosecutor treating them differently as potential members of the jury. See Miller–El [v. Dretke], 545 U.S. [231] at 247, 125 S. Ct. [2317] at 2329 [162 L.Ed. 2d 196 (2005)]."

" 'Leadon v. State, 332 S.W.3d 600, 612 (Tex. App. 2010).

" ' "Potential jurors may possess the same objectionable characteristics, but in varying degrees. Additionally, prospective jurors may share a negative feature, but that feature may be outweighed by characteristics that are favorable from the State's perspective. Such distinctions may properly cause the State to challenge one potential juror and not another."

" 'Johnson v. State, 959 S.W.2d 284, 292 (Tex. App. 1997). "This Court has recognized that for disparate treatment to exist, the persons being compared must be 'otherwise similarly situated.' " Sharp v. State, 151 So. 3d 308, 342 (Ala. Crim. App. 2013) (on rehearing).

***16** " ' "The prosecutor's failure to strike similarly situated jurors is not pretextual ... 'where there are relevant differences between the struck jurors and the comparator jurors.' United States v. Novaton, 271 F.3d 968, 1004 (11th Cir. 2001). The prosecutor's explanation 'does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.' Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 973–74, 163 L.Ed. 2d 824 (2006) (quotation marks and citation omitted)."

" 'Parker v. Allen, 565 F.3d 1258, 1271 (11th Cir. 2009).' "

"Wiggins v. State, 193 So. 3d 765, 790 (Ala. Crim. App. 2014)."

Luong v. State, 199 So. 3d 173 at 191-92 (Ala. Crim. App. 2015). With these principles in mind, we will address each of Petersen's claims in turn.

A.[10]

First, Petersen argues that the State used its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986). (Petersen's brief, pp. 33-46.) Specifically, Petersen claims that the State's reasons for striking seven prospective African-American jurors were pretextual. Id.

After several veniremembers were disqualified, excused, deferred, or stricken for cause, 47 qualified veniremembers remained--38 were Caucasian and 9 were African-American. The 9 African-American veniremembers constituted 19% of the venire.

The State used 7 of its 18 peremptory strikes to remove African-American veniremembers from the jury panel. Petersen used 1 of his 17 peremptory strikes to remove an African-American veniremember from the panel. As best we can discern, Petersen's jury consisted of 11 Caucasians and 1 African-American. Before the jury was struck, the State made the following statement to the court:

"[PROSECUTOR:] Can I just ask a question for the record? I'm telling the Court right now, if they put 'no' on the death penalty on their questionnaire, this is my position. It doesn't matter what they say. I'm striking them. If they come in here--

"THE COURT: So, you don't want to make a challenge for cause on them?

"[PROSECUTOR:] Well, I would. I'm just making, for the record, protection. If they sit in the box--and I'm not talking about these, but the ones I want in--and they sit there and don't say, 'I can do the death penalty,' I'm not going to ask the Court, but I'm going to say, 'You put on your questionnaire you can't do it. So, when are you telling the truth?' I'm not going to put them--but I'm going to strike them. And I don't care what color, what race, man, woman.

"And if there's a Batson challenge, then the question I'm asking the Court, you're going to bring them down, do like you said. So, if they raise that, you're going to say there's

enough for them to strike race neutral. Would you agree? I just want to be sure.

"THE COURT: I don't like to prejudge issues.

"[PROSECUTOR:] I'm not asking you to prejudge.

"THE COURT: I tend to think that anything anybody wrote on a questionnaire would support a peremptory challenge by either side--

"[PROSECUTOR:] That's good. Thank you."
(R. 919-20.)

Later, prior to the jury being sworn, Petersen's counsel made a motion indicating that a Batson violation had occurred. (R. 967.) After hearing the defense's reasons in support of its motion, the circuit court determined that there was a prima facie case of discrimination and asked the State to give its reasons for striking certain African-American jurors from the venire. (R. 970.)[11]

***17** The following exchange then occurred:

"[PROSECUTOR:] Yes, Your Honor. If you would remember in reference to juror number 28, Ms. [K. Ca.], she came up and spoke on two main points. First, that she's on bond pending action of the grand jury in Henry County, Alabama, our corresponding county within the 20th Judicial Circuit, our jurisdiction, for unlawful possession of a controlled substance. She also gave a response that she suffers from bipolar, which is one mental illness that we expect will be raised by the defense in this case.

"THE COURT: Anything else on 28?

"....

"[PROSECUTOR:] No. And then, going to--the next State strike was 107. 107, [Ms. T.H.], which is marked out and her new last name is [M.], number 107. She also gave a response about mental illness.

"....

"[PROSECUTOR:] That she's also bipolar ... or knew somebody who was bipolar. So, corresponding with juror number 28. His mental illness is at issue in this case. Specifically, the defense has affirmatively pled not guilty and not guilty by mental disease or defect. Given the closeness of her relationship to bipolar disorder, which, based off the information obtained through voir dire, she stated that her ... sister in law's husband suffers from bipolar.

"THE COURT: Anything else?

"....

"[PROSECUTOR:] Also, on question number 53 in the juror questionnaire, she stated that--she further referenced the mental illness.

"THE COURT: Next juror.

"[PROSECUTOR:] The next is number 47, [K. Cr.] She was one of the four jurors brought up and addressed by the Court about her position on the death penalty. On the questionnaire, she stated that life without parole was a severe enough penalty. And given the consideration that the death--if the jury comes back guilty, that death will be on the table for that, her response indicated that she's pro life without parole, because imprisonment and loss of freedom forever is punishment enough. That's on question 52. Also, she stated that her cousin was violent when not taking medicines and that her family has been untreated--has been treated unfairly by the cops.

"THE COURT: Is that from the questionnaire?

"[PROSECUTOR:] Yes, sir.

"....

"[PROSECUTOR:] [She wrote:] 'The way the officers chose to engage with the citizens in minor issues. Example, an officer made my mother cry by talking to her harshly during a minor traffic stop. It was completely unnecessary.'

"....

"THE COURT: Next juror.

"[PROSECUTOR:] The next juror is number 4, Your Honor, [J. Bar.] He initially, on his questionnaire, or raised his hand on voir dire, stated that he was not for the death penalty. And he was in the group that we asked the court to individually bring up of the four jurors that sat in the box. So, based off of his initial responses, that led us to request that of the Court.

"And on question number 42 of the Court, in reference to how he feels about the death penalty, he said, 'Well, I feel

I didn't give a life, so I don't have the authority to judge for no one--for one to be taken.'

"....

"Also, on question number 52, he stated that there is no punishment by taking a life.

***18** "....

"THE COURT: Okay. Next strike that's at issue.

"[PROSECUTOR:] The next one is number 49, which is Ms. [M.C.]. And if the Court will remember, that on individual voir dire, she came up. And she's actually been at a different nightclub on a previous occasion, many years ago, where there was a shooting. Two individuals were shot. She didn't see who the shooter was. But it was very traumatizing to ... her. She got very upset at your bench describing the details of that.

"She received psychiatric treatment for a number of years thereafter and was on medication. She stated it would be on her mind if she sat through the trial and it would cause her to be emotional.

"....

"She also said, in reference to number four, if answered 'yes,' to explain your relationship to the person or circumstances that led to seeking help, whether the help was successful, 'Myself. Help was successful until today.' Remember she related to the Court, because of the pressure of this case--

"THE COURT: Right.

"[PROSECUTOR:] We need someone that can keep their mind on the case.

"....

"THE COURT: I will note for the record, as well, on my notes from--I guess it was Monday, maybe, when we initially talked with her, I made the notations in my own handwriting on my personal notes, 'Sobbing, crying, Wicksburg shooting, hyperventilating as she spoke with us.' All right. Next strike at issue.

"[PROSECUTOR:] The next one was the State's eleventh strike, which was number 37, J.C.

"THE COURT: She was in the group, also, that came up.

"....

"[PROSECUTOR:] She was. Based off her initial response regarding the death penalty on her questionnaire or with the general voir dire.

"....

"Question number 53, she answered--this is what she says. She disagreed when it comes to whether a person should be sentenced to death for intentionally committing a capital murder, their background and circumstances of the crime do not matter. We understand the jury has a right to consider those things. But her response is, 'Some people are mentally ill. Mental illness is real and debilitating. Mental illness can play a role in some instances. So, I believe mental illnesses should be considered in'--I can't tell you what that says.

"....

"She's also employed in the medical field. And we also struck [people] in the medical field ... [white people, too].

"....

"THE COURT: Okay. Last one, number 5.

"[PROSECUTOR:] Number 5.... Number 5 has served on a previous jury and rendered a verdict of not guilty. He's a black male. We also struck, in removing persons who had rendered verdicts of not guilty before, number 31, [R.C.], who was a white male.

"....

"If I could point out, Judge, on number 5, that on 25, his answers, previous experiences [as a juror], [he said] yes, and the case was a Houston County assault, not guilty. Clearly, these kind of cases are shootings, once again. And we struck another white male for the same reason."

(R. 970-78, 980-81.) After hearing the above from the State, the circuit court determined that the State's reasons for striking the above veniremembers were sufficiently race-neutral. (R. 981.)

***19** On appeal, Petersen argues that the State's reasons for striking seven African-American veniremembers were pretextual and resulted in only one African-American veniremember serving on his final jury. (Petersen's brief, p. 37-46.) Specifically, he argues (1) that the Houston

County District Attorney's office has a history of removing African-American veniremembers from death-penalty cases and that the same is true in this case, thereby establishing a prima facie case of racial discrimination; (2) that similarly situated African-American and Caucasian veniremembers were treated differently; and (3) that the State's request to remove J. Bar., an African-American, was based on racial discrimination. Id. We address each in turn.

1.

First, Petersen contends that the statistical evidence concerning removal by the Houston County District Attorney's office of African-American veniremembers in death-penalty cases shows a history of discrimination and supports such a finding in the present case. As noted above, African-American veniremembers constituted 19% of the venire. After the State and Petersen exercised their peremptory strikes, 1 African-American juror remained, constituting 8% of the final jury. Finally, the State used 7 of its 18 peremptory strikes to remove 7 of the 9 African-Americans remaining on the venire after excusals and challenges for cause. We note that numbers and statistics do not, alone, establish a prima facie case of racial discrimination. See Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001)(holding State's use of six peremptory strikes to remove six of nine African-American veniremembers insufficient to establish a prima facie case of racial discrimination); Scheuing v. State, 161 So. 3d 245, 260 (Ala. Crim. App. 2003)("Here, the State's use of peremptory strikes to remove 8 of 12 African-American veniremembers does not raise an inference of racial discrimination."). Even so, the circuit court acted within its discretion in determining that a prima facie case of racial discrimination existed, thereby shifting the burden to the State to offer race-neutral reasons for the strikes.

2.

Petersen next argues that similarly situated African-American and Caucasian veniremembers were treated differently by the State. Specifically, he argues that the State struck prospective jurors M.B., K. Cr., M.C., J.C., T.M., and K. Ca., all of whom were African-American, but did not strike Caucasian prospective jurors who he alleges were similarly situated in a variety of ways. As demonstrated by the excerpts of the State's reasons quoted above, however--and as the circuit court found--those veniremembers were struck for race-neutral reasons. Additionally, review of the juror questionnaires and the transcript of voir dire examination does not demonstrate that the prosecutor engaged in disparate treatment when he struck those African-American veniremembers.

For example, the State struck M.B., an African-American male, because he had served on a previous jury that rendered a verdict of not guilty. (R. 980.) The State also struck R.C., a Caucasian male, for the same reason. (R. 980.) This Court has previously stated that "a black veniremember's prior service on a jury in which a not guilty verdict was rendered is a facially race-neutral reason for striking the veniremember." Lyde v. State, 605 So. 2d 1255, 1257 (Ala. Crim. App. 1992).

3.

Finally, Petersen argues that the State's request for J. Bar., an African-American, to be removed was made for racially discriminatory purposes. The record in this case indicates that J. Bar. was among a group of four veniremembers who were brought back into the courtroom for further questioning based on their opposition to the death penalty. (R. 934-37.) The circuit court asked whether they could follow the law as to sentencing, and each of them, including J. Bar., responded in the affirmative. (R. 936-37.)

***20** Petersen contends that since the State failed to ask J. Bar. any additional questions on the matter, it must have struck him for racially discriminatory purposes. We note, however, that, in addressing its reasons for striking J. Bar., the State noted his response on his questionnaire not only that he did not support the death penalty, but also that he was not sure there was a punishment for taking a life. (R. 974.) Under these circumstances, Petersen has failed to demonstrate that the State acted with racially discriminatory purposes when it moved to remove J. Bar. See Mashburn v. State, 7 So. 3d 453, 461-62 (Ala. Crim. App. 2007)(holding that striking African-American veniremember for his opposition to the death penalty and hesitation to consider it a proper punishment at all was not pretextual).

Based on our review of the voir dire examination and the juror questionnaires, we find no evidence that the prosecutor engaged in purposeful discrimination toward African-American veniremembers. Therefore, Petersen is not entitled to relief on this Batson claim.

B.[12]

Petersen next argues that the State used its peremptory strikes against women in violation of J.E.B. v. Alabama, 511 U.S. 127 (1994), and that this Court should remand the case for a hearing to determine whether the State can offer gender-neutral reasons for those strikes. (Petersen's brief, pp. 46-51.) Because Petersen did not raise this claim at trial, we question whether it is properly before this Court.

Initially, we note that a plurality of the Alabama Supreme Court has recently stated that Alabama appellate courts should no longer include such claims in plain-error review under circumstances like those present in Petersen's case. See Ex parte Phillips, [Ms. 1160403, October 19, 2018] —— So. 3d ——, —— (Ala. 2018) (Stuart, C.J., concurring specially, joined by Main and Wise, JJ.) ("Simply, (1) plain error should not be available for a Batson [or J.E.B.] issue raised for the first time on appeal because the failure to timely make a Batson inquiry is not an error of the trial court; (2) the defendant should be required to timely request a Batson hearing to determine whether there was purposeful discrimination because, under the plain-error rule, the circumstances giving rise to purposeful discrimination must be so obvious that failure to notice them seriously affects the integrity of the judicial proceeding ...."); see also id. at —— (Sellers, J., concurring specially) ("I also concur with Justice Stuart's discussion of the Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), issue, which aligns our jurisprudence with what I believe is persuasive jurisprudence from federal courts. A Batson claim is a unique type of constitutional claim that, for the reasons set out in Justice Stuart's opinion, should be deemed waived even in capital cases if not timely made. Batson claims are forfeited if there is no objection to the composition of the jury before the commencement of a trial."). For the reasons stated in that opinion, plain-error review should likewise no longer apply to J.E.B. claims in circumstances like Petersen's.

Even if, however, the J.E.B. issue raised by Petersen was subject to plain-error review, Petersen is not entitled to relief. Here, as noted in Part III.A., supra, after a number of veniremembers were disqualified, excused, or stricken for cause, 47 veniremembers remained. Of those 47 veniremembers, 22 were female and 25 were male. Therefore, the 22 female veniremembers constituted 47% of the venire. The State used 14 of its 18 peremptory strikes to remove female veniremembers. Petersen used 3 of his 17 peremptory strikes to remove female veniremembers. Females constituted 42% of Petersen's final jury. At the conclusion of the jury-selection process, neither Petersen's defense counsel nor the circuit court indicated that a J.E.B. violation had occurred.

***21** On appeal, Petersen argues that the State's use of 14 of its 18 peremptory strikes to remove women from the venire along with the prosecutor's comment that he "wanted to keep men on the jury" and that he "[d]idn't want a jury of all women" supports an inference of discrimination. (Petersen's brief, p. 48.) He further argues that the female veniremembers the State struck were a variety of ages and gave various answers during voir dire and, thus, that the only common characteristic among them was their gender. (Petersen's brief, p. 49.) Finally, Petersen argues that similarly situated male and female veniremembers were treated differently. (Petersen's brief, pp. 50-51.) We address each argument in turn.

1.

First, we disagree with Petersen's contention that the State's use of 14 of its 18 peremptory strikes to remove women from the venire supports an inference of discrimination. As noted above, the female veniremembers constituted 47% of the venire, and, after the State and Petersen exercised their peremptory strikes, women constituted 42% of Petersen's final jury. Although the State used 14 of its 18 peremptory strikes to remove 14 of the 22 women remaining on the venire after excuses and challenges for cause, this fact does not establish a prima facie case of gender discrimination, and we do not think a prima facie case has been established in this case. See Largin v. State, 233 So. 3d 374, 403 (Ala. Crim. App. 2015) (holding that State's use of 22 of 29 strikes against female veniremembers did not raise an inference of discrimination). Even so, we will nevertheless consider Petersen's remaining arguments.

2.

Second, Petersen argues that, because the female veniremembers the State struck were a variety of ages and gave various answers during voir dire, the only common characteristic among them was their gender. (Petersen's brief, p. 49.) This Court recognized in McCray v. State, 88 So. 3d 1, 20 (Ala. Crim. App. 2010), that

> "there is almost always going to be some variance among prospective jurors who are struck; therefore, this alone does not establish heterogeneity of the struck veniremembers so as to support an inference of discrimination. The question, as noted in both Ex parte Branch[, 526 So. 2d 609 (Ala. 1997)] and Ex parte Trawick[, 698 So. 2d 162 (Ala. 1997)], is whether the struck jurors shared only the characteristic at issue, in this case, gender."

Review of the juror questionnaires and the transcript of voir dire examination reflects that many of the women struck shared characteristics other than gender.

For example, Petersen identifies K. Cr. and E.E. as being improperly struck even though they both answered that they have purchased weapons. (Petersen's brief, p. 49.) The record reveals that K. Cr. indicated that she was opposed to the death penalty. (R. 972-73.) This Court has noted that, at the very least, opposition to the death penalty is a valid reason for the State to strike veniremembers. See Scheuing v. State, 161 So. 3d 245, 286 (Ala. Crim. App. 2013). Additionally, the record shows that E.E. revealed that her son had been in prison but she indicated that she could be fair and impartial. (R. 913.) We note, however, that, in her juror questionnaire, E.E. indicated that "[a]ttorneys and the [district attorney] manipulate the system." Because E.E. demonstrated a potential bias toward the State in her juror questionnaire, the State's decision to remove her from the jury does not demonstrate purposeful discrimination.

3.

Finally, we disagree with Petersen's argument that similarly situated male and female veniremembers were treated differently to an extent that indicates that discrimination occurred. Petersen argues that the State struck certain female prospective jurors but did not strike male jury members who provided similar answers to certain questions either during voir dire or on the jury questionnaires. Based on our review of the voir dire examination and the juror questionnaires, however, we find no evidence that the prosecutor engaged in purposeful discrimination toward female veniremembers.

***22** For example, the record indicates that the State struck female veniremember K.E. who, like male jury member B.E., had never purchased a firearm. (R. 484.) During voir dire, however, K.E. indicated that she did not believe that someone's background should be considered mitigating and she indicated that she would not accept mitigating factors of someone's social background. (R. 711-12.) This Court has previously recognized that a juror may not arbitrarily ignore any applicable mitigating or aggravating circumstance. See Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1983), affirmed in part and remanded, 482 So. 2d 1241 (Ala. 1985). Based on K.E.'s response, it appears that her removal from the venire was in Petersen's best interest because she may not have followed the law. See generally Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002)(holding that the challenged jurors were stricken for nondiscriminatory reasons, including a stated inability to follow the law), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003). Thus, we find no plain error, and Petersen is not entitled to relief.

III.[13]

Petersen contends that the circuit court erroneously limited voir dire by refusing to let his defense counsel further question nine veniremembers about their views on the death penalty after, he says, they indicated that they would automatically impose the death penalty without considering mitigating evidence. (Petersen's brief, pp. 85-87.) Although he acknowledges that the court questioned those nine veniremembers individually, Petersen argues that he should have been permitted to question those veniremembers about their contradictory responses on the issue. (Petersen's brief, pp. 85-86.) Petersen did not raise this issue in the circuit court; thus, it will be reviewed for plain error. See Rule 45A, Ala. R. App. P.

The record on appeal reveals that, after questioning the full venire during voir dire, Petersen's defense counsel identified nine veniremembers for further questioning who, he says, indicated on their juror questionnaires that they would automatically impose the death penalty without considering any mitigating evidence. Those veniremembers were J. Bas., B. El., T.B., C.D., G.D., K.E., E.G., C.G., and J.G. (R. 896, 898-908.)[14] The circuit court then brought in those nine veniremembers for further questioning. (R. 915.) The following exchange occurred:

> "THE COURT: Let the record reflect that we've called down in a group--I'll call the names out one more time. Let me know if I don't call your name. [J. Bas.], [T.B.], [C.D.], [G.D.], [K.E.], [B. El.], [E.G.], [C.G.], and [J.G.]. Is that everybody?

"(No response.)

"THE COURT: This is, again, the death penalty question. I know that a lot of question[s] have been asked and the questionnaires, as well. And, certainly, all of us, as Americans, are entitled to our beliefs--we can call them political, religious, whatever--over any multitude of issues. And you don't surrender those beliefs because you serve on a jury.

"But always when you serve on a jury or if you serve as a judge, your first obligation has to be able to, when necessary, set aside political, religious or other such beliefs and go by what the law says, whether you may otherwise agree or disagree with it. Okay?

"So, in regard to the death penalty, is there any of you that cannot follow the law of Alabama regarding the death penalty, whatever that law may be? I won't spend 30 minutes going over it with you. But, is there anyone who could not follow the law of Alabama on the death penalty?

"(No response.)

"THE COURT: Yes? No? I guess what I'll do, I'll point to each of you. And tell me, yes, you can follow the evidence and the law, or, no, you cannot. And I'll start down there at the end.

"(Whereupon, the prospective jurors were polled and gave affirmative responses.)

***23** "THE COURT: And if you believe, after hearing the case, that the evidence and the law supports a verdict of life without parole, can all of you impose a sentence of life without parole?

"PROSPECTIVE JURORS: Yes.

"THE COURT: Yes? Tell me 'no' if you cannot, anyone cannot.

"(No response.)

"....

"THE COURT: Anything else from the defense for these jurors?

"....

"[DEFENSE COUNSEL:] Other than just--aside from asking them about the questionnaire, why did you put on here that you're not open to these things.

"THE COURT: Well, that would be an issue for a peremptory strike, in my opinion. And they've answered it on their questionnaire."

(R. 915-18.) Thereafter, Petersen did not move to question the veniremembers individually.

This Court has previously recognized that

> "Rule 18.4(c), Ala. R. Crim. P., provides that '[t]he court shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors.' In Morgan [v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed. 2d 492 (1992)], ... the United States Supreme Court held that a capital defendant is entitled to question prospective jurors about their views on the death penalty and to strike for cause those prospective jurors who would automatically impose the death penalty if the defendant is found guilty of the capital charge. However, '[t]he right to question veniremembers regarding their qualifications to serve on the jury or their interest or bias is limited by propriety and pertinence and is to be exercised within the sound discretion of the trial court, and the questions must be reasonable under the circumstances of the case.' Smith v. State, 698 So. 2d 189, 198 (Ala. Crim. App. 1996), aff'd, 698 So. 2d 219 (Ala. 1997). See also Rule 18.4(d), Ala. R. Crim. P. ('Voir dire examination of prospective jurors shall be limited to inquiries directed to basis for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their strikes.'). 'In selecting a jury for a particular case, "the nature, variety, and extent of the questions that should be asked prospective jurors" must be left largely within the sound discretion of the trial court.' Bracewell v. State, 447 So. 2d 815, 821 (Ala. Crim. App. 1983), aff'd, 447 So. 2d 827 (Ala. 1984) (quoting Peoples v. State, 375 So. 2d 561, 562 (Ala. Crim. App. 1979)). 'A trial court is vested with great discretion in determining how voir dire examination will be conducted, and the court's decision as to the extent of voir dire examination required will not be overturned except for an abuse of that discretion.' Travis v. State, 776 So. 2d 819, 835 (Ala. Crim. App. 1997), aff'd, 776 So. 2d 874 (Ala. 2000)."

***24** Floyd v. State, [Ms. CR-13-0623, July 7, 2017) —— So. 3d ——, —— (Ala. Crim. App. 2017). Here, defense counsel was given an opportunity through a written questionnaire to ask the nine identified veniremembers about their views on

the death penalty. Based on their responses to a question on the juror questionnaire, Petersen's defense counsel told the court that they believed that those nine veniremembers should be questioned further about their views on the death penalty and mitigating evidence. The court agreed and, without hesitation, called those prospective jurors back and asked them additional questions based on those concerns. Under those circumstances, contrary to Petersen's argument, the court did not "limit voir dire" in any meaningful way. The fact that the court did not seek to allow Petersen's defense counsel to ask those veniremembers even more questions does not constitute an abuse of discretion under Floyd, supra. Thus, Petersen is not entitled to relief on this claim.

IV.[15]

Petersen argues that the circuit court erred by removing veniremember B.C. from the venire. (Petersen's brief, pp. 87-88.) According to Petersen, although B.C. initially indicated during voir dire that she might not be able to vote in favor of sentencing Petersen to death, because she later indicated that she would be able to do so in response to further questioning from the State and defense counsel, the court should not have removed her. Id.

The following is well settled law:

> " ' "A trial judge's finding on whether or not a particular juror is biased 'is based upon determination of demeanor and credibility that are peculiarly within a trial judge's province.' [Wainwright v.] Witt, 469 U.S. [412] 429, 105 S. Ct. [844] 855 [(1985)]. That finding must be accorded proper deference on appeal. Id. 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' Nobis v. State, 401 So. 2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So. 2d 204 (Ala. 1981)." '
>
> "Boyle v. State, 154 So. 3d 171, 196 (Ala. Crim. App. 2013) (quoting Martin v. State, 548 So. 2d 488, 490–91 (Ala. Crim. App. 1988)).
>
> > " ' " 'In a capital case, a prospective juror may not be excluded for cause unless the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.' Drew v. Collins, 964 F.2d 411, 416 (5th Cir. 1992), cert. denied, 509 U.S. 925, 113 S. Ct. 3044, 125 L.Ed. 2d 730 (1993) (quotations omitted). '[T]his standard likewise does not require that a juror's bias be proved with unmistakable clarity. This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.' [Wainwright v.] Witt, 469 U.S. [412,] 425–26, 105 S. Ct. [844,] 852–53 [(1985)]." '
>
> "Boyle, 154 So. 3d at 196–97 (quoting Parr v. Thaler, 481 Fed. App'x 872, 876 (5th Cir. 2012))."
>
> Townes v. State, 253 So. 3d 447, 471 (Ala. Crim. App. 2015).

The record on appeal indicates that, during voir dire, veniremember B.C. initially indicated that she may have difficulty imposing the death penalty because she did not believe in the death penalty. (R. 255.) The following exchange then occurred:

> "THE COURT: Okay. I want to ask you about that. Are there any other issues that you need to discuss with me or just that one?
>
> "[B.C.:] No. Just that.
>
> "THE COURT: Okay. I need to ask you this way. The law of Alabama permits the death penalty in certain circumstances. Okay. So, the first issue, if you sit on the jury, will be whether he's guilty or not guilty of the crime. It has nothing to do with punishment--
>
> "[B.C.:] Okay.
>
> "THE COURT: --because he's presumed innocent of the charge. So, we don't even think about punishment unless or until a jury tells us that he's guilty. So, the lawyers, myself, no one will talk about the death penalty when they present their cases to you. If he's found not guilty, then he's free to go. The jury is discharged. The case is over. We never get to penalty.
>
> ***25** "[B.C.:] Right.
>
> "THE COURT: If he is found guilty of a capital offense, a jury nor a judge is free to then simply impose the death penalty. Our law has laws and procedures that would then have to be followed to determine whether the death penalty is appropriate or life without parole. There will only be two options if he's found guilty, death penalty or life without parole.
>
> "And probably everybody has an opinion about the death penalty. It's just one of those issues, like a few others,

that everyone has some opinion, one way or the other about. And it's okay to have those opinions. But the issue becomes, in the case, is whether you could follow the law or is your opinion of such a nature that you could not follow the law. Okay?

"So, if you were to sit on the jury, the jury finds him guilty beyond a reasonable doubt, we go through the sentencing part of the case, you hear the evidence, I give you the law, and you do believe, based on the evidence and the law, that the death penalty is appropriate, would you be able to set aside your personal belief and consider and impose the death penalty or would you--

"[B.C.:] To be honest with you, I don't know. Because I know that, you know, a person can be guilty and, you know, he has taken another life, but, you know, I just don't believe that he could--you know, you could take--that we have--even though it's law, that we could choose to terminate that person's life. You know. I mean, he should get the punishment that he deserves.

"But, in my own personal opinion and my belief, you know, I don't think that we get to choose to terminate someone's life, even if he had taken someone else's life.

"THE COURT: Right. And I don't want to put words in your mouth.

"[B.C.:] Right.

"THE COURT: So, you tell me. Do I understand that you're telling me that even if you think, under the law and the evidence, the death penalty would be appropriate, that you still would not be able to vote for the death penalty?

"[B.C.:] I don't--I wouldn't--like, I would be undecided to choose that. I don't know.

"THE COURT: But, if you do think the evidence and the law warrants the death penalty, would you be able to vote for death?

"[B.C.:] Of course. Yeah.

"THE COURT: Any questions, [prosecutor]?

"[PROSECUTOR:] Yes. Ms. [B.C.], I appreciate your honesty. I just want to discuss two things. I heard what you said, even though if I found him guilty--and I'll ask it this way--I could consider the death penalty. But, is it your opinion that the State, the jury, as no right to terminate his life? I can vote life without parole, but I can't vote death.

"[B.C.:] Yeah.

"[PROSECUTOR:] Okay. And I respect that.

"[B.C.:] Yeah.

"[PROSECUTOR:] And my question--I need to ask you this way. Your opinion and your belief is what I heard you were talking about. No matter what, your opinion and your belief is you won't vote death no matter what? You'll automatically do life without parole under any circumstance? Is that fair?

"[B.C.:] Yeah.

"[PROSECUTOR:] Okay. Well, like the judge says, we have to prove he's guilty at the guilt phase. And then, at the penalty phase, the burden is still on the State. So, my question, are you telling the judge I can listen to the evidence, and if the State convinces me, then I can vote to put him to death, or, no, my belief--I don't believe we have a right to terminate a man's life or woman? I can send him to prison for life without parole to die there, but I don't believe I can ever vote to terminate his life, no matter what.

***26** "[B.C.:] I wouldn't be able to.

"[PROSECUTOR:] 100 percent, you could not do that?

"[B.C.:] 100 percent, I wouldn't be able to.

"[PROSECUTOR:] Thank you for your honesty.

"THE COURT: [Defense counsel]?

"[DEFENSE COUNSEL:] Yes. Now, you seem to have given this issue some thought--

"[B.C.:] Uh-huh.

"[DEFENSE COUNSEL:] --obviously.

"[B.C.:] That's why I stayed. I was going to just walk out, but then I was, like, wait.

"[DEFENSE COUNSEL:] You've given it some thought. And that's what we want. We want people who think. We want thoughtful people to be on the jury--

"[B.C.:] Right.

"[DEFENSE COUNSEL:] --to get a fair trial. We need open-minded people to listen to the evidence and make their conclusions after they've heard it. You understand?

"[B.C.:] Right.

"[DEFENSE COUNSEL:] Now, a minute ago, when Judge asked you if you could follow the law, you said that you could. And I know that there's probably some conflict. You've never been involved as a juror--

"[B.C.:] No. This is my first time.

"[DEFENSE COUNSEL:] --on a capital-murder case, have you?

"[B.C.:] No. This is my first time being called as a juror.

"[DEFENSE COUNSEL:] So, you've never been exposed to--

"[B.C.:] No.

"[DEFENSE COUNSEL:] --what you're going to be exposed to here. Right?

"[B.C.:] No.

"[DEFENSE COUNSEL:] Are you open to the fact that maybe, once exposed to this, you may have a different opinion?

"[B.C.:] Different opinion about the death penalty?

"[DEFENSE COUNSEL:] About whether or not there could be some circumstance where it could be warranted as opposed to just never.

"[B.C.:] I don't think I could ever be in that position to--

"[DEFENSE COUNSEL:] Well, I guess what I'm asking is, are you open--are you open to considering--

"[B.C.:] Considering--

"[DEFENSE COUNSEL:] --both sides?

"[B.C.:] Yes, of course.

"THE COURT: So, if you listen to the evidence-again, we're assuming he's been convicted.

"[B.C.:] Okay.

"THE COURT: And we really shouldn't be assuming that--

"[B.C.:] Okay.

"THE COURT: --but we just have to for these questions. So, assuming he's been convicted of capital murder, and you listen to then the evidence at what we call the sentencing trial and the additional law that I give you about the death penalty, and you think, under the evidence and the law, the death penalty is appropriate, would you be able to vote for the death penalty?

"[B.C.:] If the evidence shows that he was--or that they were guilty? Are you asking that?

"THE COURT: We're assuming he's guilty.

"[B.C.:] Okay.

"THE COURT: And then the sentencing will open up new issues and so forth that the attorneys will present to you.

"[B.C.:] So, you're saying would I be able to choose the death penalty if it went to--

"THE COURT: Only if you think the evidence and the law supports it.

"[B.C.:] Evidence and the law supports.

"THE COURT: The death penalty is never automatic--

"[B.C.:] Okay.

"THE COURT: --in any case. All right? But the evidence and the law, both of those two things that you hear in the courtroom--the attorneys will give you the evidence. I'll give you the law. And then you have to determine, as a juror, is the death penalty appropriate or not.

***27** "[B.C.:] Maybe. I wouldn't be able to decide.

"THE COURT: All right. That's fine. I appreciate it." (R. 255-64.)

Later on during voir dire, the circuit court mentioned the above exchange with B.C. concerning her beliefs regarding the death penalty and indicated that it appeared that "she will not be able to follow the law and the Court's instruction on the death penalty." (R. 305-06.) The State agreed with the court's assessment and moved to remove B.C. for cause. (R.

306.) Defense counsel objected and the following exchange occurred:

> "[DEFENSE COUNSEL:] She indicated to you and to me that she would be open. And then, obviously, [the prosecutor], when he was questioning her, she changed her mind. I think she's conflicted, which is okay. But she did indicate the ability to weigh the circumstances and the evidence.
>
> "THE COURT: My recollection was that, initially when I asked that--what I call the standard question, very sort of academic question, not trying to bias a juror one way or the other, she indicated that she could follow the evidence and the law and then impose the death penalty.
>
> "Then, under, respectfully, cross-examination by [the prosecutor], she indicated no. I think you followed up with some more questions. And then I followed up again with her on what I call my standard question. She indicated that she could not. She, in fact, changed her opinion. That's my memory. I don't mind if you all want me to--my final call being in my second colloquy with her, she indicated that she could not.
>
> "[DEFENSE COUNSEL:] And I think that that's--I would stipulate that that's probably an accurate recollection of what she said. But my opinion--and I guess our objection is that she seemed as if she could--she was not completely set in one fashion. She was able to be manipulated both ways, which is, again, what the evidence--
>
> "THE COURT: Right.
>
> "[DEFENSE COUNSEL:] --and the trial process is.
>
> "THE COURT: I agree she changed, it appeared, under the district attorney's questioning. And that was why I specifically went back a second time. If she stood by her initial response to me, I would not have granted it based on the district attorney's examination of her. But if she did seem honest and sincere in her answers to me finally.
>
> "So, it is my judgment from all the available evidence and all of her responses, as well as her demeanor in front of me, that she is not able to set aside her personal opposition to the death penalty and follow the law should it be appropriate. So, over objection, I will grant challenge for cause. [B.C.] is removed."

(R. 305-08.)

On appeal, Petersen argues that, even though B.C. expressed reservations about her ability to impose the death penalty, those reservations "did not warrant removal as they would not 'prevent or substantially impair' her ability to serve. (Petersen's brief, p. 87 (citations omitted).) Based on the excerpts from the record quoted above, however, the circuit court did not abuse its broad discretion by removing prospective juror B.C. for cause. Initially, B.C. indicated that she could not impose a sentence of death. When later questioned about her views by the prosecution, defense, and the court, she continued to express hesitation about whether she could impose the death penalty even after being instructed to do so by the court. Because there were clear indications that B.C. would not follow the law, Petersen is not entitled to relief on this claim.

V.[16]

***28** Petersen also argues that the circuit court erred when it death-qualified the jury. (Petersen's brief, p. 97.) Specifically, Petersen asserts that death-qualifying the jury produces a conviction-prone jury and disproportionately excludes minorities and women in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petersen did not object to voir dire questions focused on the jurors' views about capital punishment. Accordingly, this issue is reviewed for plain error only. See Rule 45A, Ala. R. App. P.

This Court has repeatedly rejected such arguments. Specifically, this Court has stated:

> " 'In Davis v. State, 718 So. 2d 1148 (Ala. Crim. App. 1995)(opinion on return to remand), aff'd, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1117, 143 L.Ed. 2d 112 (1999), we stated:
>
> > " ' " 'A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L.Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L.Ed. 2d 137 (1986). Neither the federal nor the state constitution prohibits the state from ... death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d

> 368, 391-92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1297, 122 L.Ed. 2d 687 (1993)."

" '718 So. 2d at 1157. There was no error in allowing the State to death qualify the prospective jurors.' "

Phillips v. State, [Ms. CR-12-0197, December 18, 2015] —— So. 3d ——, —— (Ala. Crim. App. 2015) (quoting Brown v. State, 11 So. 3d 866, 891 (Ala. Crim. App. 2007)).

The trial court did not commit any error--plain or otherwise--in death-qualifying the prospective jurors. Accordingly, Petersen's claim is without merit, and he is not entitled to relief on this issue.

VI.[17]

Petersen argues that the circuit court erred in denying his motion to suppress the statements he gave to law-enforcement officers on August 10, 2012, and August 14, 2012. (Petersen's brief, pp. 64-72.) According to Petersen, admission of his inculpatory statements violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel under the United States Constitution.

A.

First, Petersen argues that the circuit court erred by denying his motion to suppress because the interviews did not cease after he had, he says, "unequivocally" invoked his right to counsel. Petersen argues he is entitled to relief under the principles announced in Edwards v. Arizona, 451 U.S. 477 (1981). (Petersen's brief, pp. 65-67.)

On August 10, 2012, Petersen was arrested for the shooting that occurred at Teasers on August 9, 2012. The same day that he was arrested, Petersen was questioned about the shooting by Captain William Rafferty. (C. 979.) Before he began asking Petersen questions about the shooting, Cpt. Rafferty informed him of his Miranda rights and asked Petersen if he understood those rights. (C. 983-84.) After Petersen indicated that he understood those rights, Cpt. Rafferty began asking Petersen about what had happened at Teasers the night before. Petersen told Cpt. Rafferty about the events that led up to the shooting and then told him that "without thinking [he] did something [he] can't take back because [he] was angry" and that he was "upset [with] the way they treated [him]." (C. 991.) When Cpt. Rafferty asked Petersen to tell him exactly what he did, Petersen said:

> ***29** "Probably should talk to my mom and lawyer before I go into or know what the charges are I don't know ... I already ... police officers when they arrested me uh said you like killing people you[ ] think you're bad ass so I supposed passed away and I don't know if I shot anybody else but I didn't mean to."

(C. 991.) Despite mentioning talking to his lawyer, however, Petersen continued to give Cpt. Rafferty information about what had happened.

Following a break, the interview resumed at 10:11 a.m. that morning. Cpt. Rafferty again reminded Petersen of his right to counsel, and Petersen indicated that he understood that right. (C. 1021-23.) After answering a few more questions from Cpt. Rafferty, Petersen made the following statement:

> "I would like to talk to my mother and I guess I have to talk to my lawyer too so 'cause I told you everything I know.
>
> "....
>
> "And I'm probably going to tell them the same thing to be perfectly honest with you."

(C. 1024.) Cpt. Rafferty then asked: "So at some point you want--you're gonna want to talk to your mother and some point you're gonna want to talk to your--any attorney?" (C. 1024.) Petersen then replied:

> "Maybe, I don't know I'm not--attorney--apparently I did--I don't know--I don't know how to tell it to my mother I just like someone to call my mother or go to her house she's probably gonna have a mental break down. That's understandable apparently fucking four--eight more other people are gonna have one too all because of what I did I hate (inaudible) and if I recall any more information I'll let you know, if it like pops in my head like a memory lost."

(C. 1024.) After asking Petersen a few more questions, Cpt. Rafferty concluded the interview and confirmed with Petersen that he knew he could have asked for an attorney but that he chose to talk to Cpt. Rafferty without one. (C. 1027.)

On August 14, 2012, Cpt. Rafferty conducted another interview with Petersen and, once again, advised Petersen of his Miranda rights. (C. 1029.) During that interview, Cpt. Rafferty began asking Petersen questions about what had happened on the night of the shooting. At one point during their conversation, the following exchange occurred:

"[PETERSEN:] So uh ... if I say something disrespectful I honestly don't mean it (inaudible).

"[CPT. RAFFERTY:] I just want you to talk like you regularly talk, ok.

"[PETERSEN:] And you just ask me questions --

"[CPT. RAFFERTY:] Sure.

"[PETERSEN:] --I'll try telling you if I'm feeling comfortable (inaudible).

"[CPT. RAFFERTY:] Ok, that's fine that's your right.

"[PETERSEN:] Need a lawyer (inaudible) this is my lawyer (inaudible) phone call or anything, he wasn't any attorney he was some dude that uh ... laid it all down for me basically but (inaudible) of course (inaudible). Why the fuck am I talking to you (inaudible). I'm not going to put myself in the situation. I'm not gonna lie I'm not gonna (inaudible) whatever.

"[CPT. RAFFERTY:] And you're here talking to me; we brought you down here--

"[PETERSEN:] (Inaudible) legitimate question I mean there's no problem with me answering it.

"[CPT. RAFFERTY:] Right and you're talking at your own free will, no one's forcing you to talk to us and your rights have been read to you?

"[PETERSEN:] Yeah so this can all be played back in court later at my dismay or something like that (inaudible) I don't know maybe it's all (inaudible) no one's pointing a gun to my head."

***30** (C. 1053-54.)

On November 22, 2016, Petersen filed a pretrial motion asking the circuit court to suppress the two statements he had made to police on August 10, 2012, and August 14, 2012. (C. 389.) On December 5, 2016, the court held a suppression hearing and heard undisputed testimony from Cpt. Rafferty that Peterson was advised of his Miranda rights, that Petersen acknowledged that he understood those rights, and that he waived them. Cpt. Rafferty also testified that Petersen did not, at any point during either interview, refuse to speak with him or make an unequivocal assertion of his right to counsel. The following day, the court denied Petersen's motion.

In Alabama, it is well settled that "[t]his Court reviews de novo a circuit court's decision on a motion to suppress evidence when the facts are not in dispute." Jones v. State, 217 So. 3d 947, 954 (Ala. Crim. App. 2016) (internal quotations and citations omitted). In the instant case, the facts are uncontested. The only issue is the circuit court's application of the law to those facts. Therefore, the circuit court's ruling is afforded no presumption of correctness.

This Court has previously stated:

"In determining whether a suspect's statement was an unequivocal invocation of his right to counsel, we are guided by the following principles:

" ' "The applicability of the ' "rigid" prophylactic rule' of Edwards[v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981)] requires courts to 'determine whether the accused actually invoked his right to counsel.' Smith v. Illinois, [469 U.S. 91, 95, 105 S. Ct. 490, 492, 83 L.Ed. 2d 488 (1984)] (emphasis added), quoting Fare v. Michael C., 442 U.S. 707, 719 [99 S. Ct. 2560, 2569, 61 L.Ed. 2d 197] (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. See Connecticut v. Barrett, supra, 479 U.S. [523], at 529 [107 S. Ct. [828] at 832 (1987)]. Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' McNeilv. Wisconsin, 501 U.S. [171] at 178 [111 S. Ct. [2204] at 2209 (1991).] ...

" ' "... As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' Smith v. Illinois, 469 U.S., at 97–98 [105 S. Ct., at 494] (brackets and internal quotation marks omitted). Although a suspect need not 'speak with the discrimination of an Oxford don,' post, at 476, 114 S. Ct., at 2364 (Souter, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." '

"Ex parte Cothren, 705 So. 2d 861, 864 (Ala. 1997) (quoting Davis [v. United States], 512 U.S. [452] at 458–59 [(1994)]).

"Furthermore, a suspect's reference to an attorney is equivocal if ' "a reasonable officer in light of the

circumstances would have understood only that the suspect might be invoking the right to counsel." ' Cothren, 705 So. 2d at 864 (quoting Davis, 512 U.S. at 459). '[T]he proper standard to be used in resolving this issue is an objective one --whether a police officer in the field reasonably could have concluded from the circumstances that a suspect was not absolutely refusing to talk without the assistance of an attorney.' Cothren, 705 So. 2d at 866–67.

***31** "Equivocal has been defined as:

" ' " 'Having different significations equally appropriate or plausible; capable of double interpretation; ambiguous,' 5 Oxford English Dictionary 359 (2d ed., J.A. Simpson & E.S.C. Weiner, eds., 1989); and as: 'Having two or more significations; capable of more than one interpretation; of doubtful meaning; ambiguous,' Webster's Third International Unabridged Dictionary 769 (1986)." '

"Cothren, 705 So. 2d at 866 (quoting Coleman v. Singletary, 30 F.3d 1420, 1425 (11th Cir. 1994))."

Thompson v. State, 97 So. 3d 800, 807–08 (Ala. Crim. App. 2011).

In the present case, Petersen's invocation of his right to counsel in both interviews was not unequivocal. In fact, during the suppression hearing, his defense counsel acknowledged that it was ambiguous. (R. 404-05.)

During his first interview with Cpt. Rafferty on August 10, 2012, Petersen stated: "Probably should talk to my mom and lawyer before I go into or know what the charges are I don't know ...." (C. 991) (emphasis added). During the second portion of his first interview on August 10, 2012, Petersen stated: "I would like to talk to my mother and I guess I have to talk to my lawyer too so 'cause I told you everything I know.... And I'm probably going to tell them the same thing to be perfectly honest with you." (C. 1024) (emphasis added). When Cpt. Rafferty attempted to clarify whether he wanted to talk to an attorney, Petersen said, "Maybe, I don't know I'm not--attorney--apparently I did--I don't know--I don't know how to tell it to my mother I just like someone to call my mother or go to her house she's probably gonna have a mental break down." (C. 1024) (emphasis added). Petersen, however, continued to tell Cpt. Rafferty about what happened the night of the shooting and Cpt. Rafferty confirmed that he wanted to talk without the presence of counsel. (C. 1027.)

Petersen's use of the words "probably should," "guess" and "maybe" could have reasonably led Cpt. Rafferty to conclude that Petersen was not certain whether he wished to speak to an attorney before continuing to answer questions. See Ex parte Cothren, 705 So. 2d 861, 866 (Ala. 1997) (holding that the phrase "I think I want to talk to an attorney" was not an unequivocal request for an attorney because the "use of the word 'think' could have led [the interrogating officer] to conclude that [the suspect] was not certain as to what he should do").

Finally, during another interview with Cpt. Rafferty on August 14, 2012, Petersen stated: "Need a lawyer (inaudible) this is my lawyer (inaudible) phone call or anything, he wasn't any attorney he was some dude that uh ... laid it all down for me basically but (inaudible) of course (inaudible). Why the fuck am I talking to you (inaudible). I'm not going to put myself in the situation. I'm not gonna lie I'm not gonna (inaudible) whatever." (C. 1054) (emphasis added).

Petersen's use of the phrase "need an attorney" lacks any indication of an absolute present desire to consult with an attorney. Instead, that phrase indicates that Petersen might desire counsel if he determines that he needs counsel. See Thompson, 97 So. 3d at 808 (holding that the suspect's statement " 'I might need one. If I need one,' was at best an ambiguous and equivocal statement regarding his desire to assert his right to counsel")(citing Henry v. State, 265 Ga. 732, 735–36, 462 S.E.2d 737, 743 (1995)).

***32** Based on the objective standard set forth in Davis and Cothren as presented in Thompson, supra, a reasonable officer in Cpt. Rafferty's position would have understood only that Petersen might desire to invoke his right to counsel if he deemed that he needed counsel. It was reasonable for Cpt. Rafferty to conclude from the circumstances that Petersen was not refusing to talk without the assistance of an attorney. Under these circumstances, Petersen's reference to an attorney was, at best, an equivocal assertion regarding his right to counsel.

The second half of our inquiry requires determining whether Cpt. Rafferty fulfilled his duty to ask questions to clarify Petersen's reference to an attorney before asking him questions concerning the shooting. As demonstrated by the portions of the record quoted above, Cpt. Rafferty reminded Petersen of his right to have a lawyer present, but Petersen continued to give him information about what had happened on the night of the shooting. Cpt. Rafferty adequately fulfilled

his duty to clarify Petersen's invocation of his right to counsel before proceeding with the interrogation. Thus, Petersen is not entitled to relief on this claim.

B.

Next, Petersen argues that the statement he made to police on August 14, 2012, should have been suppressed because, he says, his Sixth Amendment right to counsel had attached and he did not waive the presence of counsel. (Petersen's brief, pp. 67-69.) He further argues that, because he was not told that his right to counsel had already attached, he could not possibly have validly waived a right that he did not even know he had. Id. This claim was not presented to the circuit court below; thus, it is reviewed for plain error. See Rule 45A, Ala. R. App. P.

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. In addressing the right to counsel, the Alabama Supreme Court has instructed:

> "A criminal defendant has a right to counsel at any 'critical stage' in the proceedings in which he or she is prosecuted and sentenced, e.g., United States v. Wade, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 (1967), that is, at any stage at which a substantial right of the accused may be affected, Mempa v. Rhay, 389 U.S. 128, 134–36, 88 S. Ct. 254, 19 L.Ed. 2d 336 (1967)."

Ex parte Pritchett, 117 So. 3d 356, 358 (Ala. 2012). In Ex parte Cooper, 43 So. 3d 547, 549 (Ala. 2009), the Alabama Supreme Court, applying the holding in Rothgery v. Gillespie County, Texas, 554 U.S. 191, 128 S. Ct. 2578, 171 L.Ed. 2d 366 (2008), provided guidance as to when the Sixth Amendment right to counsel attaches. Because "the United States Supreme Court [has] unequivocally defined the point at which a defendant's right to counsel attaches in criminal proceedings" as the start of adversarial judicial proceedings, the Court "[held] that a defendant's Sixth Amendment right to counsel attaches at the initial appearance." Ex parte Cooper, 43 So. 3d at 549.

At the time of his second statement to police on August 14, 2012, Petersen had already had an initial appearance. According to the record on appeal, just hours after his first interrogation on August 10, 2012, Petersen was charged with three counts of capital murder and one count of attempted murder and was then apprised of his rights, including his right to have counsel appointed, at his initial appearance before District Court Judge Benjamin Lewis. (C. 62, 66.) During his initial appearance, Petersen did not request court-appointed counsel. (C. 74-77.) After a hearing on August 15, 2012--one day after his second statement to police on August 14, 2012--counsel was appointed for Petersen. (C. 78.) Under these circumstances and based on the legal principles quoted above, we agree with Petersen that his Sixth Amendment right to counsel had attached.

***33** This does not mean, however, that Petersen is entitled to relief on this claim. In Ex parte Cooper, the Alabama Supreme Court, in discussing the United States Supreme Court's decision in Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079, 173 L.Ed. 2d 955 (2009), stated:

> "[A]fter the right to counsel has attached, 'a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings.' Montejo, 556 U.S. at 794, 129 S. Ct. at 2089. Thus, a court must no longer presume a waiver of a right to counsel executed after the right to counsel has attached is invalid. A defendant must invoke his or her right to counsel, even if the right to counsel has attached and counsel has been appointed, and law-enforcement officers must have ignored that invocation to warrant consideration of the issue whether the defendant's waiver of his or her right to counsel is invalid."

Cooper, 43 So. 3d at 551.

As demonstrated in Part VI.A., supra, there is no evidence indicating that Petersen made a clear assertion invoking his right to counsel. Despite Cpt. Rafferty's reiterations that he had the right to the assistance of counsel, Petersen continued to divulge information about what had happened on the night of the shooting and at no point indicated that he refused to speak with law-enforcement officers on August 14, 2012, without having his counsel there. Thus, Petersen is not entitled to relief on this claim.

C.

Petersen also argues that he did not knowingly and voluntarily waive his Miranda rights when he was questioned by Cpt. Rafferty for the first time on August 10, 2012. (Petersen's brief, p. 69.) Specifically, Petersen argues that merely reading

a paragraph from the Miranda waiver form for Cpt. Rafferty while he was intoxicated, "shackled," and "half-dressed" does not constitute a valid waiver of his Miranda rights. (Petersen's brief, p. 70.)[18]

During the hearing on Petersen's motion to suppress, Cpt. Rafferty testified about what occurred during his August 10, 2012, interview with Petersen. According to Cpt. Rafferty, after he got some basic background information from Petersen, he advised him of his Miranda rights. (R. 330.) Specifically, Cpt. Rafferty testified that Petersen understood his rights and that he did not threaten Petersen or promise him anything in exchange for his statements. (R. 330.) That testimony is supported by the transcript from that interview, which was included in the record on appeal. The transcript indicates that, before Cpt. Rafferty began asking Petersen questions about the shooting, the following exchange occurred:

> ***34** "[CPT. RAFFERTY:] Ok. Before I ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to talk to an attorney and have an attorney present with you while being questioned. If you cannot afford to hire an attorney one will be appointed to represent you before any questioning if you wish, you can decide at any time to exercise these rights; not answer any questions [or] make any statements. You understand what I've ex--your rights as I've explained to you?
>
> "[PETERSEN:] Yes, [Captain].
>
> "[CPT. RAFFERTY:] Ok ... and uh today's date is uh August 10th, 2012 and the time's 9:18 a.m. Ok. Can you read this for me out loud?
>
> "[PETERSEN:] I have read or been read this statement of my rights and understand why my rights --what my rights are. I'm willing to answer questions. No promises or threats have been used against me.
>
> "[CPT. RAFFERTY:] Ok, you understand what your rights are?
>
> "[PETERSEN:] Yes, sir."

(C. 983-84.) Following that exchange, Cpt. Rafferty began asking Petersen about what had happened the night before, and Petersen cooperated. (C. 984-1021.)

Following a break, the interview resumed at 10:11 a.m. that morning, and the following exchange occurred:

> "[CPT. RAFFERTY:] Ok Ryan, uh ... we just got back from taking a break. Uh time is 10:11 a.m. Want you to understand that you still have the right to your attorney, you still have the right to talk to your attorney before you answer any questions and you--you can stop answering anytime. Your same rights that I read to you a few minutes ago, ok. The same rights that I read to you at 9:18 a.m.; and I'm going to put the a.m. on there because I didn't. Ok Ryan, uh, now the statement that you give me a little bit ago was of your own free will is that correct? I didn't force you to give me a statement?
>
> "[PETERSEN:] No, you did not.
>
> "[CPT. RAFFERTY:] I didn't twist your arm, anything like that. You [gave] me the statement--
>
> "[PETERSEN:] No sir you didn't (inaudible).
>
> "[CPT. RAFFERTY:] --of your own free will.
>
> "[PETERSEN:] Yes.
>
> "[CPT. RAFFERTY:] You made also, also made a statement that uh ... you might want to talk to your mother at some point and you also made a statement that you might need to talk to your attorney, but you kept talking didn't you; you kept talking to me didn't you? Look at me Ryan.
>
> "[PETERSEN:] Yeah.
>
> "[CPT. RAFFERTY:] Ok, I never forced you to talk to me did I?
>
> "[PETERSEN:] Nope (inaudible).
>
> "[CPT. RAFFERTY:] Ok, all right and you [gave] me that statement of your own free will and you understand what your rights were.
>
> "[PETERSEN:] I ... yeah ... I get ... I get that--
>
> "[CPT. RAFFERTY:] Ok.
>
> "[PETERSEN:] I understand that.
>
> "[CPT. RAFFERTY:] All right, I just wanted-wanted to clarify that you understood what your rights were and at any time that you say I want an attorney, I don't want to talk

no more; the interview's over until you talk to an attorney, you understand that?

"[PETERSEN:] Ok--ok yes.

"[CPT. RAFFERTY:] You understood that?

"[PETERSEN:] I understood that yes."

(C. 1021-23.) Petersen then continued to answer Cpt. Rafferty's questions about what had happened at Teasers. (C. 1023-28.) After asking Petersen a few more questions, Cpt. Rafferty concluded the interview and confirmed with Petersen that he knew he could have asked for an attorney but that he chose to talk to Cpt. Rafferty without one being present. (C. 1027.)

In addressing a similar claim, this Court has recently stated:

"In evaluating a circuit court's ruling admitting into evidence a defendant's statement to law enforcement, we apply the standard articulated by the Alabama Supreme Court in McLeod v. State, 718 So. 2d 727 (Ala. 1998):

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

" 'The Fifth Amendment to the Constitution of the United States provides in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself ...." Similarly, § 6 of the Alabama Constitution of 1901 provides that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. Culombe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860, 6 L.Ed. 2d 1037 (1961); Hubbard v. State, 283 Ala. 183, 215 So. 2d 261 (1968).

" 'It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L.Ed. 568 (1897). In Culombe, 367 U.S. at 602, 81 S. Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, "if his will has been overborne" by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. Id. (emphasis added).

" 'The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the "totality of the circumstances." Boulden v. Holman, 394 U.S. 478, 480, 89 S. Ct. 1138, 1139–40, 22 L.Ed. 2d 433 (1969); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S. Ct. 1152, 1154, 20 L.Ed. 2d 77 (1968); see Beecher v. Alabama, 389 U.S. 35, 38, 88 S. Ct. 189, 191, 19 L.Ed. 2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See Ex parte Matthews, 601 So. 2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S. Ct. 2996, 120 L.Ed. 2d 872 (1992); Jackson v. State, 562 So. 2d 1373, 1380 (Ala. Crim. App. 1990) (stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); Eakes v. State, 387 So. 2d 855, 859 (Ala. Crim. App. 1978) (stating that the true test to be employed is "whether the defendant's will was overborne at the time he confessed") (emphasis added).'

"718 So. 2d at 729 (footnote omitted)."

Callen v. State, [Ms. CR-13-0099, Apr. 28, 2017] —— So. 3d ——, —— (Ala. Crim. App. 2017).

This Court has carefully examined the transcript of Petersen's August 10, 2012, statement to police. There is no evidence indicating that Petersen was induced to confess to what he did on August 9, 2012, or that he was threatened. In fact, it appears that, even after being told that he did not have to talk with Cpt. Rafferty and that he could invoke his right to counsel, he continued to speak with Cpt. Rafferty knowing that he could stop the interview at any time. Petersen's conduct showed a "willingness and a desire for a generalized discussion about the investigation." Ex parte Williams, 31 So. 3d 670, 676 (Ala. 2009). Finally, although Petersen contends that he could not have validly waived his Miranda rights

because he was shackled and, he says, might have still been intoxicated, this Court has recently stated:

> ***36** " 'The fact that the appellant was handcuffed, was not given anything to eat or drink, and did not make a telephone call, while factors to consider in the totality of the circumstances, did not render the appellant's confession involuntary.' Battle v. State, 645 So. 2d 344, 345 (Ala. Crim. App. 1994).... ' "The fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary." ' Thompson v. State, 153 So. 3d 84, 110 (Ala. Crim. App. 2012), quoting Baker v. State, 557 So. 2d 851, 853 (Ala. Crim. App. 1990). 'The Alabama courts have recognized that subnormal tendencies of the accused are but one factor to review in the totality of the circumstances surrounding the confession.' Harkey v. State, 549 So. 2d 631, 633 (Ala. Crim. App. 1989)."

Callen, —— So. 3d at ——. According to Cpt. Rafferty, Petersen was handcuffed because he was suspected of "killing three people by shooting them and injuring a fourth person." (R. 2150.) There is also no evidence in the record on appeal suggesting that Petersen was so intoxicated that he could not understand the meaning of his words or his rights. Based on the foregoing, Petersen is not entitled to relief on this claim.

D.

Finally, Petersen argues that the circuit court's admission into evidence of his statements to Cpt. Rafferty on August 10, 2012, and August 14, 2012, prejudiced him. (Petersen's brief, pp. 70-72.) Specifically, he contends that, after the court ruled that those statements were admissible, the State used them to undermine his credibility and misrepresent the nature of his statements to the jury. Id. Petersen contends that, as a result, his constitutional rights were violated and his convictions and sentences are due to be reversed.

This claim fails to satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "[W]e are not required to consider matters on appeal unless they are presented and argued in brief with citations to relevant legal authority." Zasadil v. City of Montgomery, 594 So. 2d 231, 231 (Ala. Crim. App. 1991). Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011).

Petersen's argument here is nothing more than a bare allegation. He fails to cite to any legal authority supporting his claim, nor does he provide any meaningful analysis demonstrating that he is entitled to relief.

Regardless, Petersen is not entitled to relief on this claim. Although he contends that the admitted statements were prejudicial, the statements were relevant to show his culpability for killing the victims in this case. 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."). The statements were not unduly prejudicial because the probative value of the statements was not "substantially outweighed" by any prejudice, see Rule 403, Ala. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Guilt-Phase Issues

VII.[19]

***37** Next, Petersen contends that the circuit court erred in failing to exclude certain character evidence under Rule 404(b), Ala. R. Evid. (Petersen's brief, p. 58.) Specifically, Petersen contends that the circuit court "erroneously permitted the State to introduce allegations of a prior uncharged attempted murder as well as fifteen notebooks containing a large volume of prejudicial and inflammatory drawings, lyrics, notes, and other personal writings that were irrelevant to any issue in dispute." Id. According to Petersen, the "State's reliance on this illegal evidence to support a conviction for capital murder, without any limiting instruction from the trial court, requires reversal." Id. Petersen did not raise these arguments in the circuit court below; thus, we review them only for plain error. See Rule 45A, Ala. R. App. P.

It is well settled that

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

Floyd, —— So. 3d at ——. Rule 404(b), Ala. R. Evid., states:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

In the present case, Petersen challenges a number of alleged instances in which, he says, the State improperly used evidence of prior bad acts in violation of Rule 404(b), Ala. R. Evid.

First, he challenges the State's reference during its guilt-phase opening statement to an alleged physical altercation between Petersen and other people at a local bar that ended with Petersen being arrested for driving under the influence ("DUI") after he had attempted to run the other people over with his truck and then crashed into the bar. (Petersen's brief, pp. 58-59.) Petersen also argues that the State attempted to elicit evidence about this incident on cross-examination of defense witness Patricia Huckabee. (Petersen's brief, p. 59.) Huckabee stated, however, that she did not have any knowledge of that incident. (R. 3396.)

The State's reference to that incident in its opening statement and its brief question to Huckabee did not constitute plain error, particularly in light of Petersen's decision to introduce evidence during his case-in-chief indicating that he had been previously arrested for DUI. Additionally, there were repeated references by Petersen to his prior criminal history, including his arrest for DUI. (R. 3213, 3216, 3237, 3317.) Thus, Petersen is not entitled to relief on that claim.

Next, Petersen contends that the State was erroneously permitted to admit, as State's Exhibit 132, Petersen's journals and various writings into evidence. According to Petersen, those journals and writings contained references to prior physical altercations Petersen had been involved in, including one incident at a local bar during which he brandished a box cutter; a list of drugs Petersen had tried; a statement Petersen had written about a school shooting being "too small scale;" and "prejudicial" song lyrics and drawings. (Petersen's brief, p. 62.) Petersen notes that, during its closing statement and rebuttal argument, the State told the jury to consider those journals and even referenced them during the penalty phase of his capital-murder trial. (Petersen's brief, pp. 62-63.)

***38** The journals and writings were admitted collectively, without objection, as State's Exhibit 132 during Cpt. Rafferty's testimony during the prosecution's rebuttal. The contents of those materials were first referenced by Petersen during the testimony of Dr. Mark Cunningham. (R. 3719.) Once the journals and writings were referenced by Petersen, the State was entitled to reference them, see, e.g., Scott v. State, 163 So. 3d 389, 439 (Ala. Crim. App. 2012), and they were offered in the State's rebuttal presumably in part to show that they were seized as a part of Cpt. Rafferty's investigation. Their admission did not constitute plain error.

VIII.[20]

Petersen contends that the circuit court erred when it denied his request to introduce, as substantive evidence of Petersen's intoxication, assertions from a civil complaint filed by Scotty Russell about Petersen's level of intoxication on the night of the shooting. (Petersen's brief, pp. 72-75.) He further contends that the circuit court's instruction limiting the purpose for which the jury could consider those statements was erroneous. Id. This argument was not raised in the circuit court below and, thus, will be reviewed for plain error. See Rule 45A, Ala. R. App. P.

The circumstances underlying this issue are as follows. During direct examination, Russell testified that, although Petersen appeared "pissed off" on the night of the shooting,

he did not appear drunk or intoxicated. (R. 1727, 1763.) On cross-examination, the defense sought to impeach Russell's testimony that Petersen was not intoxicated or drunk on the night of the shooting by offering allegations made by Russell in a civil complaint he filed against Teasers. (R. 1763, 1766, 1785, 1788.) Russell's primary contention in that lawsuit was that Teasers had given liquor to Petersen, whom he described in his complaint as being a "visibly intoxicated person." (C. 1972; R. 1777-78.)

Over the State's objection, and after an extensive discussion, the circuit court permitted the defense to ask Russell about paragraphs 16, 17, and 27 in his complaint. (R. 1784-85, 1787-88.) The defense also sought to question Russell about paragraph 18 of the complaint, but the State objected, thereby prompting the court to instruct the jury that it could consider Russell's testimony about the complaint for the limited purpose of weighing the credibility of his testimony. (R. 1785-86.) Specifically, the court gave the following instruction:

> "THE COURT: Disregard the last recitation of paragraph 18. Let me be clear. This is just being admitted for a limited purpose.... It's just offered for these statements that were made, allegedly, that just happen to be in the context of a lawsuit. Okay?
>
> "But, don't concern yourself with any other respect of it, other than the law does permit that when a witness has testified and they have filed a lawsuit, you can consider that in judging their credibility as a witness, whether they may have some sort of financial advantage or disadvantage as part of their testimony. That can be considered on the credibility issue. But, otherwise, don't consider any of this for any other purpose than those. Okay? Go ahead."

(R. 1786.)

Following this instruction, Petersen's defense counsel attempted to ask Russell to confirm the allegations in the complaint that Petersen was "visibly intoxicated" and to establish whether Russell had recovered in that civil lawsuit because of that allegation:

> "[DEFENSE COUNSEL:] [Please read paragraph] 27.
>
> "[RUSSELL:] 'Scotty B. Russell, on August 29th' --I mean, 'August 9th, 2012, was injured by Ryan Clark Petersen, who shot him after defendants furnished spiritous liquors to Petersen, a visibly intoxicated person, contrary to the provisions of law.'

***39** "[DEFENSE COUNSEL:] Thank you. If you can, again, when you say--when it says what you just said, 'The defendants furnished spiritous liquors to Petersen, a visibly intoxicated person, contrary to provisions of law,' who are the defendants?

"[RUSSELL:] I did not make--I did not say that--

"[DEFENSE COUNSEL:] I'm just asking you a question. Scotty B. Russell is plaintiff. The people you sued--

"[RUSSELL:] That's me.

"[DEFENSE COUNSEL:] --are the defendants? Right?

"[RUSSELL:] Correct.

"[DEFENSE COUNSEL:] Who did you sue?

"[RUSSELL:] Paul A. Eubanks, an individual, Teasers Rock Hard Cabaret, Teasers Show Club.

"....

"[DEFENSE COUNSEL:] [Y]ou testified that--when I asked you, you testified that Ryan, to you, didn't seem intoxicated. Is that what you said?

"[RUSSELL:] He wasn't when he come in the door with the gun. No.

"[DEFENSE COUNSEL:] He didn't seem intoxicated? Right?

"[RUSSELL:] (Witness nodding head in affirmative.)

"[DEFENSE COUNSEL:] But, isn't it true that you told your lawyer that he was intoxicated, visibly intoxicated, and that's why the club's responsible and you sued them? Correct?

"[RUSSELL:] No. I said there was drinks on his table. That's what I had told--

"[DEFENSE COUNSEL:] You told a lawyer there were drinks on his table? Right?

"[RUSSELL:] Yes. That is right.

"[DEFENSE COUNSEL:] That's all you told him?

"[RUSSELL:] Well, as far as being drunk, I didn't know if he was drunk or--I mean, I don't know what he drank.

"[DEFENSE COUNSEL:] Well, this is your statement. These are--this is your statement of facts. And I don't--listen, you've been through a lot. I'm not trying to--I'm not trying to I'm not trying to, you know.

"[RUSSELL:] I mean, I know what--

"[DEFENSE COUNSEL:] But I just want--

"[RUSSELL:] When somebody's drunk, they can't hardly walk, they're stumbling, they're wobbling around, they've got slurred speech, they don't talk normal, they--

"[DEFENSE COUNSEL:] But you understand that the statement of facts that you said the basis of your lawsuit is that he was visibly intoxicated and they continued to serve him. That's what this is. You understand that? That's what you're saying. You're saying that's what makes them responsible. That's what you're saying in here. You understand that?

"[RUSSELL:] Those aren't my exact words. No.

"[DEFENSE COUNSEL:] Not your exact words. But your lawyer used those words, didn't he?

"[RUSSELL:] Apparently."
(R. 1787-88, 1789-91.)

The State objected and the following exchange occurred:

"THE COURT: [The complaint] can't be offered in the theory of his testimony is structured a certain way to benefit from the lawsuit because the lawsuit is over. If it was pending, I mean, that would be the only relevance for the jury, unless there's some other relevance you can think of.

"[DEFENSE COUNSEL:] Well, I mean, if he was paid, it tends to substantiate the claim.

"THE COURT: I know. But, as he sits here as a witness, how does that affect his credibility?

"[DEFENSE COUNSEL:] I think it shows that he's not being truthful in his denial.

"THE COURT: He wouldn't have to give the money back.

"[DEFENSE COUNSEL:] No. I'm just saying--

"THE COURT: But that's the theory when, like, say, the lawsuit was still pending while the jury could explore it, because they could go back and say, well, certainly, he's wanting to testify a certain way because he wants to not so much get justice in the criminal case, but get a monetary award in a civil case. But, if there's already been --the same would be true, I tend to think if, say, it went to trial and the jury ruled in the defendant's favor. How would that be relevant? I don't think this jury could take that as meaning that somehow your client is now not guilty of these events or that those events are true.

***40** "But I can't--off the top of my head--I try and be careful because of the type of case we're in. But I'm trying to think of how it could be relevant to impeach his or affect his credibility, how the jury could consider it in a proper way.

"[DEFENSE COUNSEL:] I guess the only way--and I'm just saying that language is the language that makes the club liable. It's the only language that really makes the club liable.

"THE COURT: But, see, we can't try the civil case.

"[DEFENSE COUNSEL:] I understand.

"THE COURT: That's what we would end up having to do. And then the jury is having to decide whether the club was guilty or not under that. Which, that's not the whole purpose that we're here for. To me, I still view it as it was simply an out-of-court statement just as though you call the nurse at the hospital who he purportedly made that statement to.

"....

"I'll sustain. But, if you can come up with a different theory, I'll reconsider it. But, at this point--

"[DEFENSE COUNSEL:] Okay. One more thing before I start back. Your Honor, we anticipate moving to admit it, the lawsuit.

"[PROSECUTOR:] No. They can't get it admitted.

"[DEFENSE COUNSEL:] Judge, we just need an objection on the record and a ruling.

"THE COURT: Unless you can give me a theory. We can go down that road all day of just both sides offering things without making a legal argument as to why. And I can't come up with a legal reason.

"[DEFENSE COUNSEL:] It impeaches his complete credibility, because he made one statement in open

court and he's made other statements in various legal proceedings.

"THE COURT: And all that's admitted to the jury.

"[DEFENSE COUNSEL:] And we would ask the lawsuit be admitted.

"THE COURT: Even more than I anticipated being admitted. But that's fine.

"[DEFENSE COUNSEL:] We would ask the lawsuit be admitted into evidence as an exhibit to support our testimony.

"THE COURT: The district attorney has not attacked the fact that the lawsuit was filed and what's been reported is, in fact, what's in the complaint. So, I'll, I guess, sustain any objection to the actual lawsuit itself being admitted."

(R. 1794-98.)

Defense counsel then continued with his cross-examination of Russell and asked him if Petersen was visibly intoxicated on the night of the shooting as alleged in his civil complaint. (R. 1799.) Contrary to the allegation in his complaint, Russell testified that Petersen "did not appear to be intoxicated when he came in with his gun." (R. 1800.)

Petersen argues on appeal that Russell's civil complaint should have been admitted as substantive evidence of his intoxication on the night of the shooting and for the purpose of impeaching Russell. (Petersen's brief, pp. 74-75.) We disagree.

Generally, a witness's prior inconsistent statement is admissible to impeach the witness's credibility but is not admissible as substantive evidence of the matter asserted. M.L.H. v. State, 99 So. 3d 911, 913 (Ala. 2011). Rule 613(b), Ala. R. Evid., provides, in pertinent part:

"Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity to admit or deny having made it."

***41** As demonstrated by the excerpts of the record quoted above, Petersen's defense counsel questioned Russell about Petersen's level of intoxication on the night of the shootings. When Russell stated that he did not think that Petersen was intoxicated, Petersen's defense counsel attempted to impeach him by confronting him with the allegations in Russell's civil complaint he had filed against Teasers and its owners. Although Russell acknowledged that he had filed the lawsuit, he emphatically stated that he did not tell his lawyer that he thought Petersen was "visibly intoxicated" that night. Under those circumstances, that statement was properly admitted for the purposes of evaluating his credibility. It would not, however, have been proper for the court to admit it as substantive evidence of the matter asserted. Thus, Petersen is not entitled to relief on this claim.

IX.[21]

Petersen argues that the circuit court erroneously permitted the State to elicit prejudicial guilt-phase victim-impact testimony. (Petersen's brief, pp. 79-82.) Specifically, he argues that the testimony given by Lorraine Peacock, Krista Sellers, Scotty Russell, James Williams, and William Gaines was used to "inflame the passions of the jury and urge [it] to convict based on impermissible victim impact testimony." (Petersen's brief, p. 81.) He also challenges comments made during rebuttal closing argument that allegedly "contrast[ed] the impermissible victim impact testimony with" Petersen. (Petersen's brief, p. 81.) According to Petersen, the court's decision to permit the State to introduce allegedly improper victim-impact evidence violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and his rights under the Alabama Constitution. (Petersen's brief, p. 82.)

Petersen did not object to this testimony in the guilt phase of his capital-murder trial. Thus, we are limited to evaluating this issue under the plain-error standard found in Rule 45A, Ala. R. App. P. See Turner v. State, 924 So. 2d 737, 767 (Ala. Crim. App. 2002).

On appeal, Petersen first attacks two portions of testimony given by eyewitness Lorraine Peacock. (Petersen's brief, p. 80.) First, he argues that the following excerpt from Peacock's testimony constituted impermissible victim-impact testimony:

"[PROSECUTOR:] Tiffany Grissett, did she have children?

"[PEACOCK:] I found out she had a son.

"[PROSECUTOR:] Do you see him today?

"[PEACOCK:] I think I see him. He's grown a little bit." (R. 1596.) According to Petersen, whether Grissett had any children is "immaterial to any issue at trial and highly inflammatory." (Petersen's brief, p. 80.)

Petersen also argues that the following testimony given by Peacock concerning the statements she made to victim Cameron Eubanks's father, Paul, after Eubanks was shot constituted inadmissible victim-impact testimony:

"[PROSECUTOR:] Now, once again, if I could, did you see what [Eubanks's] father continued to do, if anything, 'til the paramedics and law enforcement-what did he do with his own son?

"[PEACOCK:] He held him.

"[PROSECUTOR:] Now, tell me, if you could--you mentioned [Eubanks's] head was in a propped-up position. When you moved him, like you said, to get him in position, did you see then what was on the wall, or when the body was moved, whether there was anything on the floor?

"[PEACOCK:] Yes. There--

"[PROSECUTOR:] What was it?

"[PEACOCK:] Blood and brain matter. And that's when I told him that I couldn't help him.

"[PROSECUTOR:] What did you tell his father that he needed to do? What were the words?

"[PEACOCK:] Hold him.

"[PROSECUTOR:] Pardon me?

"[PEACOCK:] 'Hold your baby.'

"[PROSECUTOR:] And did you see Mr. Eubanks take and hold his son?

"[PEACOCK:] Yes, I did."

(R. 1519-20.)

We disagree with Petersen's claim that the testimony quoted above constituted improper victim-impact testimony. Generally, "victim-impact statements typically 'describe [only] the effect of the crime on the victim and his family' and, although relevant to the penalty-phase, are inadmissible in the guilt phase." Wilson v. State, 142 So. 3d 732, 784 (Ala. Crim. App. 2010). None of the testimony quoted above describes the effect the crime has had on Grissett or her family or Eubanks and his family. Thus, Petersen is not entitled to relief with regard to Peacock's testimony.

***42** In addition to the above testimony given by Peacock, Petersen argues that the following testimony given by Krista Sellers concerning the fact that victim Tiffany Grissett was engaged to a military firefighter and was wearing his shirt when she was shot, also constituted impermissible victim-impact testimony:

"[PROSECUTOR:] Now, can you tell us, when you saw her there, was she dead?

"[SELLERS:] Yeah.

"[PROSECUTOR:] Could you tell if she had been shot?

"[SELLERS:] Yeah.

"[PROSECUTOR:] What did you see around her? Blood?

"[SELLERS:] Yeah.

"[PROSECUTOR:] And do you remember--you described her clothing. Was she wearing a white type blouse, also?

"[SELLERS:] Yeah. It was Mark's military shirt.

"[PROSECUTOR:] It was what?

"[SELLERS:] Her fiancé, a military firefighter. And she used to wear his shirt to the club with a little fedora. It was one of her outfits."

(R. 4077.) Once again, this testimony does not describe the impact the crime had on Grissett or her family and, thus, does not constitute victim-impact testimony. Thus, Petersen is not entitled to relief here.

Next, Petersen attacks the testimony given by victim Scotty Russell in which Russell describes the surgeries and physical therapy he has had to endure since the shooting as well as the counseling and other mental-health services he has had to seek in order to deal with the trauma from the incident:

"[PROSECUTOR:] All right. Now, tell the ladies and gentlemen of the jury, if I could--and I know it's been a while. But, when your wife was there caring for you, and you were sedated, once again, was that statement ever given to you after you got out of the hospital to see if it was 100 percent accurate and you went back over it after your arm surgery, or, no, it was written up and I see it? You know.

"[RUSSELL:] I've seen it a couple of times since.

"[PROSECUTOR:] Now, can you tell the ladies and gentlemen of the jury, if I could--you were in the hospital three days?

"[RUSSELL:] Yes.

"[PROSECUTOR:] And then, were you discharged and went home and everything was fine? That was the end of it?

"[RUSSELL:] No. Lord, no.

"[PROSECUTOR:] What happened after that?

"[RUSSELL:] I have went and seen psychiatrists. I have went and seen multiple physical therapists. I've had to see a surgeon. I had over 130 stitches in my arm that had to come out.

"[PROSECUTOR:] Tell me, if you could, please, sir. Until this night when you went, had you ever been shot?

"[RUSSELL:] No.

"[PROSECUTOR:] Had you ever been where other human beings were shot?

"[RUSSELL:] No.

"[PROSECUTOR:] And did it change you from that night?

"[RUSSELL:] Yes.

"[PROSECUTOR:] And would you tell the ladies and gentlemen of the jury, if I could, on your therapy, did you have to continue to go to rehab for therapy for your arm?

"[RUSSELL:] Yes, I did. I had to go for a long period. I had five months of rehab on my arm.

"[PROSECUTOR:] And, today, is your arm strength like it was before that?

"[RUSSELL:] No."
(R. 1744-45.)

"[PROSECUTOR:] What about your emotions?

"[RUSSELL:] They was all over the place. I didn't know if I was going to see my family again. I didn't know--I didn't know to the extent--how bad my arm was going to be. I didn't know if I was going to be able to provide a living for my family. I didn't--there was all kind of things going through my head."
(R. 1760-61.)

Although victim-impact testimony is generally inadmissible during the guilt phase, it is well settled that

***43** "such statements 'are admissible during the guilt phase of a criminal trial ... if the statements are relevant to a material issue of the guilt phase.' Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993); see also Gissendanner v. State, 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (holding that victim-impact type evidence is admissible in the guilt phase if it is relevant to guilt-phase issues). Rule 401, Ala. R. Evid., provides: ' "Relevant evidence" [is any] 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.' "

Wilson, 142 So. 3d at 784. Here, Russell's testimony was evidence of the extent of his injuries and, thus, was relevant to a material issue of the guilt phase. Petersen is not entitled to relief here.

In addition to the arguments made above, Petersen also attacks what he says was the State's repeated elicitation of "irrelevant, inflammatory" testimony from other eyewitnesses about the impact the shooting has had on their lives. (Petersen's brief, p. 81.) Petersen's argument here fails to comply with the requirements of Rule 28(a)(10), Ala. R. App. P.

In its entirety, Petersen's argument is as follows:

"Throughout its case-in-chief the State repeatedly elicited irrelevant, inflammatory testimony from eyewitnesses, including James Williams, Lorraine Peacock, William Gaines, and Krista Sellers, about the lasting trauma of having been present for the shooting. (R. 1416, 1427, 1340-41, 1661-62, 1865, 4060-61.) See Ala. R. Evid. 401, 403."
(Petersen's brief, p. 81.) Rule 28(a)(10), Ala. R. App. P., requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "[W]e are not required to consider matters on appeal unless they are presented and argued in brief with citations to relevant legal authority." Zasadil v. City of Montgomery, 594 So. 2d 231, 231 (Ala. Crim. App. 1991). Failure to comply with Rule

28(a)(10) has been deemed a waiver of the issue presented. C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011).

Petersen's argument here is nothing more than a bare allegation. Although he cites portions of the record he claims constitute inadmissible victim-impact testimony, he provides no citations to any legal authority supporting his contention or any analysis demonstrating why he is entitled to relief on this claim. Because Petersen's argument here does not comply with Rule 28, Ala. R. App. P., it is deemed waived.

Even if Petersen had complied with the requirements of Rule 28(a)(10), Ala. R. App. P., his argument is without merit. In addressing a similar issue, this Court has stated:

> "The Alabama Supreme Court has held that victim-impact statements
>
> > " 'are admissible during the guilt phase of a criminal trial only if the statements are relevant to a material issue of the guilt phase. Testimony that has no probative value on any material question of fact or inquiry is inadmissible. See C. Gamble, McElroy's Alabama Evidence § 21.01 (4th ed. 1991), citing, inter alia, Fincher v. State, 58 Ala. 215 (1877) (a fact that is incapable of affording any reasonable inference in reference to a material fact or inquiry involved in the issue cannot be given in evidence). If the statements are not material and relevant, they are not admissible.'
>
> "Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993).
>
> ***44** " '[T]he introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error if the record indicates that it probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of the defendant based on the admissible evidence and the applicable law.' Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995). The Court in Ex parte Rieber also said:
>
> > " 'However, in Ex parte Crymes, 630 So. 2d 125 (Ala. 1993), a plurality of this Court held in a capital murder case in which the defendant was sentenced to life imprisonment without parole that a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.'
>
> "663 So. 2d at 1005."

Woodward v. State, 123 So. 3d 989, 1021 (Ala. Crim. App. 2011). Although a portion of the testimony cited by Petersen above constituted improper victim-impact evidence because it directly addressed how the shooting affected those who witnessed it, as the Alabama Supreme Court made in clear in Ex parte Rieber, 663 So. 2d 999 (Ala. 1995), the admission of victim-impact evidence during the guilt phase is not a ground for reversal "if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant." Ex parte Rieber, 663 So. 2d at 1005. Here, the admission of that victim-impact evidence was undoubtedly harmless. Petersen did not deny his involvement in the shootings at Teasers. Moreover, in addition to the physical evidence, the State had evidence from Petersen's statements to police and others in which he acknowledged what he had done. This Court concludes that, when viewed in the light of the evidence of Petersen's guilt, the victim-impact evidence " 'did not affect the outcome of the trial, that it did not prejudice [Petersen's] substantial rights, and that it did not rise to the level of plain error.' " Scheuing v. State, 161 So. 3d 264, 265 (quoting Woodward v. State, 123 So. 3d 989, 1021 (Ala. Crim. App. 2011)). Therefore, no plain error exists that would entitle Petersen to relief on this issue.

Finally, Petersen contends that, after eliciting the testimony discussed above, the State ended its rebuttal closing argument in the guilt phase by "contrasting the impermissible victim impact testimony with Mr. Petersen" in an effort to "inflame the passions of the jury and urge them to convict" based on that inadmissible testimony. (Petersen's brief, p. 81.) Specifically, he attacks the following portion of the prosecutor's argument:

> "So, here's the last thing I want to tell you. Ryan Petersen, death and destruction, evil, wicked, inflicted death and serious pain and suffering, emotionally and mentally and physically on all those people."

(R. 4398.)

Initially, we note that none of the testimony discussed above is referenced in the prosecutor's statement. When evaluating statements made by the State during its closing arguments, this Court has stated that those statements "must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App.

1997). "A prosecutor may argue in closing any evidence that was presented at trial. He may also present his impressions from the evidence. He may [even] argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." Williams v. State, 627 So. 2d 994, 995 (Ala. Crim. App. 1992). The above-quoted statement is nothing more than the prosecutor's impression of the evidence. Thus, Petersen is not entitled to relief on this claim.

X.[22]

***45** Petersen contends that the circuit court erred in allowing the State to introduce "irrelevant and highly prejudicial crime scene and autopsy photographs [into evidence] in violation of state and federal law" during the guilt phase of his capital-murder trial. (Petersen's brief, pp. 82-83.) Specifically, he contends that the court erred in admitting 123 "inflammatory" photographs, each depicting the body of a deceased victim, blood, close-ups of wounds, or some combination thereof. According to Petersen, 37 photographs depicted the bodies of 3 deceased victims at the scene, with 27 of those photographs showing the victims' uncovered bodies; 31 showed close-up photographs of bullet wounds taken at the scene; 12 photographs showed blood pooling and blood spatter; and 43 "inflammatory" autopsy photographs depicted graphic wounds of the victims. (Petersen's brief, pp. 82-83.) Petersen further contends that the admission of those photographs into evidence during the penalty phase "undermined the Eighth Amendment's requirement of heightened reliability in cases involving the death penalty." (Petersen's brief, p. 83.) These arguments were not presented to the circuit court below; thus, they will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

It is well settled that

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

Floyd, —— So. 3d at ——. This Court has previously addressed the argument that Petersen raises here and has stated:

> " ' "Alabama courts have held on many occasions that photographs of the crime scene and the victims are admissible, even though they might be gruesome and cumulative, if they shed light on an issue being tried. E.g., Baird v. State, 849 So. 2d 223, 246 (Ala. Crim. App. 2002)." McGahee v. State, 885 So. 2d 191, 214 (Ala. Crim. App. 2003).'
>
> "Blackmon v. State, 7 So. 3d 397, 449 (Ala. Crim. App. 2005).
>
> " 'Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence. Chunn v. State, 339 So. 2d 1100, 1102 (Ala. Cr. App. 1976). To be admissible, the photographic material must be a true and accurate representation of the subject that it purports to represent. Mitchell v. State, 450 So. 2d 181, 184 (Ala. Cr. App. 1984). The admission of such evidence lies within the sound discretion of the trial court. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882, 883 (1973); Donahoo v. State, 505 So. 2d 1067, 1071 (Ala. Cr. App. 1986) (videotape evidence). Photographs illustrating crime scenes have been admitted into evidence, as have photographs of victims and their wounds. E.g., Hill v. State, 516 So. 2d 876 (Ala. Cr. App. 1987). Furthermore, photographs that show the external wounds of a deceased victim are admissible even though the evidence is gruesome and cumulative and relates to undisputed matters. E.g., Burton v. State, 521 So. 2d 91 (Ala. Cr. App. 1987). Finally, photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors. Hutto v. State, 465 So. 2d 1211, 1212 (Ala. Cr. App. 1984).
>
> "Ex parte Siebert, 555 So. 2d 780, 783–84 (Ala. 1989).
>
> " ' "Courts and juries cannot be squeamish about looking at unpleasant things, objects or circumstances

> in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens, or gives character to other evidence sustaining the issues in the case, should not exclude it." '

***46** "Gwin v. State, 425 So. 2d 500, 508 (Ala. Crim. App. 1982) (quoting Baldwin v. State, 282 Ala. 653, 656, 213 So. 2d 819, 820 (1968))."

Thompson, 153 So. 3d at 130.

In the present case, we note that Petersen does not argue that the 123 "inflammatory" photographs were not relevant; instead, he argues that they were prejudicial and constituted "needless presentation of cumulative evidence." (Petersen's brief, p. 82.) Based on the legal principles quoted above, the "inflammatory" and "cumulative" nature of those photographs does not render them inadmissible and does not mean that the court abused its discretion in choosing to admit them at trial. Petersen is not entitled to relief on this claim.

XI.[23]

Petersen contends that, for two reasons, the circuit court erred in admitting into evidence State's Exhibits 44-50 and 136, which contained video footage from the security system at Teasers showing what happened the night of the shootings. (Petersen's brief, pp. 88-90.) First, he contends that the proper predicate for admission of that evidence had not been laid pursuant to the "silent-witness" theory. Id. Second, he argues that, after those exhibits were improperly admitted, the court allowed the State to elicit improper testimony from bartender William Gaines and disc jockey James Williams about their opinions of Petersen after watching that video even though, he says, they had not personally seen him in the club that night. (Petersen's brief, p. 89.)

Initially, we note that, when Exhibits 44-50 and 136 were first offered into evidence, defense counsel specifically stated that he had no objection to their admission. (R. 2917 and 4291.) Thus, we review their admission into evidence only for plain error. See Rule 45A, Ala. R. App. P.

Once again,

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

Floyd, —— So. 3d at ——. With regard to the admissibility of videotape recordings, like security camera footage, the Alabama Supreme Court has previously stated:

> "Traditionally, courts and commentators analyzing the issue of the admissibility of sound recordings, photographs, motion pictures, videotape recordings, maps, and diagrams have treated all these items in the same manner. See 3 James H. Chadbourn, Wigmore on Evidence, § 790 (1970 & Supp.1991); 2 John W. Strong, McCormick on Evidence § 214 (1992); William A. Schroeder, et al., Alabama Evidence, § 11–3 (1987 & Supp. 1988); F.M. English, Annotation, Admissibility of Sound Recordings in Evidence, 58 A.L.R.2d 1024 (1958); and see, International UAW–CIO v. Russell, 264 Ala. 456, 470, 88 So. 2d 175, 186 (1956) (discussing the 'pictorial communication' theory as applied to motion pictures); National States Ins. Co. v. Jones, 393 So. 2d 1361, 1366 (Ala. 1980) (discussing tape recordings); and C.P. Robbins & Associates v. Stevens, 53 Ala. App. 432, 437, 301 So. 2d 196, 200–01 (1974) (discussing tape recordings). In fact, in National States Insurance, this Court stated, 'A tape recording of a pertinent event is analogous to a photograph of a scene. A recording preserves the situation as it took place just as a photograph preserves the scene as it existed at a given point.' 393 So. 2d at 1367.
>
> ***47** "There are two theories upon which photographs, motion pictures, videotapes, sound recordings, and the like are analyzed for admission into evidence: the 'pictorial communication' or 'pictorial testimony' theory and the 'silent witness' theory. Wigmore, supra, § 790; McCormick, supra, § 214; and Schroeder, supra § 11–3. The 'pictorial communication' theory is that a photograph, etc., is merely a graphic portrayal or static expression of what a qualified and competent witness sensed at the time in question. Wigmore, supra, § 790, and McCormick, supra, § 214. The 'silent witness' theory is that a

photograph, etc., is admissible, even in the absence of an observing or sensing witness, because the process or mechanism by which the photograph, etc., is made ensures reliability and trustworthiness. In essence, the process or mechanism substitutes for the witness's senses, and because the process or mechanism is explained before the photograph, etc., is admitted, the trust placed in its truthfulness comes from the proposition that, had a witness been there, the witness would have sensed what the photograph, etc., records. Wigmore, supra, § 790, and McCormick, supra, § 214.

"A reasonable reading of Voudrie [v. State, 387 So. 2d 248 (Ala. Cr. App. 1980)], Carraway [v. State, 583 So. 2d 993 (Ala. Crim. App. 1991)], Molina [v. State, 533 So. 2d 701 (Ala. Crim. App. 1988)], and the more recent caselaw of the Court of Criminal Appeals leads us to conclude that the Court of Criminal Appeals is of the opinion that the 'pictorial communication' and 'silent witness' theories are mutually exclusive theories, rather than alternative theories. The proper foundation required for admission into evidence of a sound recording or other medium by which a scene or event is recorded (e.g., a photograph, motion picture, videotape, etc.) depends upon the particular circumstances. If there is no qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the 'silent witness' foundation must be laid. Under the 'silent witness' theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability. When the 'silent witness' theory is used, the party seeking to have the sound recording or other medium admitted into evidence must meet the seven-prong Voudrie test.

"....

"On the other hand, when a qualified and competent witness can testify that the sound recording or other medium accurately and reliably represents what the witness sensed at the time in question, then the foundation required is that for the 'pictorial communication' theory. Under this theory, the party offering the item must present sufficient evidence to meet the 'reliable representation' standard, that is, the witness must testify that the witness has sufficient personal knowledge of the scene or events pictured or the sounds recorded and that the item offered accurately and reliably represents the actual scene or sounds."

Ex parte Fuller, 620 So. 2d 675, 677–79 (Ala. 1993)(footnote omitted).

In the present case, the State laid a proper predicate for admitting the videotape-security footage in question under the "pictorial communication" theory. The record on appeal indicates that, during Petersen's capital-murder trial, Teasers co-owner Bruce Middleton testified that the club has multiple cameras throughout its facility and that the system was working properly on August 9, 2012. (R. 2005.) Bartender William Gaines and disc jockey James Williams confirmed this during their testimony. (R. 1373, 1804, 1929.) Importantly, Middleton, Gaines, and Williams all testified that they had witnessed Petersen enter Teasers with a gun that night and heard gunshots and confirmed that the security footage in the State's exhibits accurately reflected what they had witnessed. (R. 1184, 1374-75, 1807, 1850-51, 1853-54, 1868-69, 1871, 1879-80, 1944, 1949-50, and 2049.)

In addition to the testimony from those witnesses, the State also offered the testimony of Investigator Adam Zeh. He stated that, when he arrived at the scene, he noticed that there were cameras in the club and that they were set to record to a DVR system that stored video data. (R. 2916.) He noted that the system's date and time stamps were "off" by approximately one day and four hours. (R. 2913.) Inv. Zeh further testified that the system was "outdated" and that, to avoid the risk of losing any potential footage, police recorded portions from the footage with police camera equipment. (R. 2912-13.) He verified that he had watched the original footage, which was introduced and admitted as State's Exhibit 136, and that those portions were accurate recordings from the original footage that was offered and admitted as State's Exhibits 44-50. (R. 2913-14, 2916.)

***48** In light of the testimony described above, it is clear that the State offered testimony from witnesses with "sufficient personal knowledge of the scene or events pictured or the sounds recorded and that the item[s] offered accurately and reliably represents the actual scene or sounds." Fuller, 620 So. 2d at 678. Therefore, the State laid a proper predicate for admitting the videotape security footage in Exhibits 44-50 and 136 under the "pictorial communication" theory. Thus, Petersen is not entitled to relief on this claim.

Petersen also argues that, after improperly admitting that testimony, the circuit court then allowed the State to elicit improper testimony from Gaines and Williams concerning their opinions of Petersen after watching that video when,

he says, they had not personally seen him in the club that night. (Petersen's brief, p. 89.) After reviewing, in context, the testimony cited by Petersen in his brief, we conclude that the record refutes his claim. In their testimony Gaines and Williams not only reiterated what they personally witnessed on the night of the shooting, but they also confirmed that their observations were adequately represented in the security-camera footage. Thus, Petersen is not entitled to relief on this claim.

XII.[24]

Petersen argues that the State erroneously introduced "several exhibits showing [him] in shackles and jail clothing, including photographs that depict a shirtless Mr. Petersen in handcuffs following his arrest, and two videos" showing him in an orange jumpsuit and leg irons with his hands shackled to a waist belt. (Petersen's brief, p. 90.) According to Petersen, those images " 'suggest[ ] to the jury that the justice system itself sees a "need to separate a defendant from the community at large." ' " (Petersen's brief, p. 90, quoting Deck v. Missouri, 544 U.S. 622, 630-31 (2005) and Brown v. State, 982 So. 2d 565, 594 (Ala. Crim. App. 2006).) As a result, Petersen contends that his rights to "due process, a fair trial, and a reliable sentence as provided by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law" have been violated. (Petersen's brief, p. 91.) Petersen did not raise this argument at trial; thus, it will be reviewed for plain error. Rule 45A, Ala. R. App. P.

This Court has previously stated:

> "Shackling or handcuffing a defendant during trial tends to negate the presumption of innocence and is generally prohibited absent special circumstances. Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L.Ed. 2d 525 (1986). 'However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs.' Doster v. State, 72 So.3d 50 (Ala. Crim. App. 2010)."

Hosch v. State, 155 So. 3d 1048, 1120 (Ala. Crim. App. 2013). Here the circuit court did not commit error--plain or otherwise--in admitting the photographs and videos at issue. Petersen is not entitled to relief on this claim.

XIII.[25]

Petersen contends that the admission of forensic psychologist Dr. Doug McKeown's testimony and mental-health evaluation of Petersen during the State's rebuttal constitutes plain error. (Petersen's brief, pp. 13-24.) Petersen also challenges references to Dr. McKeown's report by the State in its opening and closing arguments, arguing that those references constituted plain error. According to Petersen, allowing Dr. McKeown to testify to statements Petersen made during his mental-health evaluation after he had been told that those statements would not be used as evidence against him violated his rights to "due process, a fair trial, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Petersen's brief, p. 24.) Because Petersen did not object to Dr. McKeown's testimony at trial or to any references to that testimony in the State's opening and closing arguments, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

***49** At trial, Petersen pursued a defense of not guilty by reason of mental disease or defect, and he offered expert testimony from Dr. Mark Cunningham in support of his defenses of intoxication and insanity. Thus, Petersen placed his mental state at issue. During the State's rebuttal, Dr. McKeown testified concerning his mental-health evaluation of Petersen that took place on October 23, 2012. When asked about whether Petersen was suffering from any mental disease or defect that would have hindered his ability to know what he was doing at the time of the crime, Dr. McKeown stated:

> "No ... other than what influence may have occurred from what type of substances he may have taken. He acknowledged that he had had six drinks that night."

(R. 4246.) He further stated:

> "But there was no indication he was suffering from a severe mental disease or defect that would have impaired his ability to understand the wrongfulness of his act."

Id. When asked if Petersen had indicated that he was under the influence of any intoxicating substances that would have hindered his ability to understand the nature of his actions, Dr. McKeown stated that he had not. (R. 4247.) He further testified that, based on his evaluation of Petersen, he believed that Petersen possessed "reasonable decision making skills and the ability to interact with defense counsel." (R. 4250.)

The State then asked Dr. McKeown if he had viewed the security footage of the shooting at Teasers and he replied that he had. Dr. McKeown testified that Petersen had indicated to him that he "shot victims" and that he knew that he had done

something wrong and that he needed to get away. (R. 4253, 4254.)

In Brownfield v. State, 44 So. 3d 1 (Ala. Crim. App. 2007), aff'd, 44 So. 3d 43 (Ala. 2009), this Court was faced with a similar scenario. Like Petersen, the defendant pursued a defense of not guilty by reason of mental disease or defect; specifically, Brownfield argued "that the murders were the result of Brownfield's addiction to methamphetamine." 44 So. 3d at 28.

> "At the conclusion of the defense's case, the State called Dr. Clinger as a rebuttal witness. Dr. Clinger testified without objection that she had examined Brownfield to determine his sanity at the time of the offenses; she stated that she gathered information from the district attorney's office and from defense counsel and had met with Brownfield twice for a total of approximately four or five hours. When asked what information she used to diagnose Brownfield, defense counsel objected and requested a sidebar, at which time a bench conference was held off the record. Upon the conclusion of that bench conference, Dr. Clinger testified without objection that her goal was to evaluate Brownfield and to assess his treatment needs, if any. She stated that she performed a diagnostic clinical interview and administered an IQ test; she testified without objection as to her conclusions regarding his intellectual status and mental ability. Dr. Clinger testified that Brownfield was able to recall and repeat information to her, including arithmetic problems she posed to him, his educational background, and his work history. The following exchange then occurred:
>
> " '[Prosecutor]: All right; did he have any memory at all as to his activities on December 23, 24 and 25?
>
> " '[Dr. Clinger]: He was able to provide me with an account of what he was doing during most of that time.
>
> " '[Prosecutor]: All right; was he able to recall getting into a verbal dispute with his sister on the 23rd?
>
> " '[Dr. Clinger]: Yes.
>
> " '[Prosecutor]: And what details was he able to provide regarding that?
>
> ***50** " '[Dr. Clinger]: Well, it was something about--
>
> " '[Defense counsel]: Judge, I object again. That goes to the very issue that I was informing you about. And that has nothing to do with this test or his assessment, and I would object.
>
> " '....
>
> " '(JURY NOT PRESENT.)
>
> " 'THE COURT: All right; do you want to state your objection?
>
> " '[Defense counsel]: Well, Judge, what I'm concerned about is the very front page of the forensic evaluation report prepared by Dr. Clinger, she says, and I will just read it, "Ben Brownfield was also informed that these results may be used in court proceedings either through testimony of the examiner and/or the written report to assist reaching decisions regarding his competency to stand trial and his mental state at the time of the alleged offense but that none of the information could be used as evidence against him concerning his guilt on any charge." Now, my objection is that this questioning, and where I believe the assistant district attorney was going with that is to get into the facts of what Mr. Brownfield has described to Dr. Melissa Clinger. And just because the court gives some kind of limiting instruction at some point that they are not to consider any of this in their determination of guilt[, it] is still highly prejudicial and will violate his rights, Your Honor--his due process rights because he was told that none of this could be used, and none of this information could be used as evidence against him. And this is a way to circumvent that by getting into the details of what he told her.
>
> " 'THE COURT: Well, he has raised the issue of insanity at the time of the alleged offense, and the law is very clear that any statements that he gives to the psychologist would be admissible on that issue.
>
> " '[Defense counsel]: Well, there is no issue of insanity, and we withdraw any claim that he was insane. And we will put that on the record.
>
> " '[Prosecutor]: Judge, we would consider that to be untimely made, and they've already introduced evidence from their expert on his inability to recall the details. And if it's not admissible on his mental state at the time, it certainly is to impeach Dr. Lacy's testimony about him having no memory whatsoever of these events.
>
> " '[Defense counsel]: We are not arguing that he was legally insane. That's the term that I'm talking about,

legal insanity. And nothing that we have put on or attempted to argue goes to legal insanity.

" '[Prosecutor]: Well, Your Honor, that was one of the questions that we asked before we got started if he was maintaining that plea and [defense counsel] stated clearly, yes, [he] was.

" '[Defense counsel]: Well, we have not put on any evidence to that effect.

" '[Prosecutor]: And in fact I think he requested an instruction to that effect.

" '[Defense counsel]: Well, that doesn't mean that we're going that route.

" 'THE COURT: Well, I asked specifically so that this issue could be addressed at the very beginning, and you told me that you definitely intended to pursue that plea of not guilty by reason of mental disease or defect. And you put on your psychiatrist.

***51** " '[Defense counsel]: Well, Your Honor, we said that we were not contesting his sanity at trial or his competency at trial. And that's what I recall telling the court that that was not going to be an issue.

" 'THE COURT: Right, because that issue had already been decided by the court because it had not been made an issue previously and there had been no request for a hearing on the issue of whether he was competent to stand trial.

" '[Defense counsel]: Well, our position now is that we're not arguing any insanity.

" 'THE COURT: Well, I think it's too late. I think the door has been opened because there's been questions asked of your psychiatrist regarding that plea. So I'm going to permit her to testify. But any statements that he made to you, you can relate, you know, if they had a bearing on your assessment of his mental state at the time of the alleged offense. Otherwise, they should not be admissible in this hearing. Do you understand?

" '[Dr. Clinger]: Well, Your Honor, I didn't ask if he did it or not, and he didn't tell me if he did it or not.

" 'THE COURT: All right; so that should take care of that.

" '[Defense counsel]: Well, Judge, is the court saying that we asked our witnesses questions concerning whether the defendant was legally insane?

" 'THE COURT: I'm saying that questions were asked and at no time was there an objection made to those questions. And I know the psychiatrist was asked if he was suffering from a mental disease or defect, and--

" '[Defense counsel]: Yes, that was asked.

" 'THE COURT: Right, and there was no objection made as if you had withdrawn that plea.

" '[Defense counsel]: Okay, I see the court's point.

"THE COURT: All right; let's recess for lunch.'

"(R. 1959–63.)

"Dr. Clinger then testified that Brownfield informed her that he was unhappy with his sister because on December 23, 2001, he had given her some money that she was supposed to have used to obtain drugs. Dr. Clinger testified with regard to the events of December 24 that Brownfield recalled taking a shower at Farmer's residence and riding around with his friend Nick Logan and that he told Farmer what he had done. As for Brownfield's recollection of the events on December 25, Dr. Clinger testified that Brownfield told her that he remembered the officers advising him of his Miranda rights. According to Dr. Clinger, she saw no indication that Brownfield suffered from a severe mental disease or defect 'ever or during the time of the alleged offense.' (R. 1965.) She stated that she 'thought [Brownfield] had no significant impairment as far as mental illness or cognitive deficits or problems in thinking that would have interfered with his ability to appreciate the wrongfulness of his acts and the consequences.' (R. 1966.) On cross-examination, Dr. Clinger was questioned extensively about false memories. She was further questioned about Brownfield's assertions to her that he had ingested Xanax and crystal methamphetamine at times prior to the murders and the possibility that those narcotics may have affected his memory."

Brownfield, 44 So. 3d at 29–32.

In rejecting Brownfield's claim that the admission of the report constituted reversible error, the Alabama Supreme Court stated:

"Rule 11.2(b), Ala. R. Crim. P., governs the admissibility of testimony about statements made by a defendant during a mental examination. Rule 11.2(b)(2), provides:

> ***52** " '(2) The results of mental examinations made pursuant to subsection (a)(2) of this rule [providing for examination into the defendant's mental condition at the time of the offense] 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 any 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.'

"(Emphasis added.)

"The plain language of Rule 11.2(b)(2) unequivocally forbids the admission of statements made by a defendant or evidence derived from the defendant's statements during a pretrial mental examination unless the defendant testifies about his or her mental condition. Consequently, because Brownfield did not testify at his trial, applying the plain language of Rule 11.2(b)(2), we must conclude that error occurred in the admission of Dr. Clinger's testimony concerning statements Brownfield made during the mental examinations. Although it was proper to admit into evidence Dr. Clinger's testimony regarding her opinion about Brownfield's mental condition at the time of the offenses, the admission of her testimony regarding statements made by Brownfield during the mental examinations was error.

"The inquiry, however, does not end here. This Court must determine whether it 'appear[s] that the error complained of has probably injuriously affected [Brownfield's] substantial rights.' Rule 45, Ala. R. App. P., provides:

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

"The Court of Criminal Appeals has further stated with regard to the application of the harmless-error rule:

> " ' " 'After finding error, an appellate court may still affirm a conviction on the ground that the error was harmless, if indeed it was.' Guthrie v. State, 616 So. 2d 914, 931 (Ala. Crim. App. 1993), citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705 (1967). 'The harmless error rule applies in capital cases.' Knotts v. State, 686 So. 2d 431, 469 (Ala. Crim. App. 1995), opinion after remand, 686 So. 2d 484 (Ala. Crim. App. 1995), aff'd, 686 So. 2d 486 (Ala. 1996), cert. denied, 520 U.S. 1199, 117 S. Ct. 1559, 137 L.Ed. 2d 706 (1997), citing Ex parte Whisenhant, 482 So. 2d 1241 (Ala. 1983). 'In order for a constitutional error to be deemed harmless under Chapman, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict. In order for the error to be deemed harmless under Rule 45, the state must establish that the error did not injuriously affect the appellant's substantial rights.' Coral v. State, 628 So. 2d 954, 973 (Ala. Crim. App. 1992), opinion after remand, 628 So. 2d 988 (Ala. Crim. App. 1992), aff'd, 628 So. 2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L.Ed. 2d 61 (1994). 'The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing.' Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 199[5]), aff'd, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1117, 143 L.Ed. 2d 112 (1999)."

> ***53** " 'McNabb v. State, 887 So. 2d 929, 976–77 (Ala. Crim. App. 2001).'

"Sale v. State, 8 So. 3d 330, 347 (Ala. Crim. App. 2008). See also Ex parte Brown, 11 So. 3d 933 (Ala. 2008) (holding that the alleged improper admission of evidence in a capital trial was harmless); Cothren v. State, 705 So. 2d 849 (Ala. Crim. App. 1997) (holding that the improper admission of the defendant's coerced

confession was harmless in light of the overwhelming evidence establishing that the defendant committed the capital offense).

"In this case, a review of the record establishes that the admission of Dr. Clinger's testimony was harmless; the improperly admitted evidence could not have probably injuriously affected Brownfield's substantial rights. The admission of testimony regarding Brownfield's statements concerning his education and work experience is harmless because those statements are not relevant to whether Brownfield committed the offense or to his mental condition at the time of the offense. Consequently, testimony concerning those statements could not have probably injuriously affected Brownfield's substantial rights. Likewise, Dr. Clinger's testimony regarding Brownfield's recollection of the events on December 23, 24, and 25, 2001, could not have probably injuriously affected Brownfield's substantial rights because statements Brownfield made to law-enforcement officers on December 25 and 26, 2001, had been previously admitted into evidence and established with greater detail what Brownfield recalled regarding the events leading up to and following the murders....

" '....

"Brownfield's statement establishes in detail his recollection of the events surrounding the murders; the statements made to Dr. Clinger some seven months after the murders are general and cursory. Therefore, Dr. Clinger's testimony with regard to statements made by Brownfield about his activities on the days surrounding the murders, in light of the previously admitted detailed statement Brownfield made to the police, could not have probably injuriously affected Brownfield's substantial rights.

"Finally, the evidence of Brownfield's guilt as to the capital offenses was overwhelming. The evidence indicated that during the week of December 24, 2001, Brownfield had been using crystal methamphetamine and on the evening of December 24 had consumed several Xanax tablets. After taking the tablets, he became angry at his sister, Brenda McCutchin, who was sleeping in her bed with her grandson, Joshua Hodges. Brownfield entered the room and beat both Brenda and Joshua with a claw hammer. He then left Brenda's house and traveled in her car to Latham McCutchin's house. He entered Latham's house, and a struggle ensued. Brownfield struck Latham with his fists and the hammer. Brownfield also stabbed Latham in the heart and cut his throat with a knife. When Brownfield left Latham's house, he took Latham's wallet. The evidence further indicated that Brownfield admitted to his ex-girlfriend, Tammy Farmer, that he had killed Brenda, Joshua, and Latham. The results of DNA testing of blood found on Brownfield's shoes indicated that the blood was Latham's. Because the evidence was sufficient to prove beyond a reasonable doubt that Brownfield committed the capital offenses, the error in the admission of Dr. Clinger's testimony was harmless."

***54** 44 So. 3d 43, 47–50 (Ala. 2009).

In the present case, Dr. McKeown's testimony concerning the results of Petersen's competency evaluation was error. See Ex parte Brownfield, supra. But the admission of that testimony was harmless because it did not prejudice Petersen. See id. See also Lockhart v. State, 163 So. 3d 1088, 1108 (Ala. Crim. App. 2013) ("[T]his court has recognized that, even in capital cases, the harmless-error rule applies to contentions that Rule 11.2 was violated."). As the State points out in its brief on appeal,

> "First, statements Petersen provided about hypothetical situations or matters unrelated to the shooting were not relevant to whether he committed the offense.... Cf. Brownfield, 44 So. 3d at 45, 47-49. Moreover, Dr. Cunningham testified on direct about hypotheticals Dr. McKeown asked Petersen and offered his opinion of Dr. McKeown's findings.... Second, statements about the crime and his medical history were previously admitted into evidence through Petersen's statements to police, as well as through Dr. Cunningham's testimony.... Cf. Brownfield, 44 So. 3d at 48-49; Thompson, 153 So. 3d at 147."

(State's brief, pp. 15-16 (citations omitted).) We agree with the State's analysis in this regard. Petersen's case is similar to the factual scenario in Brownfield most notably in that the challenged statements included only information cumulative to statements by Petersen that had been previously admitted.[26] Moreover, as in Brownfield, "the evidence of [Petersen's] guilt as to the capital offenses was overwhelming."[27] 44 So. 3d at 50.

The error complained of did not probably injuriously affect Petersen's substantial rights, and, because the evidence was sufficient to prove beyond a reasonable doubt that Petersen committed the capital offenses, any error was harmless. See Brownfield, 44 So. 3d at 50.

XIV.[28]

Next, Petersen argues that certain comments by the prosecutor during his rebuttal closing argument at the guilt phase improperly interjected the issue of punishment into the guilt phase. (Petersen's brief, p. 84.) Specifically, Petersen contends that the prosecutor's reference to his prior statements to law-enforcement officers that he should be killed for what he had done "shifted the focus of the jury's attention from the central question of whether the State had proved its case beyond a reasonable doubt and to the issue of punishment." Id. (internal quotation marks and citations omitted). According to Petersen, the prosecutor's "improper reliance upon [his] request for death as a basis for a finding of guilt violated [his] rights to a jury trial, due process, a fair trial, equal protection, and a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Petersen's brief, p. 85.) Petersen did not object to the prosecutor's statements in the circuit court below; thus, we consider this issue only for plain error. See Rule 45A, Ala. R. App. P.

***55** During his rebuttal arguments in the guilt phase of Petersen's capital-murder trial, District Attorney Douglas A. Valeska made the following statements concerning Petersen's prior statements to law enforcement that he should be put to death for what he had done:

> "I'm not supposed to talk about it, but since [defense counsel] talked about it, kill him. Kill him. He needs killing. You know it from the statement. Read the statement, people, what he says. I did it. I need killing."

(R. 4387.)

> "Here's what it amounts to. It's real simple. He confesses to everything in his statements. These are the victims. This is what he did. And let's talk about Scotty Russell, once again, his injuries. One, two, three, four, five, six, seven, eight, nine, ten. Ten for ten. Didn't miss a person.
>
> "Is that somebody that's so intoxicated that they don't know what they're doing, they can hit their target ten times, they can escape, try and run away, and then they say, 'I remember aiming. I remember shooting. I remember that,' in his own statements?
>
> "I did it. I need to be put -- and he says killed, lethal injection. Not me. It's 'cause they said something, the only reason I'm talking about that, you know, once again."

(R. 4397-98) (emphasis added).

This Court has previously stated:

> "It is well settled that '[a] prosecutor has the right to "reply in kind" to statements made by defense counsel in the defense's closing argument.' Newton v. State, 78 So. 3d 458, 478 (Ala. Crim. App. 2009) (citations and quotations omitted). ' "When the door is opened by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will suddenly be subject to reply." ' Davis v. State, 494 So. 2d 851, 855 (Ala. Crim. App. 1986) (quoting DeFoor, Prosecutorial Misconduct in Closing Argument, 7 Nova L.J. 443, 469–70 (1982–83)). Further, a prosecutor's rebuttal argument is 'viewed as having been made in the heat of the debate, and such a remark is usually valued by the jury at its true worth and not expected to become a factor in the formulation of the verdict.' McGowan v. State, 990 So. 2d 931, 974 (Ala. Crim. App. 2003)."

Vanpelt v. State, 74 So. 3d 32, 82 (Ala. Crim. App. 2009). In reiterating Petersen's statements during his rebuttal closing argument, the prosecutor noted that he was doing so because they were previously referenced by Petersen's defense counsel. The prosecutor's statements were, in fact, a permissible "reply-in-kind" to the defense's references to Petersen's statements, and Petersen is not entitled to relief on this claim.

XV.[29]

Petersen argues that the circuit court erred by denying his defense counsel's request to instruct the jury on provocation manslaughter. (Petersen's brief, p. 93.) According to Petersen, because there is "undisputed evidence" that the shootings followed a physical confrontation between him and employees at Teasers, the court should have given that instruction. Id. Its failure to do so, Petersen says, violated his rights to "due process, a fair trial, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Petersen's brief, pp. 93-94.)

***56** The standard of review for jury instructions is abuse of discretion. See Chambers v. State, 181 So. 3d 429, 443 (Ala. Crim. App. 2015). "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." Barrett v. State, 33 So. 3d 1287, 1288 (Ala. Crim. App. 2009) (citing Culpepper v. State, 827 So. 2d 883, 885 (Ala. Crim. App. 2001)). This Court has stated:

> " ' " 'A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses.' MacEwan v. State, 701 So. 2d 66, 69 (Ala. Crim. App. 1997). An accused has the right to have the jury charged on ' "any material hypothesis which the evidence in his favor tends to establish." ' Ex parte Stork, 475 So. 2d 623, 624 (Ala. 1985). '[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[ ] weak, insufficient, or doubtful in credibility,' Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978), 'even if the evidence supporting the charge is offered by the State.' Ex parte Myers, 699 So. 2d 1285, 1290–91 (Ala. 1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L.Ed. 2d 648 (1998). However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A–1–9(b), Ala. Code 1975. 'The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S. Ct. 2675, 153 L.Ed. 2d 847 (2002). ' "A court may properly refuse to charge on a lesser included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury." ' Williams v. State, 675 So. 2d 537, 540–41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So. 2d 580, 582 (Ala. Crim. App. 1987)."
>
> " 'Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2000)(opinion on return to remand).'
>
> "Harbin v. State, 14 So. 3d 898, 909 (Ala. Crim. App. 2008)."

Fuller v. State, 231 So. 3d 1207, 1217 (Ala. Crim. App. 2015).

Section 13A-6-3(a), Ala. Code 1975, governs manslaughter. It provides, in pertinent part:

> "A person commits the crime of manslaughter if:
>
> "....
>
> "(2) He causes the death of another person under circumstances that would constitute murder under Section 13A–6–2[, Ala. Code 1975]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself."

In Spencer v. State, 201 So. 3d 573 (Ala. Crim. App. 2015), this Court stated:

> " 'Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative.'

***57** "Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001).

"In discussing what constitutes 'imminent assault' in regard to provocation manslaughter, this Court has stated:

> " ' " ' "Mere words, no matter how insulting, never reduce a homicide to manslaughter. Manslaughter is the unlawful killing of a human being without malice; that is, the unpremeditated result of passion--heated blood--caused by a sudden, sufficient provocation. And such provocation can, in no case, be less than an assault, either actually committed, or menaced under such pending circumstances as reasonable to convince the mind that the accused has cause for believing, and did believe, he would be presently assaulted, and that he struck, not in consequence of a previously formed design, general or special, but in consequence of the passion suddenly aroused by the blow given, or apparently about to be given." ...' Reeves v. State, 186 Ala. 14, 65 So. 160, 161 [(1914)]." Easley v. State, 246 Ala. 359, at 362, 20 So. 2d 519, 522 (Ala. 1944). Thus, the mere appearance of imminent assault may be sufficient to arouse heat of passion.'

"Cox v. State, 500 So. 2d 1296, 1298 (Ala. Crim. App. 1986). 'What constitutes legal provocation is left to the trial judge's interpretation.' Gray v. State, 574 So. 2d 1010, 1011 (Ala. Crim. App. 1990) (citing Shultz v. State, 480 So. 2d 73, 76(Ala. Crim. App. 1985))."

Spencer, 201 So.3d at 596-97. "In addition, provocation has been defined as that treatment by another which arouses anger or passion, which produces in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror." Fuller, 231 So. 3d at 1218 (internal quotation marks and citations omitted).

In the present case, both witness testimony and security footage from Teasers showed that Bruce Middleton and Joe Glow flanked Petersen and held him by his forearms as they escorted him out of the club on the night of the shootings. (R. 1204, 1207-08, 1333, 1712, 1828, 1856, 2036-39; State's Exh. 45, 48-49.) At one point, Petersen stiffened his body and dropped to make himself dead weight. (R. 2039.) Eubanks lifted Petersen's feet in an effort to clear the carpeting and doorway as they took Petersen out of the club. (R. 1208, 1333, 2039-40.) Once they were outside, Petersen was immediately released and he fell on his backside. (R. 1204, 1207-08, 1333, 1712, 1828, 1856, 2036-39.)

At trial, Petersen argued that he was entitled to a provocation manslaughter instruction because Middleton, Glow, and Eubanks "assaulted" him as he was being escorted out of Teasers. Following a long discussion on this issue, the circuit court denied Petersen's request for that instruction after finding that none of the evidence presented at trial indicated that Petersen had been assaulted or that he had acted in the heat of passion. (R. 4307-23.) Based on the circumstances described above, the circuit court did not err in refusing the instruction. Thus, Petersen is not entitled to relief on this claim.

XVI.[30]

***58** Next, Petersen argues that the circuit court erred by improperly instructing the jury on intoxication and lesser-included offenses. (Petersen's brief, pp. 51-58.) Specifically he argues that the court's instruction on intoxication erroneously shifted the burden of proof from the State to him. (Petersen's brief, pp. 52-54.) He further argues that the court erred when it instructed the jury that no lesser-included offense was available for capital murder committed during the commission of a burglary. (Petersen's brief, pp. 54-58.) Finally, he argues that the court erred when it instructed the jury on manslaughter as the lesser-included offense of capital murder of two or more persons. Id. These arguments are being raised for the first time on appeal; thus, they will be reviewed for plain error. See Rule 45A, Ala. R. App. P.

This Court has recently stated:

> " ' " 'In setting out the standard for plain error review of jury instructions, the court in United States v. Chandler, 996 F.2d 1073, 1085, 1097 (11th Cir. 1993), cited Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L.Ed. 2d 316 (1990), for the proposition that "an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner." Williams v. State, 710 So. 2d 1276, 1306 (Ala. Crim. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997).' "
>
> " 'Broadnax v. State, 825 So. 2d 134, 196 (Ala. Crim. App. 2000), quoting Pilley v. State, 789 So. 2d 870, 882–83 (Ala. Crim. App. 1998)[overruled on other grounds, 789 So. 2d 888 (Ala. 2000)]. Moreover, "[w]hen reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them. Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999)." Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).'
>
> "Snyder v. State, 893 So. 2d 488, 548 (Ala. Crim. App. 2003). See also Maples v. State, 758 So. 2d 1, 65 (Ala. Crim. App.), aff'd, 758 So. 2d 81 (Ala. 1999)."

Henderson v. State, 248 So. 3d 992, 1005 (Ala. Crim. App. 2017). With these legal principles in mind, we now address Petersen's arguments on appeal.

A.

First, Petersen argues that the court's instruction on voluntary and involuntary intoxication "directed the jury to first decide whether [he] established that he was intoxicated, when in fact he only had to inject the issue." (Petersen's brief, p. 53.) According to Petersen, the State had the "burden of proving beyond a reasonable doubt that [he] was neither voluntarily or involuntarily intoxicated in order to convict him of capital murder," but the court's instruction shifted that burden to him. Id.

As best we can discern, in his brief Petersen challenges the following excerpts from the circuit court's jury instructions:

> "[THE COURT:] So, you need to look--I would suggest you look, first, was the defendant voluntarily intoxicated. Okay? We're all adults. And I'm not commenting on the evidence. The mere fact that someone may drink something alcoholic or take a medication or illegal drug does not automatically mean the person is intoxicated. We all understand that as adults. So, that's going to be your first issue to look at. If you determine that he was not intoxicated, voluntarily intoxicated, you don't need to look any more at this issue."

(R. 4415.)

> "[THE COURT:] So, the first thing you would need to look at--it's just like the voluntary intoxication on this point. First, was he involuntarily intoxicated. Okay? Just because there's some substance in your system doesn't mean you're intoxicated. So, you need to reach that threshold issue first."

(R. 4422.)

> "[THE COURT:] A person may become involuntarily intoxicated by introducing into his body any substance or substances which impair or disturb his mental or physical capabilities in any of the following ways. These are ors, not ands. There's three. There's three ways our law recognizes that a person may become involuntarily intoxicated. And this really goes to the involuntary issue.
>
> ***59** "First, either inadvertently, as by accident, or without knowing the nature or tendencies of the substance. Or, a second way, as a result of being deceived or tricked into doing so by fraud, artifice or guile. Or, three--there's a third way. And these are not exclusive. It can be any one or a combination. As a result of being forced to do so himself or of the substance being forcibly introduced into his body without his consent.
>
> "So, first, determine is he intoxicated. If not, you don't even need to reach any further issues."

(R. 4423.)

> "[THE COURT:] So, on the issue of involuntary intoxication, you should look at, is the defendant involuntarily intoxicated. It's just to summarize. If yes, was it to a degree that the defendant--that the defendant could not either appreciate the criminality of his conduct or conform his conduct to the requirements of law. If the answer is yes, you would return not guilty verdicts. There are no lesser included offenses."

(R. 4426.) The State argues on appeal, however, that the circuit court "explicitly instructed the jury throughout its charge on intoxication that the State carried the burden of proof and repeatedly instructed the jury that it was the State's burden to establish that Petersen was not intoxicated." (State's brief, p. 32.) We agree with the State.

The record on appeal indicates that the circuit court gave the following instructions to the jury concerning intoxication:

> "[THE COURT:] All right. Let's start looking at some of the defenses that have been raised. Voluntary intoxication. We're going to look at voluntary and involuntary intoxication.
>
> "First, voluntary. That's just what it means. Our law states that voluntary intoxication is not a defense to any criminal charge. However, evidence of intoxication, whether voluntary or involuntary, shall be considered whenever it is relevant to negate an element of the offense charged. In this case, the element is intent.
>
> "So, voluntary intoxication is not typically what you would think of as a defense, like self-defense. Rather, it's a specific commentary on that issue of intent. Okay. The State must always prove specific criminal intent in these charges. So, if a person is voluntarily intoxicated, even though that's not a defense, but if you find it was at a degree that it negated the defendant's ability to form specific intent, that is a failure of an element of a charge. That is a failure to prove an element beyond a reasonable doubt.
>
> "So, voluntary intoxication is intoxication caused by substances--it can be alcohol, drugs, medication or other substances or any combination of those--that the defendant knowingly introduces into his body, the tendency of which is to cause intoxication he knows or ought to know.
>
> "The burden of proof is on the State to prove all elements of an offense, including intent beyond a reasonable doubt. So, the defense does not have to prove to you that he was voluntarily intoxicated to a degree that it negated his intent. Rather, the State must prove to you beyond a reasonable doubt the defendant was not voluntarily intoxicated to a degree that it negated intent. Okay.
>
> "The defendant carries no burden of proof. Rather, when the issue is raised, the State must prove the defendant's criminal intent beyond a reasonable doubt, which would

include that the defendant was not voluntarily intoxicated to a degree that criminal intent is negated.

"Voluntary intoxication sufficient or to a degree that negates criminal intent will not result in a not guilty verdict. Rather, it will reduce an offense, when appropriate, to a reckless mental state offense.

***60** "So, that's going to be--start our lesser included offenses. It will reduce the charge if you find that the State has not proven to you beyond a reasonable doubt the element of intent. And that could include whether or not they've proven to you beyond a reasonable doubt that he was not voluntarily intoxicated to a degree that it negated intent. It could reduce the charges to lesser included offenses.

"So, you need to look--I would suggest you look, first, was the defendant voluntarily intoxicated. Okay? We're all adults. And I'm not commenting on the evidence. The mere fact that someone may drink something alcoholic or take a medication or illegal drug does not automatically mean the person is intoxicated. We all understand that as adults. So, that's going to be your first issue to look at. If you determine that he was not intoxicated, voluntarily intoxicated, you don't need to look any more at this issue.

"But, if he was, the second inquiry would be, was it, the voluntary intoxication, sufficient or to a degree that it negated his criminal intent. So, then, if your answer is no to that, then you need to move on to the other issues that we're discussing. You don't need to look at this issue any further. But, if you find that it was sufficient to negate criminal intent, then you need to look at the lesser included offenses."

(R. 4412-16.)

"[THE COURT:] Again, the burden is not on the defense to prove this or disprove it. Rather, it's on the State to prove to you beyond a reasonable doubt that he was not suffering from involuntary intoxication, or that if he was, that he was nonetheless able to appreciate the crimina--appreciate the criminality of his conduct and to conform his conduct to the requirements of law."

(R. 4422.)

"[THE COURT:] When a person--excuse me. When a defense of involuntary intoxication is raised by a defendant, in addition to the elements of the crime, the burden of proof remains on the State to prove beyond a reasonable doubt the defendant did not lack capacity due to involuntary intoxication."

(R. 4424-25.)

In reviewing the above instructions as a whole, it is clear to this Court that the circuit court explicitly instructed the jury throughout its charges on intoxication that the State carried the burden of proof. The court also repeatedly told the jury that it was the State's burden to establish that Petersen was not intoxicated. "[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) (internal quotation marks and citation omitted). Thus, Petersen's argument is meritless, and he is not entitled to relief.

Petersen also briefly argues that the jury's note to the court during deliberations was evidence that the court's instruction shifted the burden of proof. (Petersen's brief, p. 53.) Specifically, he claims that the following statement from the jury indicates that the instruction shifted the burden: "There is no defense from intoxication or insanity." (C. 1976; R. 4462.) We note, however, that the record indicates that this is merely an excerpt from that note. The note, in its entirety, stated:

"We have unanimous agreement on attempted murder and capital murder, all counts. There is no defense from intoxication or insanity. One jury member feels a need for reassurance that we have not overlooked any issue."

***61** (C. 1976.) Contrary to Petersen's assertion here, the note does not reflect that the jury had difficulty with the court's instruction or that it used that instruction to shift the burden from the State to the defendant on the intoxication defense. No plain error occurred with the challenged instruction, and Petersen is not entitled to relief.

B.

Second, Petersen argues that, because there was evidence of intoxication, the trial court was required to instruct the jury on lesser-included offenses for every count charged. (Petersen's brief, p. 54.) According to Petersen, the circuit court instead issued improper instructions that were "wrong as a matter of law and did not permit consideration of the lesser included offenses for the offenses charged." Id. Petersen points to two specific instances in which he says this occurred.

1.

First, he contends that, when the court instructed the jury on the counts charging murder made capital because it was committed during a burglary, it erroneously "instructed the jury that there was no lesser included offense for capital murder during the course of a burglary." (Petersen's brief, p. 54.) According to Petersen, contrary to the court's instruction, "there are lesser included offenses for capital murder in the course of a burglary, including reckless manslaughter and criminal trespass." (Petersen's brief, p. 55.) Petersen contends that the court's failure to give instructions on those lesser-included offenses was plain error. Id.

The record on appeal indicates that the court gave the following instructions with regard to the capital murder-burglary charges in the indictment:

> "There are no lesser-included offenses for capital murder during a burglary in the second degree, because there is no reckless way to commit burglary in the second degree. There is a reckless way to commit homicide. That's manslaughter. But there is no reckless way to commit a burglary in the second degree."

(R. 4417.) The court also gave the following instructions:

> "Now, then, the capital murder during the commission of a burglary in the second degree, those charges read identically. The law is the same on all of them. The distinction is there is one count for each of the alleged victims. So, I'm not going to read you all three of these, okay, because they're all three identical. But, again, they need to stand on their own merits or lack thereof, as well. And, again, on these, I've put the victims' names up by the case numbers at the top, so that you and I will both know, in the event you split verdicts, what the verdicts are.
>
> "So, we've got Cameron Paul Eubanks on one set of verdict forms. Tiffany Paige Grissett on one set of verdict forms, and then Thomas B. Robins on the others. So, if you believe, on any or all or a combination of these individuals, that the offense of capital murder during the commission of burglary in the second degree has been proven beyond a reasonable doubt, and there is no applicable defense to it, your verdict would read, we, the jury, find the defendant, Ryan Clark Petersen, guilty of capital murder during burglary in the second degree as charged in the indictment. Remember, there's no lesser included offenses under this, because burglary is a specific intent crime without any reckless version as a lesser."

(R. 4445-47.)

This Court has recently stated:

> " ' "A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses." MacEwan v. State, 701 So. 2d 66, 69 (Ala. Crim. App. 1997). An accused has the right to have the jury charged on " 'any material hypothesis which the evidence in his favor tends to establish.' " Ex parte Stork, 475 So. 2d 623, 624 (Ala. 1985). "[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[ ] weak, insufficient, or doubtful in credibility," Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978), "even if the evidence supporting the charge is offered by the State." Ex parte Myers, 699 So. 2d 1285, 1290–91 (Ala. 1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L.Ed. 2d 648 (1998). However, "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." § 13A–1–9(b), Ala. Code 1975. "The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture." Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S. Ct. 2675, 153 L.Ed. 2d 847 (2002). " 'A court may properly refuse to charge on a lesser-included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury.' " Williams v. State, 675 So. 2d 537, 540–41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So. 2d 580, 582 (Ala. Crim. App. 1987).'
> ***62** "Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2003)."

Floyd, —— So. 3d at ——. Thus, we must determine whether, under the circumstances of this case, there exists a "rational basis for a verdict convicting" Petersen of reckless manslaughter or criminal trespassing as a lesser-included offense of capital murder.

In the present case, the evidence adduced at trial established that Petersen killed Cameron Eubanks, Tiffany Grissett, and

Thomas Robins. Additionally, the evidence showed that Petersen unlawfully entered Teasers and that he intentionally and unlawfully shot those victims with his own handgun, which ultimately led to their deaths. Based on this evidence, there was no rational basis for convicting Petersen of the lesser-included offense of reckless manslaughter or criminal trespass, and a charge on those offenses would have served only to confuse or mislead the jury.

Additionally, this Court has previously stated that where, as here, the acts resulting in death are specifically directed to one or more particular persons, a reckless-murder charge is not applicable. See, e.g., Walker v. State, 523 So. 2d 528, 538 (Ala. Crim. App. 1988). The evidence adduced at trial established that Petersen targeted the victims in this case. Specifically, the evidence showed that Petersen targeted Cameron Eubanks because Eubanks worked as the doorperson that night at the club and had assisted Bruce Middleton and Joe Glow in escorting Petersen out of Teasers and that Petersen was angry that they had "disrespected" him. (R. 1164, 1204, 1208, 1333, 2265.) Next, the evidence showed that Petersen targeted Tiffany Grissett when he went into the club, saw Grissett, and stated, "All right bitch. Now it's your turn," and then followed her into the women's restroom where he shot her. (R. 1731, 2106, 2110, 2450.) Finally, the evidence established that Petersen likely targeted and killed his third and final victim, Thomas "Rocky" Robins because he resembled Bruce Middleton. (R. 2067, 2051, 2112-13.) Because the above evidence indicates that Petersen targeted the victims and that his actions were directed toward those he believed were involved in removing him from the nightclub, there was nothing to support a charge of reckless murder as a lesser-included offense. See Gavin v. State, 891 So. 2d 907, 979 (Ala. Crim. App. 2003). Thus, Petersen is not entitled to relief on this claim.

2.

Second, Petersen asserts that the circuit court erroneously instructed the jury to consider manslaughter as a lesser-included offense of the charge of murder made capital because two or more persons were murdered by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. (Petersen's brief, pp. 54-55.) According to Petersen, manslaughter is not a lesser-included offense for that capital offense and, thus, reversible error occurred. Id.

Before releasing the jury for deliberations, the circuit court gave the following instruction with regard to the charge of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975:

> ***63** "For the murder charge of capital murder of two or more persons, that lesser included offense would be the crime of manslaughter. The crime of manslaughter.
>
> "If you find that the intoxication does negate criminal intent, you would have to find him not guilty. There are no lesser included offenses for capital murder during a burglary in the second degree, because there is no reckless way to commit burglary in the second degree. There is a reckless way to commit homicide. That's manslaughter. But there is no reckless way to commit a burglary in the second degree. So, he would be acquitted of those charges. But you could consider the manslaughter on the multiple people killed charge."

(R. 4416-17.)

In the present case, Petersen was charged with capital murder under § 13A-5-40(a)(10), Ala. Code 1975, which reads as follows:

> "(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;"

With regard to "murder," as that word is used in Alabama's capital-murder statute, § 13A-5-40(b), Ala. Code 1975, provides as follows:

> "Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms 'murder' and 'murder by the defendant' as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3). Subject to the provisions of Section 13A-5-41, murder as defined in Section 13A-6-2(a)(2) and (3), as well as murder as defined in Section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section."

A defendant is guilty of manslaughter when "[h]e recklessly causes the death of another person[.]" § 13A-6-3(a)(1), Ala. Code 1975. Finally, § 13A-5-41, Ala. Code 1975, provides as follows:

> "Subject to the provisions of Section 13A-1-9(b), the jury may find a defendant indicted for a crime defined in Section 13A-5-40(a) not guilty of the capital offense but

guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in Section 13A-1-9(a), and when there is a rational basis for such a verdict, include but are not limited to, murder as defined in Section 13A-6-2(a), and the accompanying other felony, if any, in the provision of Section 13A-5-40(a) upon which the indictment is based."

Petersen cites Stoves v. State, 238 So. 3d 681, 686 (Ala. Crim. App. 2017), in support of his argument here. The State notes, and we agree, that his reliance on that case is misplaced. As the State notes, in Stoves this Court reversed the defendant's manslaughter conviction on the ground that it violated the Double Jeopardy Clause because Stoves "was also convicted of five separate counts of felony murder pertaining" to the same victims. Stoves, 238 So. 3d at 688. This Court did not hold in Stoves that manslaughter cannot be a lesser-included offense of the capital murder of two or more persons.

The State argues that manslaughter can be considered a lesser-included offense of capital murder of two or more persons because the manslaughter statute requires the killing of only one victim. (State's brief, p. 38.) The State contends, therefore, that the circuit court properly instructed the jury on manslaughter as a lesser-included offense. We need not decide that issue here because, even if the circuit court was incorrect in instructing the jury on that offense, any such error was harmless in this case. Rule 45, Ala. R. App. P., the harmless-error rule, provides:

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

Here, the jury-verdict form indicates that Petersen was found guilty of murder made capital because two or more persons were murdered by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, "as charged in the indictment." (C. 49, 488.) Although the jury could have considered manslaughter as a lesser-included offense as instructed by the circuit court, it rejected that option and, instead, found Petersen guilty of the greater-charged offense. Thus, any error in the circuit court's instructions as to lesser-included offenses was harmless, and Petersen is not entitled to relief.

XVII.[31]

Petersen contends that the State engaged in prosecutorial misconduct by, he says, misstating the law and misleading the jury during his capital-murder trial in four instances. (Petersen's brief, p. 91-93.) Petersen did not object to any of these alleged instances of prosecutorial misconduct at trial; thus, we review these claims for plain error. See Rule 45A, Ala. R. App. P.

It is well settled that " '[t]o constitute error a prosecutor's argument must have 'so infected the trial with unfairness as to make the resulting [verdict] a denial of due process.' " Hutcherson v. State, 243 So. 3d 855, 869 (Ala. Crim. App. 2017) (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L.Ed. 2d 144 (1986)).

" 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, McCullough v. State, 357 So. 2d 397, 399 (Ala. Cr. App. 1978), and that court is given broad discretion in determining what is permissible argument. Hurst v. State, 397 So. 2d 203, 208 (Ala. Cr. App.), cert. denied, 397 So. 2d 208 (Ala. 1981). Moreover, this Court has stated that it will not reverse unless there has been an abuse of discretion. Miller v. State, 431 So. 2d 586, 591 (Ala. Cr. App. 1983).

" '....

" '... 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).' "

Ivery v. State, 686 So. 2d 495, 504 (Ala. Crim. App. 1996) (quoting Bankhead v. State, 585 So. 2d 97, 105-07 (Ala. Crim. App. 1989)). "A prosecutor may argue in closing any evidence that was presented at trial. He may also present his impressions from the evidence. He may [even] argue every

matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." Williams v. State, 627 So. 2d 994, 995 (Ala. Crim. App. 1992). Finally, a prosecutor may comment on the lack of defense evidence, ask the jury to draw inferences from the evidence presented, and comment on the strength of the State's case. McWhorter v. State, 781 So. 2d 257, 321 (Ala. Crim. App. 1999). With these legal principles in mind, we address each of the incidents of alleged prosecutorial misconduct identified by Petersen.

***65** First, Petersen contends that, during the guilt phase of his capital-murder trial, prosecutor Douglas Valeska made an erroneous statement of law during his opening statement when he said:

> "You'll hear his history from the time he was young, when he first started drinking alcohol, 'til he goes through the school system. And what you'll hear, that Ryan Clark Petersen has some issues. Because, remember, he's not guilty by mental disease or defect.
>
> "Well, the law is it's severe. Not just the mental disease or defect. And bipolar, which I expect the evidence that he has, is not a severe mental disease or defect that would prevent him from knowing the difference from right or wrong or appreciating the criminality of his actions that night at Teasers."

(Petersen's brief, p. 91, quoting R. 1029-30.) Petersen further contends that District Attorney Valeska made an additional erroneous statement of law in his closing statement during the guilt phase of his capital-murder trial when he said:

> "Dr. McKeown's report. What did he tell you? Let me read what Dr. McKeown--you'll have this report. Remember I introduced it into evidence? You remember.
>
> "It says, 'While the mental health issues are reportedly in existence and he is currently taking medications consistent with a mood disorder for bipolar, there is not an indication during the time frame in question his behavior, his thinking, his judgment or his decision making was impaired as to the extent that he would have lacked the ability to appreciate the nature and quality of his actions and behavior during the time frame to a severe mental disease or defect.' "

(Petersen's brief, p. 91, citing R. 4376-77.) According to Petersen, both of those statements misstate the law concerning mental illnesses in Alabama because, he says, under Alabama law, bipolar disorder can provide a basis for an insanity defense. (Petersen's brief, p. 91, citing Sasser v. State, 387 So. 2d 237, 239-40 (Ala. Crim. App. 1980), and Russell v. State, 45 So. 3d 779, 787 (Ala. Crim. App. 2010).)

Contrary to Petersen's argument here, the statements made by District Attorney Valeska during his opening and closing statements were not improper. A prosecutor can present his own impressions that he develops based on the evidence, see Williams v. State, 627 So. 2d 994, 995 (Ala. Crim. App. 1992), and Petersen's claim fails to demonstrate how these statements "so infected the trial with unfairness as to make the resulting [verdict] a denial of due process." Hutcherson, 243 So. 3d at 869.

Second, Petersen argues that the prosecutor misled and confused the jury when, during his opening statement, he made the following comments concerning the jury's determination of Petersen's level of intoxication on the night of the shootings:

> "And there will be some evidence they say, yeah, he was drunk, yeah, he had speech slurred, yeah, whatever. Okay. Well, what's your terminology of drunk? But, let me jump to what Judge Mendheim--I expect the evidence to be voluntary intoxication, once again, negate murder to manslaughter. Excuse the expression. It ain't a drink or two. You have to consume enough that you can't form an intent in any way. Basically, you've got to be in what? A drunken stupor."

***66** (R. 1054.) He further argues that the prosecutor's repeated use of the phrase "drunken stupor" when asking witnesses to gauge the level of Petersen's intoxication on the night of the shootings confused and misled the jury. (Petersen's brief, p. 92, citing R. 1191, 1393, 1460, 1727, 1831, 2003, 2006, 2083, and 2091.) Specifically, Petersen contends that using that terminology erroneously led the jury to believe that Alabama law requires an intoxication defense to rise to the level of a "drunken stupor" in order to negate intent and result in an acquittal. Id.

After reviewing these questions in the context of the record, we disagree with Petersen's argument. If anything, those statements and questions were formulated based on District Attorney Valeska's own permissible impressions that he developed based on the evidence. See Williams v. State, 627 So. 2d 994, 995 (Ala. Crim. App. 1992). Moreover, the record indicates that the circuit court told the jury that statements or questions made by the prosecution were not evidence and even gave the following instruction concerning intoxication:

> "Intoxication includes a disturbance of mental or physical capacities resulting from the introduction of any substance or substances into the body. Intoxication, whether voluntary or involuntary, does not constitute a mental disease or defect or insanity. That's a separate defense."

(R. 4425.) "[A]n appellate court presumes that the jury follows the trial court's instructions unless there is evidence to the contrary." Thompson, 153 So. 3d at 158 (internal quotations and citation omitted). It is presumed that the jury applied the correct standard regarding intoxication in rendering its verdict, and, thus, it cannot be said that the prosecutor's use of that phrase "so infected the trial with unfairness as to make the resulting [verdict] a denial of due process." Hutcherson, 243 So. 3d at 869.

Third, Petersen argues that the prosecutor "improperly invoked differences between [his] appearance at trial and [his] appearance at the time of the shooting and arrest as evidence of guilt, ... violating his right to remain silent." (Petersen's brief, p. 92.) Petersen's argument here fails to satisfy the requirements of Rule 28(a)(10), Ala. R. App. P.

This rule requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Rule 28(a)(10), Ala. R. App. P. "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998).

Petersen's argument here is nothing more than a bare allegation. He fails to present any legal analysis demonstrating how the prosecutor's statements constitute plain error. Thus, he has failed to satisfy his duty to provide this Court with a sufficient argument under Rule 28(a)(10), Ala. R. App. P.

Moreover, even if he had complied with the requirements of Rule 28(a)(10), Ala. R. App. P., nothing in the record before us indicates that the prosecutor's comments "so infected the trial with unfairness as to make the resulting [verdict] a denial of due process." Hutcherson, 243 So. 3d at 869 (internal quotations marks and citation omitted). Thus, no plain error exists that would entitle Petersen to relief on this claim.

***67** Finally, Petersen argues that, during voir dire, the prosecutor repeatedly told the jury that it need not consider evidence of mitigating circumstances in rendering its verdict. (Petersen's brief, p. 92, citing R. 434, 436-37.) The record on appeal, however, contradicts Petersen's argument.

During voir dire, the prosecutor made the following statements to the jury with regard to its consideration of mitigating evidence:

> "[T]he jury has the right, and they have to--you have to--you not may--you have to consider any mitigation the defense puts on. Once again, I say, you know, you just can't not consider it. You have to listen to it and hear it. But it doesn't mean you have to accept it. It just says you have to listen. Okay?
>
> "....
>
> "But you have to listen to what they put on. But just because they put it on does not mean that you have to accept it. They can put on mitigating factors, and it's the State's job and responsibility to disprove them by a preponderance."

(R. 434, 436-37.) Based on the excerpts quoted above, it is clear that the prosecution did not tell the jury it could not consider any evidence of mitigating circumstances offered by the defense. It cannot be said that the prosecutor's statements during voir dire "so infected the trial with unfairness as to make the resulting [verdict] a denial of due process." Hutcherson, 243 So. 3d at 869.

Petersen has failed to demonstrate how any of the incidents discussed above constituted prosecutorial misconduct. Thus, he is not entitled to relief on this claim.

XVIII.[32]

Petersen contends that the circuit court erred in failing to grant his motion for a judgment of acquittal. (Petersen's brief, p. 94.) Specifically, he argues that the State failed to prove that he killed Cameron Eubanks "during" the commission of a second-degree burglary offense as required by § 13A-5-40(a)(4), Ala. Code 1975, as charged in the indictment against Petersen. Id. As a result, Petersen contends that his rights to due process, a fair trial, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law were violated. Id.

Generally, "[w]e review a trial court's denial of a motion for a judgment of acquittal 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 defendant guilty beyond a reasonable doubt." Mims v. State, 816 So. 2d 509, 512 (Ala. Crim. App. 2001). It is well settled:

> " 'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985).
>
> " '....
>
> " ' "The role of appellate courts is not to say what the facts are. Our role, ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision to the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978). An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." Kelly v. State, 273 Ala. 240, 244, 139 So. 2d 326 (1962).... A verdict on conflicting evidence is conclusive on appeal. Roberson v. State, 162 Ala. 30, 50 So. 345 (1909). "[W]here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense." Fuller v. State, 269 Ala. 312, 333, 113 So. 2d 153 (1959), cert. denied, Fuller v. Alabama, 361 U.S. 936, 80 S. Ct. 380, 4 L.Ed. 2d 358 (1960).' Granger [v. State], 473 So. 2d [1137,] 1139 [(Ala. Crim. App. 1985)]."

***68** White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989).

Petersen was convicted of, among other things, the murder of Cameron Eubanks, made capital because it was committed during the commission of a second-degree burglary, see § 13A-5-40(a)(4), Ala. Code 1975. The statute governing that capital offense provides that the following is a capital offense: "Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant." Alabama law provides that a person commits second-degree burglary when he

> "knowingly enters or remains unlawfully in a building with intent to commit theft or a felony therein and, if in effecting entry or while in the building or in immediate flight therefrom, the person or another participant in the crime:
>
> "....
>
> "(3) In effecting entry, is armed with a deadly weapon or dangerous instrument or, while in the building or in immediate flight from the building, uses or threatens the immediate use of a deadly weapon or dangerous instrument against another person. The use of or threatened use of a deadly weapon or dangerous instrument does not include the mere acquisition of a deadly weapon or dangerous instrument during the burglary."

§ 13A-7-6(a)(3), Ala. Code 1975.

Petersen argues that the evidence presented by the State during his capital-murder trial failed to demonstrate that there was an "entry" because Eubanks was shot and killed while he was outside Teasers. This Court has previously stated, however:

> " 'The common law defined the crime of burglary far more narrowly than its statutory successor does. Common-law burglary required a breaking and entering of the dwelling of another in the nighttime with the intent to commit a felony. Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 8.13 (1986). When Alabama adopted its current burglary statute, as part of the Alabama Criminal Code, by Act No. 607, Reg. Session, Ala. Acts 1977, the legislature expanded the crime of burglary beyond its common-law boundaries, by eliminating most of the common-law requirements. The requirement of a "breaking" was one requirement deleted. Perry v. State, 407 So. 2d 183 (Ala. Crim. App. 1981). The State is no longer required to prove that the defendant broke and entered the premises. Instead, the strictures of that element have been replaced with the general requirement of a trespass on premises through an unlawful entry or an unlawful remaining.' "

Cooper v. State, 912 So. 2d 1150, 1155 (Ala. Crim. App. 2005) (quoting Davis v. State, 737 So. 2d 480, 482-83 (Ala. 1999)(emphasis added)).

The evidence presented by the State at trial established that, on the night of the shooting, Petersen was escorted out of

Teasers by Cameron Eubanks after the co-owner of the club, Bruce Middleton, told him to leave. After he was escorted out, Petersen went to his truck and got his gun. As he approached the club with his gun, he saw Eubanks walking back into the club. Petersen approached Eubanks and shot him multiple times. After being shot, Eubanks "fell in the doorway just outside the door." (R. 1491.) Because Petersen had already been told to leave the club, the fact that he was still on the property and returned to the entrance of the club was sufficient to show that he was "unlawfully remaining" on the property when he killed Eubanks.

***69** Based on the evidence presented above, it is clear that the State provided sufficient evidence from which the jury could reasonably and fairly infer that Petersen caused Eubanks's death after shooting Eubanks while Petersen remained unlawfully on the premises. Thus, the evidence presented by the State was sufficient to establish a prima facie case of capital murder during the commission of a second-degree burglary and was sufficient for the jury to find Petersen guilty of that offense beyond a reasonable doubt. Accordingly, Petersen's motion for a judgment of acquittal was properly denied.

Penalty-Phase Issues

XIX.[33]

Petersen argues that the circuit court "erroneously refused to find as a statutory mitigating circumstance that [his] ability to appreciate the criminality of his conduct or conform it to the law was impaired." (Petersen's brief, p. 76.) Specifically, Petersen argues that there was "voluminous evidence" supporting a finding of this mitigating circumstance. Id. According to Petersen, despite this evidence, the circuit court "refused" to find that that statutory mitigating circumstance existed because the jury rejected Petersen's defenses during the guilt phase. Id. As a result, Petersen says that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Alabama law were violated. (Petersen's brief, p. 77.)

This Court recently addressed a similar argument and stated:

> "Section 13A–5–45(g), Ala. Code 1975, provides that, '[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.' The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed. 2d 973 (1978), held that a circuit court must consider all evidence offered in mitigation when determining a capital defendant's sentence. However, a defendant's proffer of evidence in support of a mitigating circumstance does not require the trial court to find that the mitigating circumstance exists. Rather, the trial court, after considering all proffered mitigating evidence, has the discretion to determine whether a particular mitigating circumstance has been proven. E.g., Carroll v. State, 215 So. 3d 1135 (Ala. Crim. App. 2015); Albarran v. State, 96 So.3d 131, 213 (Ala. Crim. App. 2011)."

Largin v. State, 233 So. 3d 374, 424 (Ala. Crim. App. 2015). During the penalty phase of his capital-murder trial, Petersen offered the following statutory mitigating circumstances into evidence: (1) that he had no significant history of prior criminal activity; (2) that, at trial, evidence was presented suggesting that he was suffering from extreme mental or emotional disturbance at the time of the offense; (3) that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of diagnosed mental illnesses together with the mixture of psychotropic drugs and alcohol; and (4) that he was 22 years old at the time of the offense. (R. 5094-95, see §§ 13A–5–51(1), (2), (6), and (7), Ala. Code 1975.) He also offered the following nonstatutory mitigating circumstances into evidence: (1) that, despite having been involuntarily committed to the Department of Mental Health before purchasing the firearm, Petersen was permitted to purchase the firearm used in the shooting; (2) that, despite Petersen having been involuntarily committed, the Coffee County Sheriff's office negligently issued a concealed-carry permit to Petersen, which allowed him to legally carry the gun used in the shooting; and (3) that South Central Alabama Mental Health Center offered testimony in direct conflict with Petersen's psychiatrist, who recommended long-term commitment to the state hospital. (R. 4536-41.)

***70** Contrary to Petersen's argument, the circuit court considered the above mitigating evidence. In its sentencing order, the court stated the following:

> "The court gives great weight to the mitigating circumstances regarding Petersen's mental health conditions, treatment and lack of treatment. The court finds that the defendant's mental health condition at the time of the murders, as well as ingestion of

alcohol and [dextromethorphan] coupled with his sudden cessation of his prescribed mental health medications supports mitigation. While these facts constitute mitigating circumstances in sentencing, they are insufficient in weight to outweigh the aggravating circumstances. Despite his mental health condition and substances in his system, as well as his sudden cessation of his psychotropic medication at the time of the murders, Petersen was fully aware of his actions and he possessed the criminal intent to kill many people. The jury rejected his insanity defense and intoxication defenses.

"The court also gives weight as mitigating circumstances to Petersen's age and his life history prior to the murders. Petersen's father committed suicide while Petersen was a young boy. Petersen's mother had a series of unsuitable men in the home that had a negative influence on Petersen. In addition, as [a] mitigating circumstance, the court gives weight to the fact Petersen has no significant criminal history prior to the murders.

"The court considers all of the mitigating circumstances found to exist, as well as all facts from trial and sentencing that may be considered as evidence of mitigating circumstances. Clark v. State, 896 So. 2d 584 (Ala. Crim. App. 2000) ("Although the trial court did not list and make findings as to the existence or nonexistence of each nonstatutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings only indicates that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider the evidence.").

"The defense submitted to the court for consideration as mitigating circumstances, which the court has considered, the judgment of the Coffee County probate court rejecting long-term commitment of Petersen to the State of Alabama for mental health treatment, as well as Coffee County sheriff's department issuing Petersen a concealed carry pistol permit shortly before the murders. After consideration, the court declines to give any weight to these actions as mitigating circumstances supportive of a life imprisonment without parole sentence. The lawful action by an Alabama sheriff to issue a concealed carry pistol permit cannot mitigate punishment for a person who subsequently commits a crime. For instance, if a jury finds a person 'not guilty' and the person later commits a crime deserving death or imprisonment that person cannot seek mitigation of punishment by arguing that if the jury had convicted him and he was sentenced to prison earlier he should receive [a] less severe sanction now for his new crime. Another example is if a person is convicted but an appellate court's judgment cannot serve as mitigation. If the probate court's judgment under the facts of this case is a mitigating circumstance entitled to weight, it would be the same as this court recognizing that judicial judgments, whether judge or jury or appellate, must take into consideration when entering a judgment whether a party before it may later commit a capital crime. Such a recognition would impair honest and unbiased judicial decision making. Further, neither factually or legally may court judgments, actions of legislative bodies, or functions of government officers operate as guarantors as factual mitigation of punishment for the new crime. Accordingly, the court declines to give any weight to these requests as mitigation.

***71** "....

"Nonetheless, this Court's decision is based only upon the finding that the aggravating circumstances outweighed the mitigating circumstances."

(C. 551-53.)

In light of the excerpts from the circuit court's order quoted above, we find that, although Petersen proffered evidence in support of the mitigating circumstances he presented during the penalty phase of his capital-murder trial and the trial court considered that evidence, it assigned that evidence no weight. The court acted within its discretion when it found that the aggravating circumstances presented by the state substantially outweighed the mitigating circumstances. See Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] —— So. 3d ——, —— (Ala. Crim. App. 2015). Thus, Petersen is not entitled to relief on this claim.

XX.[34]

Petersen contends that the circuit court's limiting instruction on hearsay evidence addressing his level of intoxication on the night of the offense precluded the jury from considering that evidence for mitigation purposes. (Petersen's brief, p. 77.) Specifically, according to Petersen, the court's instructions that evidence of his intoxication could not be used to "impeach testimony from the guilt phase" or to "contest" the finding of guilt effectively precluded consideration of the evidence altogether and, therefore, conflict with "clear state and federal law establishing that 'in capital cases, the

sentencing body may not be precluded from considering any relevant mitigating evidence.' " (Petersen's brief, p. 78 (quoting Roberts v. State, 735 So. 2d 1244. 1265 (Ala. Crim. App. 1997) and Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982)).) He further contends that, because it was his burden to prove that mitigating circumstances existed during the penalty phase of his capital-murder trial, he should have been permitted to discuss his level of intoxication on the night of the offense. (Petersen's brief, pp. 78-79.) Petersen did not raise this claim below; thus, it is subject to plain-error review. See Rule 45A, Ala. R. App. P.

The record reveals that, during his opening statement at the penalty phase of Petersen's capital-murder trial, Petersen's defense counsel stated that testimony given by law-enforcement officials during the guilt phase of Petersen's trial was false and counsel noted that he had newspaper articles containing statements indicating that Petersen was intoxicated at the time of his arrest. (R. 4543-46.) The State objected to the statements from those articles concerning Petersen's intoxication that night on the basis that those statements constituted inadmissible hearsay. (R. 4544-45.)

Following a discussion outside of the presence of the jury, the circuit court gave the jury the following instruction with regard to its consideration of that evidence:

> "Ladies and gentlemen. I'll let--I'll allow the defense to submit to you as a mitigating circumstance an issue that was purportedly reported in some news outlets shortly after this offense, [re]porting that the sheriff's office believed that it was--there was alcohol involved in some way. The report will speak for itself. That is hearsay. The State, during the guilt phase, through some of its officers, denied the accuracy of those news reports.
>
> "In the--in this phase, for mitigating circumstances, hearsay is permissible for a jury to consider not for an aggravating circumstance, but they can for a mitigating circumstance. So, that's what it's offered for.
>
> ***72** "But, again, I want to remind you that the State does have the right to contest the factual validity of this report or these reports. But the burden of proof will be on them to disprove that it's factually accurate by a preponderance of the evidence.
>
> "If you conclude by a preponderance of the evidence that it's factually inaccurate, then you cannot consider it as a mitigating circumstance. But if you find, during the actual evidentiary part of this phase, that the State is unable to prove that it is factually inaccurate by a preponderance of the evidence, then it is a mitigating circumstance that you must consider. But, again, I'm not commenting or telling you what weight to give the circumstance. But it will be submitted to you with that understanding. Okay."

(R. 4546-48.) When the defense continued to argue about the statements made by law-enforcement officers during the guilt phase of Petersen's capital-murder trial concerning Petersen's level of intoxication, the State objected again. (R. 4548.) The circuit court then gave the following instruction:

> "Again, make sure I'm clear. It's not admitted for them to attempt to impeach testimony from the guilt phase of the trial. It can't be used for that purpose. You've already determined by lawful evidence that this Court admitted beyond a reasonable doubt the defendant is guilty. That cannot be contested by either side any further. That has been determined.
>
> "The only purpose it can be used for is a mitigating circumstance to justify a sentence of life without parole as opposed to the death sentence. It would not be properly considered as impeachment of other witness[es'] testimony at trial."

(R. 4548-49.)

Petersen contends that the above-quoted instruction erroneously prevented the jury from considering his level of intoxication as a potential mitigating circumstance during the penalty phase. We disagree.

Section 13A–5–45(g), Ala. Code 1975, provides:

> "The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."

Additionally,

> "in Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L.Ed. 2d 973 (1978), the United States Supreme Court held 'that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of

the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' Additionally, in Ex parte Smith, [Ms. 1010267, March 14, 2003] —— So.2d —— (Ala. 2003), the Alabama Supreme Court, discussed mitigating circumstances in the context of a capital case as follows:

" 'To determine the appropriate sentence, the sentencer must engage in a "broad inquiry into all relevant mitigating evidence to allow an individualized determination." Buchanan v. Angelone, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L.Ed. 2d 702 (1998). Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation. Jacobs v. State, 361 So. 2d 640, 652–53 (Ala. 1978). See 13A–5–45(g), Ala. Code 1975 ("the defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52"). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L.Ed. 2d 934 (1987) (O'Connor, J., concurring specially).' "

***73** Osgood v. State, [Ms. CR-13-1416, Oct. 21, 2016] —— So. 3d —— (Ala. Crim. App. 2016).

As demonstrated by the excerpts from the record quoted above, the circuit court's instruction to the jury regarding evidence of Petersen's intoxication instructed the jury that it could not consider that evidence only for impeachment purposes. It did not prevent the jury from considering that evidence at all for mitigation purposes. It is well settled that " '[t]he jury is presumed to follow the instructions given by the trial court.' " Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010) (quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999)). Thus, Petersen's claim is without merit and he is not entitled to relief.

XXI.[35]

Petersen argues that his death sentence violates the Eighth Amendment to the United States Constitution because, he says, he is mentally ill. (Petersen's brief, pp. 94-95.) Specifically, Petersen argues that his death sentence is unconstitutional because, he says, his diagnoses of, among other things, bipolar disorder with psychotic features, autism-spectrum disorder, a personality disorder, and schizophrenia render him less culpable than a defendant who does not have a mental illness. Id. He did not present this argument to the circuit court; thus, it is subject to plain-error review. See Rule 45A, Ala. R. App. P.

This Court has previously addressed very similar arguments and stated:

"Under constitutional guidelines, in order to be exempt from the imposition of the death penalty, a defendant must meet the definition of mentally retarded, see Ex parte Perkins, 851 So. 2d 453 (Ala. 2002); Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed. 2d 335 (2002), or the definition of legal insanity. § 15–16–24, Ala. Code 1975. Moreover, Alabama's system of weighing the aggravating circumstances and the mitigating circumstances in order to determine whether life imprisonment without parole or death is the appropriate sentence in a case has been held not to be unconstitutional; thus, if the mitigating evidence concerning a defendant's mental health is determined to outweigh the aggravating evidence, the defendant could not be sentenced to death. § 13A–5–46(e)[, Ala. Code 1975]; § 13A–5–48[, Ala. Code 1975]."

Dotch v. State, 67 So. 3d 936, 1006 (Ala. Crim. App. 2010).

In the present case, the jury at the guilt phase rejected Petersen's defense of not guilty by reason of mental disease or defect. Thereafter, when determining sentencing, the jury considered evidence concerning the following mitigating circumstances: (1) that Petersen had no significant history of prior criminal activity; (2) that, at trial, evidence was presented suggesting that Petersen was suffering from extreme mental or emotional disturbance at the time of the offense; (3) that Petersen's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because of diagnosed mental illnesses together with the mixture of psychotropic drugs and alcohol; and (4) that Petersen was 22 years old at the time of the offense. (R. 5094-95, see §§ 13A–5–51(1), (2), (6), and (7), Ala. Code 1975.) The jury also considered evidence of the nonstatutory mitigating circumstance concerning Petersen's mental health and history.[36] The jury determined that this evidence was outweighed by the aggravating circumstances. The circuit court, in sentencing Petersen, gave weight to both the statutory and nonstatutory mitigating circumstances concerning Petersen's mental-health conditions, treatment, and lack of treatment but found

that "the aggravating circumstances substantially outweighs the mitigating circumstances." (C. 553.) Specifically, the court found that "[d]espite his mental health condition and substances in his system, as well as his sudden cessation of his psychotropic medication at the time of the murders, Petersen was fully aware of his actions and he possessed the criminal intent to kill many people." Id.

***74** Under the circumstances discussed above, Petersen was properly sentenced to death, and this Court will not extend or expand the constitutional prohibitions against the application of the death penalty in this case based on the argument being raised here. See Dotch, 67 So. 3d at 1006. Thus, Petersen is not entitled to relief on this claim.

XXII.[37]

Petersen also asserts that the circuit court erred when it "double counted" elements of his capital offenses as aggravating circumstances. (Petersen's brief, p. 95.) According to Petersen, "this arbitrarily renders defendants convicted of certain capital offenses automatically subject to the death penalty at the end of the guilt phase whereas others cannot be sentenced to death without additional jury findings, in violation of the Eighth Amendment." (Petersen's brief, p. 96.) Thus, Petersen contends that "his rights to a jury trial, due process, equal protection, a fair trial, an impartial jury, and a reliable sentencing, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law" have been violated. Id. Petersen raises this issue for the first time on appeal; therefore, it is reviewed for plain-error only. See Rule 45A, Ala. R. App. P.

The Alabama Supreme Court has previously recognized that,

> " 'when a defendant is found guilty of a capital offense, "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 sentencing hearing." Ala. Code 1975, § 13A–5–45(e); see also Ala. Code 1975, § 13A–5–50 ("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."). This is known as "double-counting" or "overlap," and Alabama courts "have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense." Ex parte Trawick, 698 So. 2d 162, 178 (Ala. 1997); see also Coral v. State, 628 So. 2d 954, 965 (Ala. Crim. App. 1992).' "

Ex parte Bohannon, 222 So. 3d 525, 529 (Ala. 2016) (quoting Ex parte Waldrop, 859 So. 2d 1181, 1187-88 (Ala. 2002)). Here, Petersen was convicted of capital offenses that had corresponding aggravating circumstances. Those offenses were murder made capital because the murder was "committed during the commission of a burglary," see § 13A-5-40(a)(4), Ala. Code 1975, which has a corresponding aggravating circumstance found in § 13A-5-49(4), Ala. Code 1975, and murder made capital because it involved "two or more persons by one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, which has a corresponding aggravating circumstance found in § 13A-5-49(9), Ala. Code 1975. Thus, Petersen is not entitled to relief on this claim.

XXIII.[38]

Petersen contends that "the use here of the shooting deaths themselves as the intended underlying felony for burglary in a charge of capital murder, [see] § 13A-5-40(a)(4), [Ala. Code 1975], does not 'genuinely narrow' the class of persons eligible for the death penalty." (Petersen's brief, pp. 96-97.) Therefore, Petersen argues that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law have been violated. (Petersen's brief, p. 97.) Once again, this argument was not raised at the trial level and will thus be reviewed for plain error. See Rule 45A, Ala. R. App. P.

***75** In Floyd, —— So. 3d at ——, this Court addressed a nearly identical argument. We stated:

> "In Shaw v. State, 207 So. 3d 79 (Ala. Crim. App. 2014), this Court rejected an identical argument:
>
> > " 'Shaw next argues that his two convictions for the capital offense of murder during the course of a burglary were improper because, he says, the State improperly relied on the murder of each victim as the underlying offense to establish the burglary. Specifically, Shaw argues that use of the murder itself to elevate the crime

to capital murder "violates the requirement that capital murder statutes 'genuinely narrow' the class of persons eligible for the death penalty." (Shaw's brief, p. 91.)

" '....

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

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

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

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

" '777 So. 2d at 839. Here, the murders were elevated to capital murders because they were committed during the course of a burglary and not because of the murders themselves. See Whitehead, supra. Shaw was properly charged and convicted of murdering Doris Gilbert and Robert Gilbert during the course of a burglary.'

"207 So.3d at 109."

Like the murders in Floyd and Shaw, the murder in this case was elevated to capital murder, not because of the murder itself, but because the murder was committed during the course of a burglary. Therefore, we find no error, much less plain error, in Petersen being charged with and convicted of murdering Cameron Eubanks, Tiffany Grissett, and Thomas Robins during the course of a burglary.

XXIV.

Petersen next contends that the circuit court erred when, he says, it "improperly instructed the jury it could not consider sympathy or mercy" in rendering its verdict during the penalty phase of his capital-murder trial. (Petersen's brief, pp. 97-98.) As a result, Petersen contends that his rights to "due process, a fair trial, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law" have been violated. Id. Because Petersen did not raise this argument in the circuit court, it is subject to plain-error review. See Rule 45A, Ala. R. App. P.

***76** According to Petersen, the following penalty-phase instruction given by the circuit court was erroneous:

"You must consider all of the evidence in this trial without bias, prejudice or sympathy for either side. You must be equally just to both sides. Your verdict must not be based on suspicion, speculation or conjecture."

(R. 4500.) This argument has been addressed and rejected by this Court, and the circuit court's instructions on passion and prejudice have routinely been upheld as proper. See Wilson v. State, 142 So. 3d 732, 797 (Ala. Crim. App. 2010); Vanpelt v. State, 74 So. 3d 32, 93 (Ala. Crim. App. 2009); Barber v. State, 952 So. 2d 393, 450–53 (Ala. Crim. App. 2005); Whisenhant v. State, 482 So. 2d 1225, 1235–36 (Ala. Crim. App. 1982); see also Jefferson v. State, 473 So. 2d 1100, 1103 (Ala. Crim. App. 1984) (failure to instruct jury to avoid any influence of passion, prejudice or other arbitrary factor required remand for new sentencing hearing). Petersen has not offered this Court any compelling reason to revisit these cases. Therefore, he has not shown that the circuit court's instruction was erroneous, and he is not entitled to relief on this claim.

XXV.

Petersen contends that both the circuit court and the prosecutor repeatedly misinformed the jury that its verdict was merely advisory, thereby leading the jury, he says, " 'to believe that the responsibility for determining the

appropriateness of the defendant's death rests elsewhere.' " (Petersen's brief, p. 98 (quoting Caldwell v. Mississippi, 472 U.S. 320 (1985)).) According to Petersen, this conduct violated his rights to due process, equal protection, a fair trial, and a reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. (Petersen's brief, p. 98.) This argument was not raised at the trial level and will be reviewed only for plain error. See Rule 45A, Ala. R. App. P.

In Caldwell v. Mississippi, supra, the United States Supreme Court held that "[i]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328. This Court, however, has previously held:

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

Doster v. State, 72 So. 3d 50, 104 (Ala. Crim. App. 2010) (quoting Smith v. State, 795 So. 2d 788, 837 (Ala. Crim. App. 2000)).

***77** On appeal, Petersen cites a few excerpts from the trial transcript that, he says, demonstrate the instances in which the circuit court impermissibly diminished the role of the jury during that time by referring to the jury's verdict as an "advisory verdict." (Petersen's brief, p. 98.) In one excerpt, the circuit court refers to the jury's role in rendering a verdict as follows:

> "[THE COURT:] But again, in Alabama, after a defendant is convicted of a capital offense, the law requires the jury to make a recommendation to me, the court, whether the defendant should receive[ ] the death penalty or a life without parole sentence."

(R. 4485.) In the remaining excerpts cited by Petersen, the court explained to the jury its role in determining and weighing the aggravating and mitigating circumstances in Petersen's case and stated that, under Alabama law, the jury would make its sentencing recommendation to the court based on those circumstances. (R. 4485, 4487, 4490, 4498-99, 4522, 5086.) At no point did either the court or the prosecution expressly refer to the jury's verdict as "advisory."

Contrary to Petersen's claim, those instructions and statements do not "impermissibly convey to the jury that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Doster, 72 So. 3d at 104. Instead, the instructions accurately explain the respective functions of the judge and jury. Thus, Petersen's claim is without merit.

XXVI.

Petersen argues that his death sentence is unconstitutional because, he says, it was imposed following an advisory, nonunanimous jury verdict. (Petersen's brief, pp. 98-99.) Petersen further argues that his death sentence violates the legal principles in Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 577 U.S. ——, 136 S. Ct. 616, 193 L.Ed. 2d 504 (2016), because, he says, the jury in his case did not find "unanimously beyond a reasonable doubt (1) the existence of all statutory aggravating circumstances on which the sentence is premised and (2) those aggravating circumstances outweigh the mitigating circumstances," which he claims is required by those cases. (Petersen's brief, p. 99.) Petersen contends that, as a result, his death sentence violated his right to a "jury trial, due process, a fair trial, equal protection, and a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." Id.

In State v. Billups, 223 So. 3d 954 (Ala. Crim. App. 2016), this Court addressed the constitutionality of Alabama's capital-punishment scheme in light of Hurst and, in doing so, rejected the arguments Petersen raises on appeal. Specifically, in Billups we summarized Hurst as follows:

> "In Hurst, the United States Supreme Court held Florida's capital - sentencing scheme unconstitutional. The Court noted that '[t]he analysis the Ring [v. Arizona, 536 U.S. 584 (2002),] Court applied to Arizona's sentencing scheme applies equally to Florida's.' Hurst, 577 U.S. at ——, 136 S. Ct. at 621–22. Florida's capital-sentencing scheme as it then existed was similar to Arizona's in that the maximum sentence authorized by a jury verdict finding a defendant guilty of first-degree murder was life imprisonment

without the possibility of parole; the defendant became eligible for the death penalty only if the trial court found the existence of an aggravating circumstance and found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Although Florida's procedure, unlike Arizona's, included an advisory verdict by a jury recommending a sentence, the Court found this distinction 'immaterial' because a Florida jury ' "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge[; therefore, a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." ' Hurst, 577 U.S. at ——, 136 S. Ct. at 622 (quoting Walton[v. Arizona], 497 U.S. [639] at 648, 110 S. Ct. 3047 [(1990)]). The Court reiterated that 'any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" ... must be submitted to a jury,' Hurst, 577 U.S. at ——, 136 S. Ct. at 621 (emphasis added), and concluded that Florida's procedure was unconstitutional because 'the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death," ' Hurst, 577 U.S. at ——, 136 S. Ct. at 622 (quoting former Fla. Stat. § 785.082(1)(a)); '[t]he trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." ' Hurst, 577 U.S. at ——, 136 S. Ct. at 622 (quoting former Fla. Stat. § 921.141(3).) As in Ring, in which the Court overruled its previous decision in Walton upholding Arizona's capital-sentencing scheme, the Court in Hurst overruled its previous decisions in Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed. 2d 728 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed. 2d 340 (1984), upholding as constitutional Florida's capital-sentencing scheme to the extent 'they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. at ——, 136 S. Ct. at 624 (emphasis added)."

***78** 223 So. 3d at 961-62 (footnote omitted). We further explained:

"Hurst did not ... hold unconstitutional the broad overall structure of Florida's capital-sentencing scheme--a hybrid scheme beginning with a bifurcated capital trial during which the jury first determines whether the defendant is guilty of the capital offense and then recommends a sentence, followed by the trial court making the ultimate decision as to the appropriate sentence. Rather, the Court held that Florida's capital-sentencing scheme was unconstitutional to the extent that it specifically conditioned a capital defendant's eligibility for the death penalty on findings made by the trial court and not on findings made by the jury, which contravened the holding in Ring. The Court emphasized several times in its opinion that Florida's capital-sentencing statutes did not make a capital defendant eligible for the death penalty until the trial court made certain findings. See Former Fla. Stat. § 775.082(1)(a) (2010) ('[A] person who has been convicted of a capital felony shall be punished by death' only 'if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.' (emphasis added)). And the Court held only that 'Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.' Hurst, 577 U.S. at ——, 136 S. Ct. at 624.

"The Court in Hurst did nothing more than apply its previous holdings in Apprendi [v. New Jersey, 530 U.S. 466 (2000),] and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. As the State correctly argues, 'Hurst did not add anything of substance to Ring.' (Petitions, p. 6.) The Alabama Supreme Court has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring. See, e.g., Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002); Ex parte Hodges, 856 So. 2d 936 (Ala. 2003); Ex parte Martin, 931 So. 2d 759 (Ala. 2004); Ex parte McNabb, 887 So. 2d 998 (Ala. 2004); and Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004)...."

223 So. 3d at 962-63.

Thereafter, this Court analyzed Alabama's capital-sentencing scheme and summarized Hurst's impact on it as follows:

"In sum, under Alabama's capital-sentencing scheme, a capital defendant is not eligible for the death penalty unless the jury unanimously finds beyond a reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances in § 13A–5–49 exists. Unlike both Arizona and Florida, which conditioned a first-degree-murder defendant's eligibility for the death penalty on a finding

by the trial court that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by the jury that at least one aggravating circumstance exists. If the jury does not unanimously find the existence of at least one aggravating circumstance, the trial court is foreclosed from sentencing a capital defendant to death. If the jury unanimously finds that at least one aggravating circumstance does exist, then the trial court must proceed to determine the appropriate sentence. Although the trial court in Alabama must also make findings of fact regarding the existence or nonexistence of aggravating circumstances, the trial court's findings are not the findings that render a capital defendant eligible for the death penalty, as was the case in Ring and Hurst. Under Alabama law, only a jury's finding that an aggravating circumstance exists will expose a capital defendant to the death penalty.

***79** "Alabama's capital-sentencing scheme, unlike the schemes held unconstitutional in Ring and Hurst, does not 'allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. at ——, 136 S. Ct. at 624; accord Ring, 536 U.S. at 609, 122 S. Ct. 2428. Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst."

223 So. 3d at 970.

Here, as explained above, the jury found Petersen guilty of the following capital offenses: (1) one count of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, and (2) three counts of murder made capital because three people were killed during the course of a burglary, see § 13A-5-40(a)(4) Ala. Code 1975. Those capital offenses have their own corresponding aggravating circumstances, which can be found in sections 13A-5-49(9) and (4), Ala. Code 1975.

As we explained in State v. Billups:

" 'Many capital offenses listed in Ala. Code 1975, § 13A–5–40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A–5–49.' Ex parte Waldrop, 859 So. 2d at 1188. As noted above, '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.' § 13A–5–45(e). When the capital offense itself includes as an element one of the aggravating circumstances in § 13A–5–49 (often referred to as 'overlap'), the jury will make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the guilt phase of the trial. In those cases, the maximum sentence a defendant convicted of a capital offense may receive based on the jury's guilty verdict alone is death, and Apprendi, Ring, and Hurst are satisfied because the jury's guilt-phase verdict necessarily includes the finding of an aggravating circumstance necessary for imposition of the death penalty."

223 So. 3d at 967. The record indicates that, in addition to the two aggravating circumstances discussed above, the jury also found that the State had established another aggravating circumstance beyond a reasonable doubt--that Petersen had created a greater risk of death to many persons, see § 13A-5-49(3), Ala. Code 1975.

Thus, in this case, the jury's guilt-phase verdict established that the aggravating circumstances were proven beyond a reasonable doubt, and the maximum sentence that Petersen could have received based on those verdicts was death. Accordingly, "the jury, not the trial court, ... [made] the critical finding necessary for imposition of the death penalty," and Petersen is not entitled to relief on this claim.

XXVII.

Pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Petersen's capital-murder convictions and death sentence. Petersen was convicted of one count of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, three counts of murder made capital because three people were killed during the course of a burglary, see § 13A-5-40(a)(4) Ala. Code 1975, and one count of attempted murder, see §§ 13A-6-2 and 13A-4-2, Ala. Code 1975. The jury recommended by a vote of 10 to 2 that Peterson be sentenced to death on the capital-murder convictions. The circuit court sentenced Petersen to death for his capital-murder convictions and to life imprisonment for his attempted-murder conviction.

***80** In sentencing Petersen to death, the circuit court correctly found that the mitigating circumstances in Petersen's

case were substantially outweighed by the aggravating circumstances. Specifically, the court found the following aggravating circumstances existed and gave them "great weight": (1) that Petersen knowingly created a great risk of death to many persons; (2) that the capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit burglary; and (3) that Petersen intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct. (C. 546-47, 549.) The court then considered the statutory mitigating circumstances and found that several existed.[39] (C. 547-48.) Thus, the circuit court's order shows that it properly weighed the aggravating circumstances and the mitigating circumstances and that it correctly sentenced Petersen to death. The record supports the court's findings.

Additionally, § 13A-5-53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances in order to determine whether Petersen's sentence of death is appropriate.

> " 'Section 13A–5–48, Ala. Code 1975, provides:
>
> > " ' "The process described in Sections 13A–5–46(e)(2), 13A–5–46(e)(3) and Section 13A–5–47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."
>
> " ' "The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation." Ex parte Clisby, 456 So. 2d 105, 108–09 (Ala. 1984). "[W]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party." Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990).... "The weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority." Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000).'
>
> Stanley [v. State], 143 So. 3d [230,] 333 [(Ala. Crim. App. 2011)]."

Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] —— So. 3d ——, —— (Ala. Crim. App. 2015). As explained above, the circuit court gave great weight to the aggravating circumstances it found to exist. We agree with the court's findings and, after independently weighing the aggravating circumstances and the mitigating circumstances, this Court holds that Petersen's death sentence is appropriate.

***81** As required by § 13A—5—53(b)(3), Ala. Code 1975, this Court must now determine whether Petersen's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. In this case, Petersen was convicted of one count of murder made capital because two or more persons were murdered by one act, scheme, or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, and three counts of murder made capital because three people were killed during the course of a burglary, see § 13A-5-40(a)(4) Ala. Code 1975. This Court has previously stated:

> " 'Similar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So. 2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So.2d 1148 (Ala. Crim. App.), opinion on return to remand 913 So. 2d at 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So. 2d 841 (Ala. Crim. App. 2000), aff'd, 809 So. 2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S. Ct. 824, 151 L.Ed. 2d 706 (2002) (five deaths); Samra v. State, 771 So.2d 1108 (Ala.Crim.App.1999), aff'd, 771 So.2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S. Ct. 317, 148 L.Ed. 2d 255 (2000) (four deaths); Williams v. State, 710 So. 2d 1276 (Ala. Crim. App. [1996]), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S. Ct. 2325, 141 L.Ed. 2d 699 (1998) (four deaths); Taylor v. State, 666 So. 2d 36 (Ala. Crim. App.), on remand, 666 So. 2d 71 (Ala. Crim. App. 1994), aff'd, 666 So. 2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S. Ct. 928, 133 L.Ed. 2d 856 (1996) (two deaths); Siebert v. State, 555 So. 2d 772 (Ala. Crim. App.), aff'd, 555 So. 2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3297, 111 L.Ed. 2d 806 (1990) (three deaths); Holladay v. State, 549 So. 2d 122 (Ala. Crim. App. 1988), aff'd, 549 So. 2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S. Ct. 575, 107 L.Ed. 2d 569 (1989) (three deaths); Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988), aff'd, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L.Ed. 2d 300 (1990) (four deaths); Hill v. State, 455 So. 2d 930 (Ala.

Crim. App.), aff'd, 455 So. 2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L.Ed. 2d 716 (1984) (three deaths).'

"Stephens v. State, 982 So. 2d 1110, 1147–48 (Ala. Crim. App. 2005), rev'd on other grounds, Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). See also Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007)."

Phillips, —— So. 3d at ——. We conclude that Petersen's death sentence is neither excessive nor disproportionate.

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

Conclusion

For the foregoing reasons, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Welch and McCool, JJ., concur. Windom, P.J., and Kellum, J., concur in the result.

All Citations

--- So.3d ----, 2019 WL 181145

Footnotes

1 On appeal, Petersen does not raise any specific arguments regarding his conviction for attempted murder.

2 The record in this case was supplemented at least twice in an effort to correctly paginate the transcripts from pretrial hearings and trial. This Court used the initial record on appeal and the "second corrected record on appeal" to evaluate Petersen's claims. References to the Clerk's record from the original record on appeal are denoted with "C. ____." Citations to the transcripts from Petersen's pretrial hearings and trial, found in the second corrected record on appeal, are denoted with "R. _____."

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

4 Those mitigating circumstances found to exist by the circuit court were: (1) that Petersen had no significant history of prior criminal activity; (2) that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) that Petersen's age at the time of the crime was pertinent; (4) that Petersen was under the influence of alcohol or cough syrup containing DXM or a combination of alcohol and cough syrup containing DXM at the time of the capital offenses; (5) that Petersen was not being treated for his mental-health condition and he was in need of mental-health treatment at the time of the capital offenses; (6) that his father committed suicide when he was young; (7) that Petersen was discharged from the Navy after being found unfit upon the discovery of his mental-health issues; and (8) that there was a sudden discontinuation of mental-health and/or psychotropic medications during a period just before the commission of the capital offenses.

5 This claim appears as Issue II in Petersen's brief.

6 Those veniremembers were R.D., J. Bas., R.E., R.G., D.G., A.D., and W.H. (Petersen's brief, p. 29.)

7 We note that, although Petersen did challenge prospective juror J. Bas., he did so only on the basis that she had indicated that she had family members who were in law enforcement and had strong views about the death penalty. (R. 898-99.)

8 Those 10 veniremembers were R.E., J.G., J. Cl., B.B., J. Bas., C.D., G.D., K.C., M.C., and D.G.

9 The record is unclear as to who sat on Petersen's final jury. Using the 69 juror questionnaires, voir dire transcript, and the strike list provided to this Court, this Court believes that Petersen's final jury consisted of: C.B. (No. 7), J.B. (No. 11), N.B. (No. 24), C.C. (No. 30), C. Cr. (No. 46), A.D. (No. 64), S.D. (No. 68), B.E. (No. 74), Z.H. (No. 101), W.H. (No. 102), J.H. (No. 106), and D.H. (No. 111). We believe the alternates for Petersen's jury were J.B. (No. 21) and T.G. (No. 83). Our analyses of Petersen's Batson and J.E.B. claims are based on this determination.

10 This claim appears as Issue III in Petersen's appellate brief.

11 Those veniremembers were K. Ca. (No. 28), T.M. (No. 107), K. Cr. (No. 47), J. Bar. (No. 4), M.C. (No. 49), J.C. (No. 37), and M.B. (No. 5).

12 This claim appears as Issue III.B. in Petersen's appellate brief.

13 This claim appears as Issue XIV in Petersen's brief.

14 The juror questionnaires do not include a question that specifically asked prospective jurors whether they would consider mitigating evidence before imposing the death penalty. The only question that could be construed as having presented that type of question was the following: "Please indicate how you feel about the following statement: 'When it comes to whether a person should be sentenced to death for intentionally committing a capital murder, their background and/or the circumstances of the crime do not matter.'" Veniremembers were then asked to indicate whether they agreed or disagreed with that statement.

In responding to that question, prospective jurors J. Bas., T.B., B. El., and C.G. wrote that they disagreed with that statement. Prospective jurors C.D., G.D., E.G., J.G., and K.E. all indicated that they agreed with that statement. All nine veniremembers, however, expressly indicated that they were in favor of the death penalty.

15 This claim appears as Issue XV in Petersen's brief.

16 This claim appears as Issue XXIV in Petersen's brief.

17 This claim appears as Issue VII in Petersen's brief.

18 As an initial matter, we note that the State argues that this issue should be reviewed under the plain-error standard, see Rule 45A, Ala. R. App. P., because Petersen is raising this argument for the first time on appeal. (State's brief, p. 51.) The Alabama Supreme Court has recognized, however, that an adverse ruling on a defendant's motion to suppress statements made to the police, which included his request for a hearing, preserves that issue for review. See, e.g., Ex parte Jackson, 836 So. 2d 973, 974 (Ala. 2001). In the present case, the circuit court denied Petersen's motion to suppress, which included a request for a hearing. (C. 389-90.) Thus, this issue has been properly preserved for appellate review.

19 This claim appears as Issue VI in Petersen's brief.

20 This claim appears as Issue VIII in Petersen's brief.

21 This claim appears as Issue XI in Petersen's brief.

22 This claim appears as Issue XII in Petersen's brief.

23 This claim appears as Issue XVI in Petersen's brief.

24 This claim appears as Issue XVII in Petersen's brief.

25 This claim appears as Issue I in Petersen's brief.

26 We note that Petersen, unlike the defendant in Brownfield, did not attempt to withdraw his plea of not guilty by reason of mental disease or defect. That distinction, however, does not make a difference under the facts of Petersen's case. The challenged evidence in Brownfield was erroneously admitted, not because Brownfield attempted to withdraw his plea of not guilty by reason of mental disease or defect but because Brownfield, like Petersen, did not testify at his trial. The fact that Petersen did not attempt to withdraw his plea of not guilty by reason of mental disease or defect does not change the harmless-error analysis.

27 Petersen's specific challenges to the sufficiency of the evidence are addressed below.

28 This claim appears as Issue XIII in Petersen's brief.

29 This claim appears as Issue XIX in Petersen's brief.

30 This claim appears as Issue V in Petersen's brief.

31 This claim appears as Issue XVIII in Petersen's brief.

32 This claim appears as Issue XX in Petersen's brief.

33 This claim appears as Issue IX in Petersen's brief.

34 This claim appears as Issue X in Petersen's brief.

35 This claim appears as Issue XXI in Petersen's brief.

36 Those nonstatutory mitigating circumstances included: (1) that, despite having been involuntarily committed to the Department of Mental Health some months earlier, Petersen was permitted to purchase the firearm used in the shooting; (2) that Petersen was involuntarily committed but that the Coffee County Sheriff's office negligently issued a concealed-carry permit to Petersen, which allowed him to legally carry the gun used in the shooting; and (3) that South Central Alabama Mental Health Center offered testimony in direct conflict with Petersen's psychiatrist, who recommended long-term commitment to the state hospital. (R. 4536-41.)

37 This claim appears as Issue XXII in Petersen's brief on appeal.

38 This claim appears as Issue XXIII in Petersen's brief.

39 Those mitigating circumstances the circuit court found to exist were: (1) that Petersen had no significant history of prior criminal activity; (2) that the capital offense was committed while the defendant was under the influence of extreme mental

or emotional disturbance; (3) that Petersen's age at the time of the crime was pertinent; (4) that Petersen was under the influence of alcohol or cough syrup containing DXM or a combination of alcohol and cough syrup containing DXM at the time of the capital offense; (5) that Petersen was not being treated for his mental-health condition and was in need of mental-health treatment at the time of the capital offense; (6) that his father committed suicide when he was young; (7) that Petersen was discharged from the Navy after being found unfit upon the discovery of his mental-health issues; and (8) that there was a sudden discontinuation of mental-health and/or psychotropic medications during a period just before the commission of the capital offenses.

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APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

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

March 29, 2019

CR-16-0652 **Death Penalty**

Ryan Clark Petersen v. State of Alabama (Appeal from Houston Circuit Court: CC12-878; CC12-879; CC12-880; CC12-881; CC12-882)

NOTICE

You are hereby notified that on March 29, 2019, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Todd Derrick, Circuit Judge
Hon. Carla H. Woodall, Circuit Clerk
James Hubbard, Attorney
Angela Setzer, Attorney
Randall S. Susskind, Attorney
Audrey K. Jordan, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

March 30, 2020

1180504

Ex parte Ryan Clark Petersen. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Ryan Clark Petersen v. State of Alabama) (Houston Circuit Court: CC-12-878; CC-12-879; CC-12-880; CC-12-881; CC-12-882; Criminal Appeals: CR-16-0652).

ORDER

The Petition for Writ of Certiorari filed by Ryan Clark Petersen on May 10, 2019, having been submitted to this Court,

IT IS ORDERED that the Petition for Writ of Certiorari is GRANTED, limited to Issue V presented by the petition. The parties are also directed to brief and argue the appropriate standard of review for Batson-type claims raised initially on appeal, including whether Ex parte Bankhead, 585 So. 2d 112 (Ala. 1991), should be overruled.

The Petitioner may file a brief within fourteen (14) days from the date of this Order. Thereafter, the Respondent may file a brief in accordance with subsection (g)(2) of Rule 39. If the Petitioner or the Respondent chooses not to file a brief, that party must file a waiver of the right to file the brief within the time the brief is due under the appellate rules. See Rule 39(g)(1) and (2), Ala. R. App. P.

The Petitioner may file a reply brief in response to the Respondent's brief within fourteen (14) days of the filing of the Respondent's brief, in accordance with subsection (g)(3) of Rule 39, Ala. R. App. P.

See Rule 39(h), Ala. R. App. P., with regard to oral argument.

IN THE SUPREME COURT OF ALABAMA

March 30, 2020

PER CURIAM. Parker, C.J., and Bolin, Shaw, Bryan, Stewart, and Mitchell, JJ., concur.

Wise and Sellers, JJ., dissent.

Mendheim, J., recuses.

Witness my hand this 30rd day of March, 2020.

Clerk, Supreme Court of Alabama

FILED
March 30, 2020
11:42 am

Clerk
Supreme Court of Alabama

cc:
D. Scott Mitchell
R. Todd Derrick
James Hubbard
Angela Setzer
Randall S. Susskind
Steven Marshall
Audrey K. Jordan

APPENDIX D

REL: August 21, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1180504

Ex parte Ryan Clark Petersen

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

Ryan Clark Petersen)

(Houston Circuit Court, CC-12-878; CC-12-879; CC-12-880; CC-12-881; and CC-12-882; Court of Criminal Appeals, CR-16-0652)

PER CURIAM.

WRIT QUASHED. NO OPINION.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Bolin and Mitchell, JJ., concur specially.

Mendheim, J., recuses himself.

MITCHELL, Justice (concurring specially).

I concur in the decision to quash the writ. Nevertheless, I write to express my view that Ex parte Bankhead, 585 So. 2d 112 (Ala. 1991), and its progeny are due to be overruled.

In Bankhead, this Court undertook a plain-error review when the defendant, despite not making an objection at trial, claimed that the prosecution engaged in race discrimination when striking the jury. But the review framework that has developed since Bankhead for claims of race and sex discrimination in jury selection goes beyond the scope of plain-error review and is thoroughly unworkable. See Ex parte Phillips, 287 So. 3d 1179, 1238 (Ala. 2018) (Stuart, C.J., joined by Main and Wise, JJ., concurring specially and explaining that the holding of Bankhead "is problematic for several reasons" and calling for it to be overruled), and 287 So. 3d at 1255 (Sellers, J., concurring specially and agreeing with Chief Justice Stuart's discussion of Bankhead). Additionally, the review framework is not required by the United States Constitution; in fact, multiple federal appellate courts have held that defendants have no right to

review of unpreserved claims of race or sex discrimination in jury selection. See United States v. Reid, 764 F.3d 528, 533 (6th Cir. 2014); United States v. Brown, 634 F.3d 435, 440 (8th Cir. 2011); United States v. Abou-Kassem, 78 F.3d 161, 167 (5th Cir. 1996). Moreover, I am not aware of any provision in the Alabama Constitution that requires the review framework that this Court has come to apply since Bankhead. For these reasons, I would be in favor of overruling Bankhead and its progeny in an appropriate future case.

Bolin, J., concurs.

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

August 21, 2020

1180504 Ex parte Ryan Clark Petersen. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: State of Alabama v. Ryan Clark Petersen) (Houston Circuit Court: CC-12-878; CC-12-879; CC-12-880; CC-12-881; CC-12-882; Criminal Appeals : CR-16-0652).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 21, 2020:

Writ Quashed. No Opinion. (Special Writing) PER CURIAM - Parker, C.J., and Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur. Bolin and Mitchell, JJ., concur specially. 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 21st day of August, 2020.

Julia Jordan Weller

Clerk, Supreme Court of Alabama