APPENDIX A

2020 WL 2830015
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Court of Criminal Appeals of Alabama.

Thomas Robert LANE

v.

STATE of Alabama

CR-15-1087

|

May 29, 2020

Synopsis

Background: After defendant's conviction for capital murder was reversed and remanded for a new trial, 80 So.3d 280, defendant was convicted in the Circuit Court, Mobile County, No. CC-05-1499.80, of two counts of capital murder and was sentenced to death.

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

as a matter of first impression, the trial court's admission of testimony from five witnesses who testified during defendant's first capital murder trial, which conviction was later reversed because defendant was denied his counsel of choice, during subsequent trial as the prior testimony of an unavailable witness was not plain error;

the seizure of defendant during traffic stop did not amount to a de facto arrest;

police had probable cause to arrest defendant;

peremptory strike against African American prospective juror was race neutral, despite fact that both prospective juror and seated Caucasian juror had been discharged from the military;

testimony from police detective that the he thought the overflow drain on bathtub where drowning victim was found was working properly constituted admissible lay-witness opinion testimony; and

defendant's capital murder convictions following second trial did not violate double jeopardy, even though the trial court in defendant's first trial had entered a "judgment of acquittal" as to defendant's intentional murder conviction.

Affirmed.

Windom, P.J., recused herself.

Appeal from Mobile Circuit Court(CC-05-1499.80)

Opinion

McCOOL, Judge.[1]

***1** In 2016, Thomas Robert Lane was convicted of two counts of capital murder for intentionally killing his estranged wife Theresa Lane. The murder was made capital because it was committed during a burglary, § 13A-5-40(a)(4), Ala. Code 1975, and because it was committed for pecuniary gain, § 13A-5-40(a)(7), Ala. Code 1975. The jury recommended by a vote of 11-1 that Lane be sentenced to death, and the trial court followed the jury's recommendation and sentenced Lane to death.[2]

Facts and Procedural History

Lane was first brought to trial in 2006 for the murder of Theresa. See Lane v. State, 80 So. 3d 280 (Ala. Crim. App. 2010). Before that trial, the State filed a motion seeking to disqualify Lane's appointed counsel under Rule 3.7, Ala. R. Prof. Cond., which provides that, subject to limited exceptions, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Following a hearing on the State's motion, the trial court concluded that Lane's appointed counsel would be a necessary witness for the State and thus disqualified Lane's counsel and appointed new counsel to represent Lane. Lane, 80 So. 3d at 293. Thereafter, Lane was convicted of two counts of capital murder –- murder made capital because it was committed during a burglary, § 13A-5-40(a)(4), and murder made capital because it was committed for pecuniary gain, § 13A-5-40(a)(7). Lane, 80 So. 3d at 283. The jury recommended by a vote of 8-4 that Lane be sentenced to life imprisonment without the possibility of parole, but the trial court overrode the jury's recommendation and sentenced Lane to death. Id. at 283-84.

On appeal, this Court held that the trial court erred by disqualifying Lane's first appointed counsel and that "the trial court's unjustified removal of ... Lane's counsel violated Lane's Sixth Amendment right to continued representation by his counsel of choice." Lane, 80 So. 3d at 302. In addition, the Court held that "a violation of a criminal defendant's Sixth Amendment right to counsel of choice constitutes 'structural error' that cannot be harmless and that automatically requires reversal." Id. Thus, the Court reversed Lane's convictions and death sentence and remanded the case for a new trial. Id. at 302.

On February 29, 2016, Lane was again brought to trial on the same two charges of capital murder, i.e., capital-murder burglary, § 13A-5-40(a)(4), and capital murder for pecuniary gain, § 13A-5-40(a)(7). The evidence presented at Lane's second trial tended to establish the following facts.

At the time of Theresa's death, Lane and Theresa had separated and were in the process of divorcing, and Theresa was living with her friend, Pelagia Wilson, in Wilson's house. At approximately 7:00 a.m. on October 12, 2003, Theresa finished her shift at the Wal-Mart discount store where she worked, and a coworker who gave Theresa a ride home testified that Theresa arrived at Wilson's house at approximately 7:30 a.m. At approximately 10:00 a.m., Wilson arrived home from work and found Theresa dead in a bathtub. Wilson testified that water was still running from the bathtub faucet when she discovered Theresa's body, that one of the knobs controlling the volume of water was on "[a]ll the way" (R. 1414) and the other was on "[j]ust [a] little bit" (R. 1415), that Theresa's unclothed body was almost completely submerged in water, but that the water was "going down." (R. 1415.) Wilson turned off the water and telephoned emergency 911.

***2** Dr. Leszek Chrostowski, a forensic pathologist, performed an autopsy and concluded that Theresa's body reflected "hallmark[s] of drowning." (R. 2059.) Specifically, Dr. Chrostowski testified that he observed foam in Theresa's mouth and nose, water in Theresa's sphenoid sinuses, and petechial hemorrhaging in Theresa's eyes, which indicated that Theresa had been asphyxiated. Dr. Chrostowski also testified that he observed "multiple bruises and contusions" on Theresa's head, shoulders, chest, arms, and legs (R. 2058), which, according to Dr. Chrostowski, "indicate struggle." (R. 2062.) In fact, Dr. Chrostowski testified, the injuries on Theresa's arms constituted "blunt impact injuries which can be interpreted as defense wounds." (R. 2069.) Dr. Chrostowski also testified that he observed subdural hemorrhaging in the "occipital region" of Theresa's head, which, according to Dr. Chrostowski, "indicate[d] [the] application of blunt force." (R. 2064.) Thus, given the injuries to Theresa's head and "the contusions by the clavicle ... at the base of the neck" (R. 2065), Dr. Chrostowski testified that it appeared Theresa "hit the bathtub ... with the back of her head. And then she was pushed underneath." (R. 2064.) Based on his observations, Dr. Chrostowski concluded that the cause of Theresa's death was drowning and concluded, "without slightest doubt" (R. 2063), that the drowning was a homicide.

Regarding the events preceding Theresa's death, the evidence tended to establish the following facts. Lane and Theresa, who was a native of the Philippines, married in 1995 after Lane "met [Theresa] on the Internet through a mail-order bride service." (R. 1848.) In June 2003, however, Lane and Theresa separated, and Theresa moved out of the couple's mobile home and moved into Wilson's house; Lane remained in the mobile home. Shortly thereafter, Theresa contacted Ronnie Williams, an attorney, to assist Lane and Theresa in obtaining what was initially an uncontested divorce. However, disagreements subsequently arose between Lane and Theresa regarding the division of marital property, which delayed the divorce, and there was evidence indicating that Lane attempted to coerce Theresa into agreeing to divorce terms that Lane found satisfactory. Specifically, Williams testified that Theresa owned a Nissan truck at that time and that

> "the truck was being used by Lane as a wedge or carrot, so to speak, in front of [Theresa]. If she wanted her vehicle, she signed the paperwork. That sort of thing.
>
> "In fact, it got so bad where she would go to work, he would follow her, take the truck, leave her stranded there. Call my office, if your client wants the truck, tell her to sign the papers."

(R. 2011.) There was also evidence indicating that, while the divorce was pending, Lane harassed Theresa by showing up at the Wal-Mart store where she worked; that Theresa would take different routes to work "because [she] didn't know when [Lane] might would try to follow [her]" (R. 1632); that Lane left a threatening voicemail on Theresa's cellular telephone; and that, approximately one week before Theresa was murdered, Lane went to Wilson's house and knocked on the door but that Wilson and Theresa would not open the door because they were "scared." (R. 1411.)

Evidence also indicated that Lane was desperate to have the divorce finalized quickly and that, in an effort to expedite the divorce, he repeatedly contacted Williams to express frustration with the fact that the divorce was being delayed and to urge Williams to prioritize the finalization of the divorce. As to the reason Lane wanted the divorce finalized quickly, Williams testified:

> "Well, a couple of times I had conversations with [Lane]. But on one particular occasion he had a photo. He was trying to explain to me why he was in such a great rush to get this matter over with. And he had a photo of a relatively young lady. I thought extremely young. But, at any rate, a young lady that was also from the Philippines. And he was trying to get her to travel here to the United States. And there was some -- some issue he had on timing. That if he didn't do something by a certain period of time it would cost him much more money or something adverse was going to occur. So he was trying to explain to me that he was trying to rush this matter through in order to get this individual here. This was supposedly his new bride."

***3** (R. 2022-23.) Despite Lane's efforts to have the divorce finalized quickly, Theresa refused to agree to the terms Lane proposed, so in September 2003, Williams filed on Theresa's behalf a complaint for divorce, a motion for a temporary restraining order, and an instanter motion for the return of Theresa's truck. A hearing on Theresa's instanter motion was scheduled for October 15, 2003, but the trial of Lane and Theresa's divorce action was not scheduled to occur until January 7, 2004.

On October 3, 2003, despite the fact that Lane and Theresa's divorce was not yet finalized, Lane filed with the United States Immigration Services a petition for alien fiancée in which he identified Lorna Abe, a native of the Philippines, as his fiancée. Evidence at trial established that a person petitioning for an alien fiancée must disclose the petitioner's and fiancée's prior marriages and must provide certified proof of the legal dissolution of those marriages. Although Lane's petition disclosed Lane and Theresa's marriage, Lane could not provide a judgment of divorce because no such judgment existed. Nevertheless, Lane included with his petition a "certificate of divorce" (C. 880) that purportedly acknowledged Lane and Theresa's divorce, but that certificate was neither dated nor signed by the Mobile County circuit clerk. Thus, the United States Immigration Services sent Lane a request seeking proof of the divorce.

There was testimony indicating that, while Lane and Theresa were separated, Lane informed his friends and neighbors that he was making arrangements to marry Abe and that he was frustrated with the delay in finalizing his and Theresa's divorce. Tony Bazzel, who was a friend of Lane's in 2003, testified that Lane visited him approximately one week before Theresa was murdered and that Lane was "unusually upset about ... the divorce" that day because Theresa "was trying to slow [the divorce] down" and because Lane "had another girl in the Philippines he wanted to bring over here and he wanted to process the papers." (R. 1693.) Bazzel further testified:

> "Q. Did he say anything else to you that you felt was unusual?
>
> "A. Yeah. He said he would kill [Theresa] if he thought he could get away with it.
>
> "....
>
> "Q. Did he say anything else about that?
>
> "A. Well, he said he'd put three bullets in her head ... if he thought he could get away with it.
>
> "....
>
> "Q. Did he say anything else to you at any other time about killing [Theresa]?
>
> "....
>
> "A. Well, one day we were sitting at the house. [Lane] used to come over often. Often. And we were watching a true detective story about a man who had three Filipino brides and he murdered every one of them. The last one, he drown[ed].
>
> "So [Lane] looks at me. When they start talking about the insurance money, he looks at me and mentions that Theresa had insurance money. And I said something to the effect what are you planning on doing, ... put a bomb in her car. He goes, no, I thought I'd just run her off the road or something like that."

(R. 1694-95.)

John Marshall Bowers and his wife, who were Lane's neighbors in 2003, both testified that, in the week preceding Theresa's death, Lane showed them a photograph of a "young girl that he'd done bought and paid for from the Philippines" (R. 1328) who "was going to be his new wife." (R. 1685.) Bowers testified that he asked Lane if Lane did not "think [he] need[ed] to get divorced first," but, according to Bowers, Lane replied: "I'm not going to have

to worry about that for long." (R. 1685.) Scott Bruno and Melissa Guthrie, who were also Lane's neighbors in 2003, testified that, the day before Theresa was murdered, Lane came to their home and asked them if they "would be able to watch ... his dog while he went ... to pick up his new bride from the Philippines." (R. 1340.) Bruno and Guthrie also testified that Lane showed them a picture of his "new bride" and that he told them "he had already made plans and had his passport and tickets and everything for her." (R. 1341.) However, according to Bruno, Lane stated that he would not be able to travel to the Philippines immediately because his "new bride" "was not of age," and "there was some kind of financial thing. He had to pay the father of the new ... bride." (R. 2001.) Rather, Bruno testified, Lane stated that "he had to be [in the Philippines] in December" (R. 2000), despite the fact that the trial of Lane and Theresa's divorce action was not scheduled until January.

***4** Bruno and Guthrie both testified that, as they were leaving for church at approximately 8:15 a.m. the following day –- the day Theresa was murdered –- Lane emerged from his mobile home and told them that he was going to buy coffee and doughnuts. According to both Bruno and Guthrie, Lane left in his green truck, which Guthrie identified in a photograph admitted into evidence at trial. Bruno and Guthrie also both testified that they returned home from church at approximately 9:30 a.m. and that Lane's truck was parked in front of his mobile home at that time. Evidence indicated that a round-trip drive from Lane's mobile home to Wilson's house took approximately 30 minutes. (R. 1962.)

The trial court allowed the State to read into evidence James Jay's testimony from Lane's first trial because Jay had died before Lane's second trial. In 2003, Jay and Wilson lived on the same street, and Jay testified that, at approximately 8:30 a.m. on the day Theresa was murdered –- 15 minutes after Bruno and Guthrie saw Lane leave his mobile home –- Jay was "[s]tanding at [his] kitchen window looking out" when he saw a green truck "pull[ ] over [onto Jay's] side of the property and park[ ]." (R. 1353.) When shown the photograph of Lane's truck that Guthrie had identified, Jay testified that the truck he saw on his property that morning "looked just like that." (R. 1354.) According to Jay, the driver of the truck exited the truck, crossed the street, and walked onto Wilson's front porch. However, Jay testified that he could not see whether the driver entered Wilson's house because, once the driver reached the front porch, Jay's view was obscured by shrubbery. According to Jay, the driver "[d]idn't look like no big man" (R. 1362) and was "[a]bout [Jay's] size" (R. 1355) (Jay was 5'5" and weighed 120 pounds), but evidence indicated that, at the time of Theresa's death, Lane was 5'10" and weighed 275 pounds. However, Jay also testified that there was a distance of approximately 115 feet between where he was standing at his kitchen window and where Lane's truck was parked.

As noted, Wilson discovered Theresa's body at approximately 10:00 a.m. –- 90 minutes after Jay saw near Wilson's house the truck identified as Lane's. Law enforcement officers with the Mobile County Sheriff's Department responded to Wilson's 911 call and testified regarding their observations at the scene of the murder. Deputy Eric Leddick testified that Theresa was in the bathtub with "the shower curtain ... pulled down on top of [her]" (R. 1452), that Theresa was "completely submerged underwater" (R. 1451), that the water level in the bathtub was "about three-quarters of the way up the [overflow drain]" (R. 1451), that he "could hear the water leaving the tub" (R. 1450), and that he assumed the water was draining through the overflow drain. (R. 1460.) Detective Shane Stringer also testified that "[t]he water level was above [Theresa's] face and ... was over the little [overflow] drain piece on the tub" (R. 1477) and that he "could hear water draining, which [he] believed to be [draining through] the little [overflow] drain." (R. 1478.) Detective Lark Collins, however, testified that water was also draining through the primary drain in the bottom of the bathtub but that Theresa's "hair was shutting it off some, her hair being caught in it." (R. 1571.) In addition, Det. Stringer testified that "there had been ... a bowl with assorted stuff on top of the commode that was laying [sic] in the floor kind of scattered about between the commode and the bathroom." (R. 1476.) According to Det. Stringer, "[w]ith the bent shower curtain and the stuff on the floor, it appeared that there had been a struggle." (R. 1477.)

***5** Mitch McRae, a detective with the Mobile County Sheriff's Department, responded to the scene at approximately 1:00 p.m., by which time Theresa's body had been removed from the bathtub. According to Det. McRae, Det. Collins "labeled [Theresa's death] suspicious," but Dr. Chrostowski "had just mentioned on his way out ... that [Theresa's death] was probably medical, either a seizure or an aneurysm of some type."[3] (R. 1842.) Thus, Det. McRae testified, he left the scene and "was going to try to find [Lane] and do a death notification" and "get a medical history on Theresa." (R. 1843.) According to Det. McRae, he was "talking about [the need to locate Lane] over dispatch, so every deputy in Mobile County heard it" (R. 1843) and "understood that we were looking for [Lane's truck]." (R. 1843-44.) However,

Det. McRae testified that, before anyone located Lane, Lane telephoned him and "said that he had heard his wife had passed away" and "asked a few questions" (R. 1844), so Det. McRae arranged to meet Lane at Det. McRae's office. According to Det. McRae, he was waiting on Lane to arrive when Deputy Leddick, who by that time had left Wilson's house and was on patrol, notified him that he was following Lane's truck and asked if the truck "need[ed] to be stopped." (R. 1844.) Det. McRae testified that he instructed Deputy Leddick to "pull [Lane] over" and that he told Deputy Leddick he would "meet [him] there." (R. 1844.)

Regarding what occurred after he initiated the traffic stop, Deputy Leddick testified:

> "Before I could even finish getting out of my patrol car, [Lane] got out of [his] truck and began coming back to mine. I ordered him several times to stop. And he asked several times what's wrong with my wife, what happened to my wife.
>
> "I never mentioned anything about his wife or why I was pulling him over.
>
> "....
>
> "I asked him several times to place his hands on the truck because, at that time, he started making me nervous. He kept fidgeting around, kept fidgeting around. And he asked me –- he said I don't even know where my wife lived. Where did she live?
>
> "Still, I never said anything about his wife.
>
> "At that time, I placed him in handcuffs and detained him by the back of the truck until Det. McRae arrived."

(R. 1457-58.) There is no indication or allegation that Deputy Leddick searched Lane's person or Lane's truck while waiting on Det. McRae to arrive, but Deputy Leddick did testify that he observed "a wet ... bath towel" in the passenger's cab of Lane's truck. (R. 1458.) David Phillips, an investigator with the Mobile County Sheriff's Department, also responded to the scene of the traffic stop and observed that Lane, who was wearing shorts, "had some scratch marks on the bottom of his right leg." (R. 1500.)

Approximately 15 to 20 minutes after Deputy Leddick initiated the traffic stop, Det. McRae arrived at the scene. At that time, Lane was standing near the rear of his truck and was still handcuffed. Det. McRae testified that he "immediately took the handcuffs off" Lane and that he asked Deputy Leddick "if everything was okay," and, according to Det. McRae, Deputy Leddick stated that Lane "was just acting a little weird so [he] went ahead and cuffed [Lane]." (R. 1845.) Det. McRae testified that, after he uncuffed Lane, he "invited [Lane] to the front seat of [Det. McRae's] car, and [they] sat down in the car." (R. 1845.) According to Det. McRae, Lane was not under arrest at that time, but Det. McRae "went ahead and read [Lane] his Miranda[4] rights just out of caution" (R. 1846), and Lane signed a form waiving those rights and agreed to speak with Det. McRae.

Det. McRae testified that Lane provided him with general background information regarding Lane and Theresa's marriage, their pending divorce, and Theresa's medical history, and Det. McRae also testified that Lane "admitted ... that he had met another woman from the Philippines ... and [was] interested in her and ha[d] been corresponding with her through the Internet." (R. 1850.) Regarding Lane's recent contact with Theresa, Det. McRae testified that Lane stated he "hadn't seen or heard from [Theresa] in over three weeks" (R. 1850) and that he "[s]everal times ... repeated that he [did not] know where [Theresa] was living." (R. 1851.) However, as noted, Wilson testified that Lane had been to her house approximately one week before Theresa was murdered. Lane's statement was also inconsistent with other evidence presented at trial in that, although Lane's neighbors testified that Lane had left his mobile home at approximately 8:15 a.m. that day, Det. McRae testified that Lane claimed he had not awakened until 9:00 a.m. and that he had not left his mobile home until sometime between 11:00 and 11:30 a.m. Specifically, Det. McRae testified:

***6** "Q. Okay. Did [Lane] say what he had done that morning?

"A. Yeah. I asked him about how his day started. He said he woke up at about 9 o'clock. He stayed in his residence until 11 o'clock where he emailed his friend in the Philippines until approximately 11:30, at which time he left to go visit friends at Green Park trailer park off of Airport Boulevard.

"Q. And who did you later determine lived there?

"A. That would be Bing and Tony Bazzel.

"Q. Okay. And what did he say he did at the Bazzels'?

"A. He said once he arrived at his friends' house, he went for a walk alone for approximately one hour where he stopped and purchased some items at a garage sale.

When he returned to his friends' house, Lane overheard -- he overheard a conversation on the phone with Bing. He saw that Bing became upset and he questioned her what was wrong. Bing refused to tell him, so he left in his vehicle and called a friend.

"Q. Okay. Who did he call?

"A. Willie Silver.

"Q. And what did Willie -- what did he say Willie told him?

"A. Willie told him that Theresa had been found in a bathtub dead, at which time Lane returned back to Bing's house to question her.

"Q. Okay. And so did Bing tell him anything?

"A. Bing confirmed that Theresa was dead but would not tell him any further information. That was it.

"Q. All right. And after you took this statement, did you let Tom Lane go?

"A. Yes."

(R. 1852-53.) Bazzel corroborated Lane's statement that Lane had visited the Bazzels on the morning Theresa was murdered. According to Bazzel, Lane came to the Bazzels' home at approximately 10:00 a.m. and appeared "a little nervous" and "just want[ed] to walk around," so Lane "went for a walk in the parking lot." (R. 1696.) Bazzel also corroborated Lane's statement that, after Lane returned from the walk, Bazzel's wife received a telephone call that upset her and that Lane "got fidgety" (R. 1697) when he realized that Theresa was the subject of the call.

Evidence indicated that Theresa had a $150,000 life-insurance policy through her employer, Wal-Mart. Ronald Pierce, a chaplain with the Mobile County Sheriff's Department, testified that he received a telephone call from Lane on the afternoon Theresa was murdered and that Lane asked if Pierce knew Theresa was dead, if Pierce had been to Wilson's house, if Pierce had observed "anything out of place" in the house, and if Pierce "kn[e]w what was the cause of [Theresa's] death." (R. 1802.) Pierce testified that he told Lane he had been to Wilson's house but that he also told Lane he did not know if anything was "out of place" or what caused Theresa's death. According to Pierce, Lane then asked "if there was some way [Pierce] could help [Lane] get the papers to get the insurance from Wal-Mart, the life insurance." (R. 1803.) Pierce testified that he told Lane he did not know how to collect the life-insurance proceeds but that he "would check and see if there was some way that [he] could do something to help." (R. 1803.) However, evidence indicated that, rather than waiting on Pierce's assistance, Lane went later that day to the Wal-Mart store where Theresa worked and inquired about collecting the proceeds of Theresa's life-insurance policy. Unbeknownst to Lane, however, approximately three months earlier Theresa had changed the beneficiary of the policy from Lane to her sister, and Deborah Gabel, the human-resources manager at Wal-Mart, informed Lane that he was not the beneficiary of Theresa's policy. According to Gabel, Lane's demeanor was "fine until [she] told him that he wasn't the beneficiary," at which point, Gabel testified, Lane "became irate." (R. 2096.)

***7** Testimony from Lane's neighbors indicated that, on the day Theresa was murdered, Lane attempted to establish an alibi. Bowers testified that Lane came to his home that night and testified as follows regarding his conversation with Lane at that time:

"Q. What did [Lane] say that night when he came over and told you that his wife was dead?

"A. .... [Lane] told me that ... Theresa was dead. And then he had asked me ... if I had seen him that day. That was his first thing. He asked me had I seen him that day and I said no. And then he told me that Theresa had died.

"Q. Okay. Did he tell you how she died?

"A. He said ... she either had an aneurysm or was held under water and drown[ed].

"Q. And describe how [Lane] was acting when he said that his wife was dead.

"A. Pretty much as he always did. It just ... wasn't any concern or care. There was no shock.

"Q. After you told [Lane] that you didn't see him that day, did he say anything else or ask you anything else?

"A. Yes, ma'am. He asked me to ... say that I saw him that morning. And I told him, no, I'm not going to do that because I'm not going to lie for you or anybody else.

"Q. Okay. And did he say why he wanted you to lie for him?

"A. He said that he would probably be the first person that they looked into to her death."

(R. 1686-87.) Bruno and Guthrie also testified that Lane came to their home on the day Theresa was murdered and informed them of Theresa's death. According to Guthrie, Lane "was a little nervous" (R. 1345) and "reiterate[d] about, you know, [he] did go and get the coffee and donuts. Remember?" (R. 1346.) Guthrie testified that Lane "mention[ed] that ... he was acting that way because he thought maybe a family member ... would have accused him or thought that he had done it." (R. 1349.) Susan Hodges was also Lane's neighbor in October 2003 but testified that she had never spoken with Lane until the day Theresa was murdered. However, despite the fact that she and Lane had never met, Hodges testified that Lane came to her home on the day Theresa was murdered and informed her that Theresa had died. According to Hodges, Lane then asked her if she had seen him earlier that morning, and she replied that she had not. As to what occurred next, Hodges testified:

"Q. And what happened then?

"A. He said he had left that morning and went to the corner store and got some donuts and ... he said I came straight back. And I have a half box of doughnuts left over here if y'all would like them and I said no thanks.

"Q. And did you ask him why he was asking you that?

"....

"A. He said that he was probably going to need an alibi because they usually go after the husband first."

(R. 1734-35.)

The day after Theresa's death, Det. McRae went to the Alabama Department of Forensic Sciences to be present during the autopsy in which Dr. Chrostowski concluded that Theresa's death was a homicide. Det. McRae testified that he then began interviewing "a lot of people," including Lane's neighbors, Wilson, the Bazzels, "people from Wal-Mart," and Jay, who had seen Lane's truck near Wilson's house on the morning Theresa was murdered, and Lane was arrested later that afternoon. (R. 1857.)

On October 15, 2003, Det. McRae obtained a search warrant to search Lane's mobile home and truck and seized, among other items, a chisel from Lane's truck. Scott Milroy, who was admitted as an expert in the field of "firearms and toolmarks examiner" (R. 1594), examined the chisel found in Lane's truck and testified that the "several grooves, valleys, nicks ... within the blade of th[e] chisel ... gives it a very unique quality" (R. 1599) and that, as a result, it "would be hard to duplicate [that] chisel." (R. 1617.) Milroy also examined Wilson's front door and determined that there were "impressed toolmark[s]" (R. 1609) on the door that had been created by someone who used a tool to "g[e]t underneath th[e] moulding and press[ ] on that wooden door." (R. 1617.) After comparing the unique characteristics of the chisel found in Lane's truck with the nature of the toolmarks on Wilson's front door, Milroy concluded that "there's not another chisel in the world" that could have created the marks on Wilson's front door. (R. 1617.) The day after Theresa was murdered, law enforcement officers recovered in the front yard of Wilson's house "a piece of wood that was later determined to have come off the front door." (R. 1933.)

***8** Det. McRae also recovered a computer that had been removed from Lane's mobile home before the search of the home.[5] An analysis of the hard drive of that computer indicated that, at 9:45 a.m. on the day Theresa was murdered, the background on the computer monitor had been changed from a photograph of Lane and Theresa to a pornographic photograph of Abe lying on her back with her breasts and genitals exposed, and the photograph of Abe was admitted into evidence.

As a result of his investigation, Det. McRae also learned that an employee at a gas station located "probably a quarter of a mile" (R. 1877) from Lane's mobile home had reported that Lane came into the gas station sometime between 8:00 a.m. and 11:00 a.m. on the day Theresa was murdered. However, Det. McRae testified that he reviewed video surveillance of the gas station that had been recorded between 7:30 a.m. and 12:00 p.m. that day and that Lane "was not in that store." (R. 1880.)

Wayne Dueitt, who at the time of trial was an inmate in the Mobile County Metro Jail, testified that he was Lane's cellmate in October 2003 and that Lane confessed to him that "he drown[ed] his wife in the bathtub" (R. 1814) and that he had "used a screwdriver" to gain entry into Wilson's house. (R. 1814.) Dueitt also testified that Lane told him Theresa had "struggled and she scratched his legs up" and that he had "seen the scratches on [Lane's] legs." (R. 1816.) Bruno, who, as noted, was Lane's neighbor in October 2003, was also subsequently incarcerated with Lane and also testified that Lane confessed to murdering Theresa. Specifically, Bruno testified that, while he and Lane were discussing Lane's case, Lane "mentioned to [Bruno] that ... he had told a few people in ... the chapel, church, that he did it. But he wasn't too

concerned ... about it because it was in the sanctity of the church and they couldn't use it against him." (R. 2006.)

In addition to allowing the State to read into evidence a transcript of Jay's testimony from Lane's first trial, the trial court also allowed the State to read into evidence the testimony of four other witnesses who testified at Lane's first trial but who were unavailable at Lane's second trial -- Lane's father, Aubrey Mixon, John LaPointe, and Iris Raley.[6] Lane's father testified that, approximately three weeks before Theresa was murdered, Lane visited him in North Carolina and that, during that visit, Lane stated: "[I]f I thought I could do what Peterson[7] did and get away with it, I'd kill [Theresa]." (R. 1287.) Mixon testified that, in August 2003, he was employed at a Nissan automobile dealership in Mobile and that Lane came to the dealership and "wanted to know where to put a repossession car because he was turning in his wife's car." (R. 1296.) According to Mixon, he stated to Lane that "you can't live with [women] and you can't live without them" (R. 1296), to which Lane replied: "[T]he only good woman is a dead one." (R. 1297.) LaPointe testified that he was a private investigator, that Lane contacted him in July 2003 and told him that Lane and Theresa "were separated and ... were in the middle of a divorce" (R. 1677), and that Lane wanted him "to find out where [Theresa] was, follow her." (R. 1677.) However, LaPointe testified that he declined Lane's request because "[t]here was too much emotion," and he "felt it would have been best not to get involved in that case." (R. 1678.)

***9** Raley, Wilson's stepdaughter, testified that Wilson telephoned her after discovering Theresa's body and that she immediately went to Wilson's house. Raley testified that she remained with Wilson until law enforcement officers left, at which point Raley and Wilson also left. Raley testified that, before leaving, she locked the locking mechanism on the doorknob of the front door, and, according to Raley, the chain lock on the front door was "always" locked (R. 1373) because "[w]e always went in and out the back door, kept the front door locked." (R. 1370.) According to Raley, she and Wilson returned to the house with detectives the following day and entered the house through the back door. Regarding what she observed upon entering Wilson's house that day, Raley testified:

> "When I was sitting in the living room, I was just looking around and I looked up at the [front] door. And, of course, being very familiar with the home, going through there almost every day of my life, we always kept a chain on top of the door. And I noticed that the chain was off and the side plate, part of it was missing. It was broken."

(R. 1369.) Raley further testified that "the chain ... looked ... a little splintery in places, like ... an object had ... fooled with it or something. It didn't look normal." (R. 1372.)

At the close of evidence, the jury convicted Lane of capital murder-burglary, § 13A-5-40(a)(4), and capital murder for pecuniary gain, § 13A-5-40(a)(7). As noted, at the sentencing hearing the jury recommended by a vote of 11-1 that Lane be sentenced to death, and the trial court followed the jury's recommendation and sentenced Lane to death. Because this case involves the death penalty, the appeal of Lane's convictions and death sentence is automatic. § 13A-5-55, Ala. Code 1975.

Standard of Review

Because Lane was sentenced to death, this Court, in addition to addressing the claims Lane raises on appeal, must search the record for "plain error" in accordance with Rule 45A, Ala. R. App. P., which provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."
>
> "In Ex parte Brown, 11 So. 3d 933 (Ala. 2008), the Alabama Supreme Court explained:
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> > " ' " 'To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.' " Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
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> > > " ' "The Rule authorizes the Courts of Appeals to correct only 'particularly egregious errors,' United States v. Frady, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of

judicial proceedings,' United States v. Atkinson, 297 U.S. [157], at 160, 56 S.Ct. 391, 80 L.Ed. 555 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' United States v. Frady, 456 U.S. at 163, n.14, 102 S.Ct. 1584."

" 'See also Ex parte Hodges, 856 So. 2d 936, 947–48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would "seriously affect the fairness or integrity of the judicial proceedings," and that the plain-error doctrine is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result" (internal quotation marks omitted)).'

***10** "11 So. 3d at 938. 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999). Although [Lane's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)."

Towles v. State, 263 So. 3d 1076, 1080-81 (Ala. Crim. App. 2018).

Discussion

I.

Lane argues that the trial court erred by allowing the State to read into evidence the testimony of the five witnesses who testified at Lane's first trial but who were unavailable to testify at Lane's second trial. Before trial, Lane filed a motion in limine to exclude those witnesses' prior testimony on the grounds that Lane's first trial was a "tainted ... process" (R. 214) and that the admission of the testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. At a hearing on that motion, the trial court stated:

"I'm going to require [the State] to lay the proper predicate for the use of that testimony. And I will rule on it at that point as to whether or not it's going to be admitted. But just in a vacuum, I'm not going to grant your motion.

"I'm going to deny your motion -- let me put it this way -- based on the fact that you say that some lawyers were taken away from him pre-trial and two lawyers were appointed and had two or three or four months to prepare and that is a constitutional violation, I'm denying your motion on that ground.

"....

"But [the State] will have the responsibility to prove the proper predicate to show how the statements will be admissible at trial."

(R. 215-16.) Following the hearing, it appears the prosecutor and defense counsel agreed on redacted versions of the unavailable witnesses' prior testimony (R. 275), and Lane did not object when the prior testimony was read into evidence at trial.

Initially, we note that Lane failed to preserve this claim for appellate review. It is well settled that

" 'an adverse ruling on a motion in limine does not preserve the issue for appellate review unless an objection is made at the time the evidence is introduced.' Moody v. State, 888 So. 2d 532, 582 (Ala. Crim. App. 2003). '[U]nless the trial court's ruling on the motion in limine is absolute or unconditional, the ruling does not preserve the issue for appeal.' Perry v. Brakefield, 534 So. 2d 602, 606 (Ala. 1988)."

Saunders v. State, 10 So. 3d 53, 87 (Ala. Crim. App. 2007) (emphasis added). Here, the trial court's ruling on Lane's motion in limine was not absolute or unconditional, and Lane did not object when the unavailable witnesses' prior testimony was read into evidence at trial. Thus, Lane failed to preserve for appellate review any claim regarding the admissibility of that evidence. Saunders, supra. Accordingly, this claim is subject to only plain-error review. See Saunders, 10 So. 3d at 88 (applying plain-error review to trial court's adverse ruling on defendant's motion in limine where ruling was not absolute or unconditional and defendant did not object to evidence at trial).

On direct appeal of Lane's convictions from his first trial, this Court relied on United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), in concluding that the trial court's disqualification of Lane's counsel of choice constituted " 'structural error' that cannot be harmless and that automatically requires reversal." Lane, 80 So. 3d at 302. Specifically, this Court stated:

***11** "In Gonzalez–Lopez, 548 U.S. 140, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006), the United States Supreme Court noted that the Sixth Amendment right to counsel of choice does not descend from the Sixth Amendment's overarching purpose of ensuring a fair trial, as does the right to the effective assistance of counsel, but it is 'the root meaning of the constitutional guarantee.' 548 U.S. at 147–48, 126 S.Ct. 2557. Therefore, '[w]here the right to be assisted by counsel of one's choice is wrongly denied ... it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.' Id. at 148, 126 S.Ct. 2557. The Court then went on to explain:

> " 'In Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." Id., at 307–308, 111 S.Ct. 1246 (internal quotation marks omitted). These include "most constitutional errors." Id., at 306, 111 S.Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." Id., at 309–310, 111 S.Ct. 1246. See also Neder v. United States, 527 U.S. 1, 7–9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Such errors include the denial of counsel, see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the denial of the right of self-representation, see McKaskle v. Wiggins, 465 U.S. 168, 177–178, n.8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the denial of the right to public trial, see Waller v. Georgia, 467 U.S. 39, 49, n.9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).
>
> " 'We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " Id., at 282, 113 S.Ct. 2078. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," Fulminante, supra, at 310, 111 S.Ct. 1246 —- or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.'
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> "548 U.S. at 148-49, 126 S.Ct. 2557 (footnote omitted; emphasis added)."

Lane, 80 So. 3d at 302-03.

In support of his claim that the five unavailable witnesses' prior testimony was inadmissible, Lane notes the United States Supreme Court's conclusion in Gonzalez-Lopez that the erroneous denial of a defendant's counsel of choice is a " 'structural error' " that "bears directly on the 'framework within which the trial proceeds,' " Gonzalez-Lopez, 548 U.S. at 150, 126 S.Ct. 2557 (quoting Arizona v. Fulminante, 499 U.S. 279, 282, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)), and results in " 'consequences that are necessarily unquantifiable and indeterminate.' " Id. (quoting Fulminante, 499 U.S. at 310, 111 S.Ct. 1246). Relying on that language, Lane argues that the erroneous denial of his counsel of choice rendered his first trial a "tainted proceeding" and that, as a result, the testimony from that trial was inadmissible in his second trial. Lane's brief, at 13. Thus, the issue as to this claim may be framed as follows: When a defendant's conviction is reversed because the defendant was erroneously denied his or her counsel of choice, does that " 'structural defect,' " Gonzalez-Lopez, 548 U.S. at 148, 126 S.Ct. 2557, in the defendant's trial render testimony from that trial inadmissible when the testimony is proffered in the defendant's subsequent trial as the prior testimony of an unavailable witness?

***12** On its face, Gonzalez-Lopez does not address that issue, and Lane's appellate counsel conceded at oral argument that neither the United States Supreme Court nor Alabama's appellate courts have addressed this specific issue. Consistent

with counsel's concession, this Court's research has confirmed that this specific issue raises a question of first impression under controlling law. In Townes v. State, 253 So. 3d 447 (Ala. Crim. App. 2015), this Court addressed the propriety of resolving issues of first impression under plain-error review:

> " 'It is well settled that plain-error review is an inappropriate mechanism to decide issues of first impression or to effectuate changes in the law.' Kelley v. State, 246 So. 3d 1032, 1052 (Ala. Crim. App. 2014). See also United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ('[A] court of appeals cannot correct an error [under the plain-error doctrine] unless the error is clear under current law.'); United States v. Madden, 733 F.3d 1314, 1322 (11th Cir. 2013) ('For a plain error to have occurred, the error must be one that is obvious and is clear under current law.' (citations and quotations omitted)); United States v. Accardi, 669 F.3d 340, 348 (D.C. Cir. 2012) ('[A] question of first impression ... would be inappropriate to address under plain error review.'); United States v. Lejarde–Rada, 319 F.3d 1288, 1291 (11th Cir. 2003) ('[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it.' (citations omitted)); United States v. Magluta, 198 F.3d 1265, 1280 (11th Cir. 1999) ('[A] district court's error is not "plain" or "obvious" if there is no precedent directly resolving an issue.'), vacated in part on unrelated grounds, 203 F.3d 1304 (11th Cir. 2000). Whether error resulted from the prosecutor's comment 'is an issue of first impression and thus not properly before this Court for plain-error review.' Kelley, 246 So. 3d at 1053 (citing Accardi, 669 F.3d at 348)."

Townes, 253 So. 3d at 494. Thus, because it is a question of first impression whether testimony from a trial in which the defendant was erroneously denied counsel of choice is admissible in the defendant's subsequent trial as the prior testimony of an unavailable witness, plain-error review, which is the standard that applies to this claim, is an " 'inappropriate mechanism' " to decide that issue. Townes, 253 So. 3d at 494 (quoting Kelley v. State, 246 So. 3d 1032, 1052 (Ala. Crim. App. 2014)).

We recognize that, according to Lane, by concluding that "the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' " Gonzalez-Lopez, 548 U.S. at 150, 126 S.Ct. 2557 (quoting Fulminante, 499 U.S. at 282, 111 S.Ct. 1246), Gonzalez-Lopez necessarily implies that testimony from such a structurally defective trial is inadmissible in the defendant's subsequent trial. However, it cannot be said that Gonzalez-Lopez " 'directly resolv[ed]' " that issue or that the answer to that question is " 'obvious and ... clear' " from Gonzalez-Lopez. Townes, 253 So. 3d at 494 (quoting United States v. Lejarde–Rada, 319 F.3d 1288, 1291 (11th Cir. 2003), and United States v. Madden, 733 F.3d 1314, 1322 (11th Cir. 2013) (emphasis added)). Rather, at most, support for Lane's argument might arguably be inferred from Gonzalez-Lopez, but, as the United States Supreme Court has recognized, a possible inference drawn from a United States Supreme Court decision is not an inevitable one. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, whatever inferences might arguably be drawn from Gonzalez-Lopez, it cannot be said that Gonzalez-Lopez constitutes well settled law providing that testimony from a trial in which the defendant was erroneously denied counsel of choice is inadmissible in the defendant's subsequent trial as the prior testimony of an unavailable witness. Therefore, because neither the United States Supreme Court nor this Court has addressed the question of first impression raised by Lane's claim, we will not conclude that the trial court committed plain error by admitting the unavailable witnesses' prior testimony from Lane's first trial. Townes, supra. See also United States v. Wolfname, 835 F.3d 1214, 1221 (10th Cir. 2016) (noting that plain error must be " 'clear and obvious' under 'current, well-settled law' " (emphasis added; citations omitted)); and United States v. Lin, 101 F.3d 760, 770 (D.C. Cir. 1996) (noting that, to determine that a trial court committed plain error, the alleged error "must ... have been error under settled law of the Supreme Court or of this circuit" (emphasis added)).

***13** Lane also argues that the admission of testimony from his first trial violated the Confrontation Clause of the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., amend. VI. In support of his argument, Lane relies on the United States Supreme Court's decision in Crawford, supra, which held that a prerequisite to the admission of "testimonial evidence is ... unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68, 124 S.Ct. 1354. In making this argument, however, Lane does not contend that he did not have the opportunity at his first trial to cross-examine the witnesses whose testimony was read into evidence during his second trial. Rather, Lane argues that, because he was denied the opportunity to cross-examine the witnesses with his counsel of choice, the cross-examination of those witnesses "cannot satisfy the Sixth Amendment's requirement of confrontation." Lane's brief, at 17.

However, " 'the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " Kentucky v. Stincer, 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)). Thus, the fact that Lane did not have the opportunity to cross-examine the witnesses in his first trial with the counsel of his choice did not constitute a violation of the Confrontation Clause. Nevertheless, Lane suggests that, after Crawford, an adequate opportunity for cross-examination is no longer sufficient to satisfy the Confrontation Clause; instead, Lane argues, there must be some indication that the cross-examination met some minimal threshold of adequacy. Ignoring the fact that Lane does not allege that the cross-examination in his first trial was inadequate, we note that Crawford set forth no such rule.[8] As the United States Court of Appeals for the Fifth Circuit has noted, "the Supreme Court's watershed decision in Crawford ... did not purport to set forth new standards governing the effectiveness of cross-examination. To the contrary, the Court reaffirmed its precedents holding that 'an adequate opportunity to cross-examine' a now-unavailable witness would satisfy the Confrontation Clause." United States v. Richardson, 781 F.3d 237, 244 (5th Cir. 2015) (first and third emphasis added). Thus, because Lane had an adequate opportunity to cross-examine the witnesses in his first trial and because five of those witnesses were no longer available by the time of Lane's second trial, the admission of those five witnesses' prior testimony did not violate the Confrontation Clause. Therefore, as to this aspect of Lane's claim, we find no error, much less plain error, in the trial court's admission of the prior testimony of the five unavailable witnesses.

II.

Lane argues that the trial court erred by denying his motion to suppress (1) the statement he made to Det. McRae on the afternoon Theresa was murdered and (2) the evidence obtained subsequent to his arrest the following day. Because the evidence at the suppression hearing was undisputed, we review de novo the trial court's denial of the motion to suppress. King v. State, 6 So. 3d 30, 32 (Ala. Crim. App. 2008).

At the suppression hearing, Det. McRae testified that, after responding to the scene of the murder, he wanted to locate Lane to "do a death notification to ... notify [Lane] that [Theresa] was deceased" and to "get a medical history on [Theresa]." (R. 96.) In addition, Det. McRae testified that he wanted to question Lane because Wilson was "incredibly upset and kept saying that Lane had done it" (R. 95) and because Wilson stated that Lane and Theresa were "going through a bad divorce" and that Theresa "was living with Wilson in hiding." (R. 105.) According to Det. McRae, in an effort to locate Lane, he "ran [Lane's] name ... and found out [Lane] had a felony warrant ... out of Florida" (R. 95) and then "put out a BOLO on [Lane's truck]." (R. 97.) However, as noted, before Lane could be located, Lane contacted Det. McRae and arranged to meet Det. McRae at Det. McRae's office, and Det. McRae was waiting on Lane to arrive when Deputy Leddick, at Det. McRae's instruction, initiated the traffic stop of Lane's truck.

***14** Regarding what initially occurred during the traffic stop, Deputy Leddick's testimony at the suppression hearing was similar to his testimony at trial. Specifically, Deputy Leddick testified:

> "Q. Okay. And what did you do once you pulled [Lane] over?
>
> "A. Before I could even get out of my car, Mr. Lane got out and started asking me what happened to his wife and ... several times asked me what happened to his wife. And I just kept telling him to go back and stand by his truck. He refused, kept asking me what happened to his wife, made the comment that he didn't even know where she lived.
>
> "So, at that time, I told him he was being detained for the warrants out of Florida. Placed him in handcuffs and asked him to wait by the back of the truck with me until the detectives arrived."

(R. 85.) Deputy Leddick testified that he made no attempt to elicit any information from Lane while waiting on Det. McRae to arrive, and, as noted, there is no indication or allegation from Lane that Deputy Leddick searched Lane's person or Lane's truck.

Det. McRae testified that he arrived at the scene of the traffic stop within "15, 20 minutes" from the time Deputy Leddick initiated the traffic stop (R. 98); that he immediately uncuffed Lane; that he "[s]hook [Lane's] hand" and "introduced [him]self"; and that he and Lane "walked back up to [Det. McRae's] car, sat down, and [Lane] got in the front seat with [Det. McRae] and ... sat there and had a

conversation" after Det. McRae advised Lane of his Miranda rights, which Lane waived. (R. 99.) As noted, during that conversation Lane provided Det. McRae with information regarding Lane and Theresa's marriage, their pending divorce, Theresa's medical history, and Lane's romantic interest in and communications with Abe. According to Det. McRae, Lane voluntarily participated in that conversation, and Deputy Leddick confirmed that Lane "voluntarily got in the front seat with Det. McRae." (R. 91.)

At the conclusion of the suppression hearing, defense counsel argued that Lane's statement to Det. McRae was due to be suppressed as the fruit of a warrantless arrest that was unsupported by probable cause. Defense counsel also argued that any evidence obtained from Lane after he was arrested the following day was due to be suppressed because, according to counsel, "other than Lane's illegally obtained ... statement [during the traffic stop], there was no evidence that law enforcement had reason to believe that Lane had committed an offense." (C. 468.) The trial court, however, concluded that "there is absolutely no evidence that [Lane] was ever arrested" during the traffic stop and, as a result, denied Lane's motion to suppress. (R. 115.)

On appeal, Lane argues, as he did below, that the trial court should have suppressed the statement he made to Det. McRae during the traffic stop because, he says, the statement was the fruit of a warrantless arrest unsupported by probable cause. Although he was not formally arrested during the traffic stop, Lane essentially argues that the circumstances of the traffic stop constituted a de facto arrest because, he says, he "was clearly seized within the meaning of the Fourth Amendment," and, according to Lane, "[n]o reasonable person in such a situation would have felt free to leave." Lane's brief, at 20. However, the mere fact that Lane was "seized" during the traffic stop and did not feel free to leave does not necessarily indicate that the seizure constituted a de facto arrest because it is well settled that not all seizures are arrests. See State v. Perry, 66 So. 3d 291, 294 (Ala. Crim. App. 2010) (noting that, although a traffic stop is a seizure for Fourth Amendment purposes, "a traffic stop is '" " 'more analogous' to the brief investigative detention authorized in Terry [v. Ohio, 392, U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]'" than custody traditionally associated with a felony arrest" (quoting Sides v. State, 574 So. 2d 856, 858 (Ala. Crim. App. 1990), quoting in turn Pittman v. State, 541 So. 2d 583, 585 (Ala. Cr. App. 1989), quoting in turn Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984))); United States v. Dixon, 51 F.3d 1376, 1380 n.2 (8th Cir. 1995) ("Whether a reasonable person would feel free to leave determines whether a seizure exists; it does not determine the characterization of that seizure as either an investigative stop or an arrest."); United States v. Mosley, 743 F.3d 1317, 1328 (10th Cir. 2014) (analyzing whether the seizure of the defendant was "consistent with a Terry stop, or if the degree of force transformed Defendant's seizure into a de facto arrest"); and United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995) (noting that "whether a seizure ... must be considered an arrest depends on the degree of intrusion"). Thus, in determining whether there was a de facto arrest of Lane during the traffic stop, the relevant inquiry is not simply whether Lane was seized but, rather, is whether the seizure was more consistent with the limited seizure of an investigatory detention or the more intrusive seizure associated with a formal arrest. Perry, supra.

***15** Determining whether a seizure exceeds the boundaries of an investigatory detention and rises to the level of a de facto arrest is based on the totality of the circumstances. United States v. Rasberry, 882 F.3d 241, 247 (1st Cir. 2018); Lincoln v. Turner, 874 F.3d 833, 841 (5th Cir. 2017); United States v. Schaffer, 851 F.3d 166, 173 (2d Cir. 2017); Courson v. McMillian, 939 F.2d 1479, 1492 (11th Cir. 1991). "[T]here are no 'scientifically precise benchmarks for distinguishing between temporary detentions and de facto arrests,' " Rasberry, 882 F.3d at 247 (quoting Morelli v. Webster, 552 F.3d 12, 20 (1st Cir. 2009)); rather, "[t]he inquiry is case-specific[.]" Id. at 248. See Florida v. Royer, 460 U.S. 491, 506, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (noting that there is no "litmus-paper test for ... determining when a seizure exceeds the bounds of an investigative stop" because "there will be endless variations in the facts and circumstances"); and Lincoln, 874 F.3d at 841 (noting that whether a seizure constitutes a de facto arrest is "a fact-specific inquiry"). The determination is not based on the detainee's subjective belief but, rather, is an objective standard that considers "whether a reasonable person standing in the suspect's shoes would understand his position 'to be tantamount to being under arrest.' " Rasberry, 882 F.3d at 247 (quoting United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994)).

Given the totality of the circumstances, we agree with the trial court's conclusion that the seizure of Lane during the traffic stop did not rise to the level of a de facto arrest. To begin with, although Lane was handcuffed while Deputy Leddick waited on Det. McRae to arrive, the fact that a detainee is handcuffed during a traffic stop does not necessarily elevate the seizure

to a de facto arrest. See Gallegos v. City of Colorado Springs, 114 F.3d 1024, 1030 (10th Cir. 1997) ("At least nine courts of appeals, including this circuit, have determined the use of 'intrusive precautionary measures' (such as handcuffs or placing a suspect on the ground) during a Terry stop [does] not necessarily turn a lawful Terry stop into an arrest under the Fourth Amendment."); Waters v. Madson, 921 F.3d 725 (8th Cir. 2019) (fact that detainee was handcuffed did not elevate the seizure to a de facto arrest); United States v. Fiseku, 915 F.3d 863 (2d Cir. 2018) (same); United States v. Chaney, 647 F.3d 401 (1st Cir. 2011) (same); United States v. Bullock, 632 F.3d 1004 (7th Cir. 2011) (same); and United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999) (same). This is especially true where the detainee is handcuffed for refusing to follow a law enforcement officer's commands because handcuffing a detainee under such circumstances can serve as a reasonable means of ensuring the officer's safety and maintaining the status quo during the course of the investigatory detention. See United States v. Smith, 373 F. Supp. 3d 223, 237-38 (D.C. Cir. 2019) ("Courts have ... upheld the use of handcuffs [during an investigatory stop] when necessary to allow the police to complete their investigation, including where the suspect 'attempted to resist police, made furtive gestures, ignored police commands, attempted to flee, or otherwise frustrated police inquiry.' " (emphasis added; citation omitted)); United States v. Martinez, 462 F.3d 903, 907 (8th Cir. 2006) ("This court has previously held that the use of handcuffs can be a reasonable precaution during a Terry stop to protect [law enforcement officers'] safety and maintain the status quo."); Chaney, 647 F.3d at 409 (handcuffing detainee who "ignored repeated orders from the police to stop moving and drop to the ground" was not a de facto arrest); Chestnut v. Wallace, 947 F.3d 1085 (8th Cir. 2020) (handcuffing detainee who refused to comply with law enforcement officer's request for information was not a de facto arrest); and Waters, 921 F.3d at 728 (handcuffing detainee who "disobeyed multiple commands" was not a de facto arrest). Here, Lane refused to follow Deputy Leddick's command to return to his truck. Thus, handcuffing Lane under such circumstances did not constitute a de facto arrest but, rather, was a reasonable means for Deputy Leddick to ensure his own safety during the investigatory stop and maintain the status quo until Det. McRae arrived. Further supporting this conclusion is the fact that, although Deputy Leddick handcuffed Lane, he did not place Lane in a patrol car, question Lane, or search Lane's person or Lane's truck. See Bullock, 632 F.3d at 1016 (handcuffing detainee and placing him in the back of a patrol car was reasonable, and therefore did not constitute a de facto arrest, where law enforcement officers did not "attempt[ ] to exploit the situation by asking [the detainee] questions or requesting to search his belongings").

***16** In addition, Lane was handcuffed only approximately 20 minutes while Deputy Leddick waited on Det. McRae to arrive, at which point Det. McRae immediately uncuffed Lane.[9] Although there is no bright-line test or "hard-and-fast time limit" for the maximum duration of an investigatory detention, United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), courts have held that handcuffing a detainee approximately 20 minutes did not elevate the seizure to a de facto arrest and, in fact, have held that longer seizures also did not exceed the boundaries of an investigatory detention. See Rasberry, 882 F.3d at 248 (holding that handcuffing detainee approximately 20 minutes during the search of defendant's motel room did not constitute de facto arrest and citing cases in which 50- and 75-minute detentions also did not constitute de facto arrests); Chestnut, supra (20-minute detention of handcuffed detainee not a de facto arrest); Bullock, supra (30- to 40-minute detention of handcuffed detainee not a de facto arrest); and United States v. Owens, 167 F.3d 739 (1st Cir. 1999) (50-minute detention of handcuffed detainee not a de facto arrest). Although the duration of a seizure is a relevant factor in considering whether the seizure constituted a de facto arrest, the dispositive question is whether, given the specific circumstances of the encounter, the seizure involved "any delay unnecessary to the legitimate investigation of the law enforcement officers." Sharpe, 470 U.S. at 687, 105 S.Ct. 1568. See Owens, 167 F.3d at 749 (noting that "[a] long duration ... does not by itself transform an otherwise valid stop into an arrest" and concluding that the 50-minute detention in that case did not constitute a de facto arrest given the specific circumstances of the encounter). Here, Lane was handcuffed only as long as was necessary for Det. McRae to arrive –- approximately 20 minutes –- and was handcuffed for that relatively brief period only because he refused to comply with Deputy Leddick's commands. Thus, handcuffing Lane did not constitute a de facto arrest because it was a reasonable means of ensuring Deputy Leddick's safety and preserving the status quo until Det. McRae arrived and because that seizure did not involve any unnecessary delay. See Chestnut, supra (handcuffing detainee for 20 minutes did not constitute de facto arrest where detainee was handcuffed only until officer's supervisor arrived, at which point detainee was uncuffed); and Waters, 921 F.3d at 737 (no de facto arrest where detainee was handcuffed approximately 20 minutes and "the encounter only lasted as long as it did because Mr.

Waters was argumentative and refused to cooperate with the police investigation by failing to obey legitimate requests").

The events that transpired after Det. McRae arrived also do not indicate that a de facto arrest occurred during the traffic stop. As noted, once Det. McRae arrived, he uncuffed Lane and shook Lane's hand, and Lane willingly accompanied Det. McRae to Det. McRae's car, where he sat in the front passenger's seat and had a conversation with Det. McRae, who released Lane after that conversation. In addition, there is no evidence indicating that Det. McRae confronted Lane with an accusation of guilt during the conversation or that he otherwise treated Lane as a suspect in Theresa's murder at that time. Those circumstances do not bear the hallmarks of a formal arrest but, rather, are more synonymous with a voluntary interaction. Indeed, before the traffic stop occurred, Lane had already expressed a desire to speak with Det. McRae later that afternoon; thus, it is reasonable to conclude that, once Det. McRae arrived and uncuffed Lane, a person in Lane's position would have believed not that he was under arrest but, rather, that he was merely engaging in a conversation he had already agreed to have. The fact that Det. McRae advised Lane of his Miranda rights out of an abundance of caution does not change this conclusion. See United States v. Diaz-Lizaraza, 981 F.2d 1216, 1222 (11th Cir. 1993) (noting that "Mirandizing a detainee does not convert a Terry stop into an arrest"); United States v. Obasa, 15 F.3d 603, 608 (6th Cir. 1994) (noting that "giving Miranda warnings to a detainee may not automatically convert a Terry stop into an arrest"); and United States v. Chaidez, 919 F.2d 1193, 1198-99 (7th Cir. 1990) (detainee not placed under arrest despite fact that he was given Miranda warnings).

In short, the specific facts of this case indicate that Lane was handcuffed approximately 20 minutes because he refused to follow Deputy Leddick's commands; that Lane was not placed in a patrol car or questioned, nor was his person or his truck searched, during the time that he was handcuffed; that Lane was handcuffed only as long as was necessary for Det. McRae to arrive and that he was immediately uncuffed at that time; that, as he had already agreed to do before the traffic stop, Lane voluntarily conversed with Det. McRae after being uncuffed; and that Lane was released after that conversation. Considering those circumstances in their totality, we conclude that an objectively reasonable person "standing in [Lane's] shoes would [not have understood] his position 'to be tantamount to being under arrest.' " Rasberry, 882 F.3d at 247 (quoting Zapata, 18 F.3d at 975). Thus, the seizure of Lane during the traffic stop did not constitute a de facto arrest, and, consequently, Lane's statement to Det. McRae was not the fruit of an illegal arrest. Therefore, the trial court did not err by denying Lane's motion to suppress that statement. Accordingly, Lane is not entitled to relief on this claim.

***17** Moreover, even if Lane was illegally arrested by Deputy Leddick at the beginning of the traffic stop, we hold that, under the specific facts of this case, Lane's statement to Det. McRae was nevertheless admissible. In considering the admissibility of a statement a defendant makes subsequent to an illegal arrest, the United States Supreme Court has held that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is ' "sufficiently an act of free will to purge the primary taint." ' " Taylor v. Alabama, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982) (quoting Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), quoting in turn Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (emphasis added)). Regarding the necessity of a "break [in] the causal connection between the illegal arrest and the confession," id., the United States Court of Appeals for the Seventh Circuit has held that "[a]n individual's wrongful custody can, of course, be brought to an end, and when such termination occurs, it can serve to break the causal link between the illegal arrest and his subsequent statements to the police." Miranda v. Leibach, 394 F.3d 984, 999 (7th Cir. 2005). See also id. ("But if we take it as a given that Chavez ... was illegally arrested ..., that does not necessarily mean that he remained under arrest throughout the ensuing period of his cooperation with the authorities."). Thus, even if Lane was illegally arrested by Deputy Leddick at the beginning of the traffic stop, if Lane was no longer in custody at the time he provided Det. McRae with a statement and if the statement was an act of Lane's free will sufficient to purge the taint of the illegal arrest, then the statement was not due to be suppressed. Taylor, supra. " 'To decide if a suspect is in custody, the court, looking at the totality of the circumstances, must find that a reasonable person in the suspect's position would believe that he or she is not free to leave.' " Woolf v. State, 220 So. 3d 338, 349 (Ala. Crim. App. 2014) (quoting Seagroves v. State, 726 So. 2d 738, 742 (Ala. Crim. App. 1998)). Similarly, the question whether a statement was the product of a free will "must be answered on the facts of each case," and "[n]o single fact is dispositive." Brown, 422 U.S. at 603, 95 S.Ct. 2254.

In Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990), cert. denied, 500 U.S. 929, 111 S.Ct. 2045, 114 L.Ed.2d 129 (1991), the Florida Supreme Court considered the admissibility of statements Rigoberto Sanchez-Velasco made after he was illegally arrested. In that case, Kathy Encenarro, an 11-year-old girl, was raped and murdered in Hialeah, Florida, and Hialeah police officers suspected that Sanchez-Velasco was the last person to see Encenarro alive. While investigating the case, law enforcement officers spoke with Gilberto Estrada, one of Sanchez-Velasco's friends, who informed the officers that Sanchez-Velasco had stolen a stereo from him. Apparently at the request of the officers, Estrada arranged a meeting with Sanchez-Velasco in Miami Beach, and when Sanchez-Velasco arrived, the officers arrested him for grand theft of the stereo and placed him in handcuffs. However, after the officers, who were outside their jurisdiction, learned from Estrada that the value of the stereo did not meet the minimum threshold for grand theft, they telephoned the office of the state attorney and were informed that they had no grounds for a grand-theft arrest. At that point, the officers

> "removed the handcuffs and Sanchez-Velasco walked off and sat on some nearby boards next to the street.
>
> "According to the officers' testimony at trial, the following events then occurred. Approximately ten minutes later, a detective approached Sanchez–Velasco, identified himself, and asked if Sanchez–Velasco would be willing to talk to him about Kathy's murder. Sanchez-Velasco replied that he would talk to them, but only in Hialeah. Without assistance and without handcuffs, he got into the back seat of an unmarked Hialeah police car."

Sanchez-Velasco, 570 So. 2d at 910. During the drive to the Hialeah police station, Sanchez-Velasco spontaneously made incriminating statements, and, after arriving at the police station, Sanchez-Velasco confessed to raping and killing Encenarro after he was properly advised of, and waived, his Miranda rights.

On appeal from his multiple convictions, Sanchez-Velasco argued that his statements should have been suppressed at trial because, he said, the Hialeah police officers had illegally arrested him in Miami Beach, and "there was an insufficient break between the illegal arrest and the confession." Sanchez-Velasco, 570 So. 2d at 913. In rejecting that claim, the Florida Supreme Court stated:

> "It is clear from this record that the Hialeah police officers stopped, patted down, handcuffed, and arrested Sanchez–Velasco while out of their jurisdiction. ... After the owner of the allegedly stolen stereo failed to document its value and indicated that he no longer wished to press charges, and after consulting with the state attorney's office, the police removed the handcuffs from Sanchez–Velasco. While the officer's testimony established that Sanchez–Velasco was not, in the officer's mind, free to leave, he also was not told to remain. Sanchez–Velasco walked unrestrained to the side of the road and sat down. Approximately ten minutes later, in response to a request by one of the investigating officers, Sanchez–Velasco agreed to discuss the murder of Kathy Encenarro in Hialeah, and he voluntarily entered the police car.
>
> ***18** "Based on this evidence, the trial court found that Sanchez–Velasco had voluntarily entered the police car for the drive to Hialeah and voluntarily made the statements to the officers. ...
>
> "Although these events initially began as a citizen's arrest by law enforcement officers outside of their jurisdiction, that arrest was not the basis under which Sanchez–Velasco entered the unmarked police car and proceeded with the officers to Hialeah. We find that, in light of this record, the trial judge had sufficient, competent evidence to find that Sanchez–Velasco had voluntarily entered the police vehicle.
>
> "The United States Supreme Court, in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), addressed the situation where a tainted arrest was followed by an apparently voluntary confession. The Court concluded that even if such a confession is made subsequent to Miranda warnings, such warnings, in and of themselves, may not be sufficient to remove the taint of an illegal arrest. The Court stated:
>
> > " 'It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.
> >
> > ... The question of whether a confession is the product of a free will under Wong Sun [v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)], must

> be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admiss[i]bility rests, of course, on the prosecution.'

"422 U.S. at 603–604, 95 S. Ct. at 2261–2262 (citations omitted, footnotes omitted). The Court, in Brown, decided that the state failed to sustain the burden of proving that the evidence at issue was admissible, since there was no break between the arrest and the statements and since the arrest was obviously improper and gave 'the appearance of having been calculated to cause surprise, fright, and confusion.' Id. at 605, 95 S. Ct. at 2262.

"We find that the instant case is distinguishable from Brown. In the instant case, unlike the situation in Brown, there was a significant intervening event between Sanchez–Velasco's initial arrest and his statements and confessions –- he was released from apparent custody and control of the officers. Further, unlike the police in Brown, the Hialeah officers initially believed that the arrest was lawful, and they promptly corrected their actions when they discovered that it was not and proceeded to act as they would with a material witness in a first-degree murder case. We conclude that a justifiable basis exists for the trial court to find that Sanchez–Velasco entered the police car voluntarily and agreed to proceed to the Hialeah police station. If there had been no arrest for the theft of the stereo, and if the police officers had asked him if he would talk to them about Kathy's murder since he was the last person to see Kathy alive, Sanchez-Velasco's statements would in no way be tainted, since he voluntarily went with the police to the police station in Hialeah. Given that the police removed his handcuffs and left him alone for ten minutes or so, we believe that such a break is sufficient to hold that the invalid arrest did not taint the subsequent voluntary statements made by Sanchez–Velasco.

***19** "We further agree with the trial court that the statements which Sanchez–Velasco made while he was in the police car are not the result of any inquiry and that the police officers gave him a proper Miranda warning prior to his confession at the Hialeah police station. In conclusion, we reject Sanchez–Velasco's contention that Wong Sun applies, and we find that his statements and confessions were admissible at his trial."

Sanchez-Velasco, 570 So. 2d at 913-15.

We conclude that the circumstances of Sanchez-Velasco, though not identical, are analogous to the circumstances of this case. Here, Lane was immediately uncuffed once Det. McRae arrived, just as Sanchez-Velasco was uncuffed once the Hialeah police officers realized there were no grounds for a lawful arrest at that time. Thereafter, Det. McRae introduced himself and shook Lane's hand and Lane voluntarily accompanied Det. McRae to Det. McRae's car, just as Sanchez-Velasco voluntarily accompanied officers to the Hialeah police station after a detective introduced himself and asked Sanchez-Velasco if he was willing to discuss Encenarro's murder. As was also the case in Sanchez-Velasco, although Det. McRae did not tell Lane he was free to leave, there is no evidence indicating that Lane was told he had to remain at the scene, and, as noted, Lane, like Sanchez-Velasco, was not handcuffed, placed in Det. McRae's car against his will, or otherwise restrained at that time.

Once Det. McRae and Lane reached Det. McRae's car, they both sat in the front seat and, after Lane was advised of and waived his Miranda rights, had a conversation just as Lane had previously agreed to do before the traffic stop. The evidence indicates, however, that Det. McRae and Lane's encounter was less in the nature of a formal interrogation and more in the nature of a give-and-take conversation in which Lane answered Det. McRae's questions but also "had a lot of questions" of his own, which Det. McRae "tried to answer." (R. 101.) In fact, Det. McRae testified that it was Lane who initiated the conversation by "asking detailed questions," but, Det. McRae testified, he told Lane that he "want[ed] to talk to [Lane] and ... answer all [his] questions" but that he would not do so until Lane signed the form waiving his Miranda rights. (R. 100.) Thus, there was no evidence indicating that Det. McRae's conduct during the conversation was accusatorial, coercive, threatening, or intimidating. See Bannister v. State, 132 So. 3d 267, 277 (Fla. Dist. Ct. App. 2014) (noting that "the removal of the handcuffs, the non-station house setting, and the detectives' conversational manner ... militates against a finding that Bannister was in custody"); and State v. Perez, 58 So. 3d 309, 312 (Fla. Dist. Ct. App. 2011) (holding that defendant was not in

custody where he agreed to answer law enforcement officers' questions, where he was not confronted with guilt during the interrogation, and where "the interview was conducted in a non-threatening manner and the tone was conversational, not confrontational"). In addition, once Det. McRae and Lane finished their conversation, Lane was released. See Howes v. Fields, 565 U.S. 499, 509, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012) (noting that whether a detainee is released after being interrogated is a relevant factor in determining whether the detainee was in custody).

Given the totality of the foregoing circumstances, we have no trouble reaching the same conclusion the Florida Supreme Court reached in Sanchez-Velasco. Here, even if Lane was illegally arrested by Deputy Leddick at the beginning of the traffic stop, the circumstances set forth above indicate that a reasonable person in Lane's position would not have believed that he or she was not free to leave once Det. McRae arrived. Woolf, supra. Stated differently, the evidence indicates that the custody of Lane –- whether legal or illegal –- had terminated by the time Lane provided Det. McRae with a statement, which constituted a "significant intervening event," Sanchez-Velasco, 570 So. 2d at 914, that "serve[d] to break the causal link between the illegal arrest and [Lane's] subsequent statements to the police." Leibach, 394 F.3d at 999. See also Anthony v. State, 108 So. 3d 1111, 1118 (Fla. Dist. Ct. App. 2013) ("[B]ecause Appellant was released from the handcuffs and voluntarily remained to answer Detective Melich's questions, any causal link between her arrest and her subsequent statements had been broken."). In addition, there is no evidence indicating that Lane's decisions to remain at the scene of the traffic stop, to enter the front seat of Det. McRae's car, to waive his Miranda rights, and to make a statement were the result of anything other than Lane's act of free will " 'in a spirit of apparent cooperation.' " Hanna v. State, 591 A.2d 158, 165 (Del. 1991) (quoting United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Indeed, if Lane was in fact illegally arrested by Deputy Leddick at the beginning of the traffic stop, it is quite apparent from the circumstances set forth above that the arrest "was not the basis under which [Lane] entered [Det. McRae's] police car and proceeded" to make a statement but that, instead, Lane was one of those " 'persons arrested illegally [who] ... decide[d] to [make a statement], as an act of free will unaffected by the initial illegality.' " Sanchez-Velasco, 570 So. 2d at 914 (quoting Brown, 422 U.S. at 603, 95 S.Ct. 2254). In fact, as noted earlier, before the traffic stop ever occurred Lane had already expressed a willingness to speak with Det. McRae, which further supports the conclusion that Lane's statement was wholly an act of free will completely independent of any unlawful custody that might have occurred before Det. McRae arrived.

***20** Based on the foregoing, we hold that, even if Lane was illegally arrested by Deputy Leddick at the beginning of the traffic stop, Lane's statement to Det. McRae occurred after the unlawful custody terminated, which broke the causal link between the illegal arrest and the statement, and was an act of Lane's free will sufficient to purge the taint of the illegal arrest. Taylor, supra. Thus, the trial court did not err by refusing to suppress Lane's statement. Sanchez-Velasco, supra. See also Hanna, 591 A.2d at 165 (holding, in a case where police officers ordered the defendant out of his car at gunpoint, handcuffed him, told him he was being detained for questioning regarding a homicide, but ultimately uncuffed him once detectives arrived and informed him a mistake had been made, that "[i]n light of the intervening circumstances of [the defendant's] release and his voluntary travel to the police station for questioning, the connection between his initial, unlawful seizure and his statement became so attenuated as to dissipate the taint").[10]

Lane also argues that the trial court erred by denying his motion to suppress the evidence seized subsequent to his arrest the day after the traffic stop because, he says, the arrest was not supported by probable cause. In support of that claim, Lane argues, as he did below, that, "[w]ithout [his] illegally obtained ... statement [during the traffic stop], the officers lacked sufficient evidence to have reason to believe that Lane committed an offense." Lane's brief, at 24. However, we have already concluded that Lane's statement during the traffic stop, which Lane made after waiving his Miranda rights, was not the fruit of an illegal arrest and therefore was not "illegally obtained."

Moreover, we conclude that there was probable cause to arrest Lane for the Theresa's murder even without considering the statement Lane provided during the traffic stop.

> "In explaining probable cause to arrest, the Alabama Supreme Court has stated:
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> > " 'Probable cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime. United States v. Rollins, 699 F.2d 530 (11th Cir.) cert. denied, 464 U.S. 933, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983). "In dealing with probable cause, however, as the very name implies, we

deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act ....” Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 [L. Ed.] 1879, 1891 (1949). “ ‘The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.’ ” Id. “Probable cause to arrest is measured against an objective standard and, if the standard is met, it is unnecessary that the officer subjectively believe that he has a basis for the arrest.” Cox v. State, 489 So. 2d 612 (Ala. Cr. App. 1985). The officer need not have enough evidence or information to support a conviction in order to have probable cause for arrest. Only a probability, not a prima facie showing, of criminal activity is the standard of probable cause. Stone v. State, 501 So. 2d 562 (Ala. Cr. App. 1986). “ ‘[P]robable cause may emanate from the collective knowledge of the police ....’ ” Ex parte Boyd, 542 So. 2d 1276, 1284 (Ala. 1989) (citations omitted).'

“Dixon v. State, 588 So. 2d 903, 906 (Ala. 1991).” Callen v. State, 284 So. 3d 177, 211 (Ala. Crim. App. 2017).

***21** By the time Lane was arrested, Det. McRae had learned from Dr. Chrostowski that Theresa had drowned and that her death was a homicide, and Det. McRae had personally observed “defense wounds everywhere” on Theresa's body. (R. 1855.) During the traffic stop that occurred approximately four hours after Wilson discovered Theresa's body, Deputy Leddick observed a wet bath towel in plain view in Lane's truck, and Inv. Phillips observed “scratch marks” on Lane's legs. Det. McRae was also aware, from speaking with Wilson at the scene of the murder, that Lane and Theresa were in the process of “a bad divorce” and that Theresa was living with Wilson “in hiding.” In addition, Det. McRae had spoken with Jay, who saw Lane's truck across the street from Wilson's house near the time Theresa was murdered, and had spoken with Lane's neighbors, who saw Lane leave his mobile home in his truck near the time Theresa was murdered and who testified that Lane attempted to establish an alibi with them later that day. Det. McRae had also spoken with Pierce, who informed him that, within hours of Theresa's death, Lane had sought Pierce's assistance in collecting the proceeds of Theresa's life-insurance policy. Those facts, none of which were grounded in the statement Lane provided during the traffic stop, were sufficient to establish probable cause to arrest Lane for Theresa's murder. See generally Callen, supra (probable cause to arrest defendant for murders of victims who had been stabbed where defendant had been seen near the scene of the murders and had cuts and scratches on his body). Thus, even if Lane's statement was the fruit of an illegal de facto arrest –- which it was not –- Lane's argument that there was not probable cause to arrest him for Theresa's murder is without merit. Accordingly, Lane is not entitled to relief on this claim.

III.

Lane raises three claims with respect to the jury-selection process and the composition of the jury. We address each claim in turn.

1.

Lane first argues that the State, in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), used its peremptory strikes in a racially discriminatory manner to exclude black veniremembers from the jury. Because Lane did not raise a Batson claim at trial, this claim is subject to only plain-error review. See Gobble v. State, 104 So. 3d 920, 948 (Ala. Crim. App. 2010) (“Because Gobble did not make a Batson motion [at trial], we review this claim for plain error.”).

Initially, we note that a plurality of the Alabama Supreme Court has concluded that Alabama's appellate courts should no longer review Batson claims for plain error where the defendant fails to make a timely objection to the manner in which the State used its peremptory strikes. See Ex parte Phillips, 287 So. 3d 1179, 1243 (Ala. 2018) (“I would ... hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for the first time on appeal.” (Stuart, C.J., concurring specially, joined by Main and Wise, JJ.)). Likewise, this Court has questioned whether a Batson claim that was not raised at trial should be included within an appellate court's plain-error review. See, e.g., Hicks v. State, [Ms. CR-15-0747, July 12, 2019] —— So. 3d ——, 2019 WL 3070198 (Ala. Crim. App. 2019); and White v. State, 179 So. 3d 170 (Ala. Crim. App. 2013). We do not reiterate here the multiple reasons that an appellant who asserts a Batson claim on appeal should first be required to raise the claim at trial –- reasons this Court acknowledged in White, supra, by quoting at length from Justice Murdock's opinion in Ex parte Floyd, 190 So. 3d 972, 978-87 (Ala. 2012) (Murdock, J., concurring in the result, joined by Malone, C.J., and Bolin, J.). See also Scheuing v.

State, 161 So. 3d 245, 305 (Ala. Crim. App. 2013) (Windom, P.J., concurring specially, joined by Joiner, J.) (quoting at length Justice Murdock's opinion concurring in the result in Ex parte Floyd in concluding that "death-row inmates should [not] be allowed to raise Batson ... claims for the first time on appeal"). Rather, we merely note that we continue to question whether Lane's Batson claim is properly before this Court, but we conclude that, even if it is, no plain error occurred.

> "To find plain error in the Batson context, we first must find that the record raises an inference of purposeful discrimination by the State in the exercise of its peremptory challenges. E.g., Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007). Where the record contains no indication of a prima facie case of racial discrimination, there is no plain error. See, e.g., Gobble v. State, 104 So. 3d 920, 949 (Ala. Crim. App. 2010). '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, supra at 94, 106 S. Ct. 1712), aff'd, 24 So. 3d 540 (Ala. 2009). In Ex parte Branch, 526 So. 2d 609, 622-23 (Ala. 1987), the Alabama Supreme Court discussed a number of relevant factors that can be used to establish a prima facie case of racial discrimination: (1) the veniremembers who were peremptorily struck shared only the characteristic of race and were otherwise as heterogeneous as the community as a whole; (2) a pattern of strikes against black veniremembers; (3) the prosecutor's past conduct in using peremptory challenges to strike all blacks from the venire; (4) the type and manner of the prosecutor's questions on voir dire; (5) the type and manner of questions directed to the veniremembers who were peremptorily struck, or the absence of meaningful questions; (6) disparate treatment of members of the jury venire who were similarly situated; (7) disparate examination of black veniremembers and white veniremembers; (8) the State's use of all or most of its strikes against black veniremembers. With these principles in mind, we turn to [Lane's] claims."

***22** Henderson v. State, 248 So. 3d 992, 1016-17 (Ala. Crim. App. 2017)).

In support of his Batson claim, Lane alleges that the State "used 10 of its 21 [peremptory] strikes, or 48%, against African American veniremembers, despite the fact that African Americans represented 23% of qualified jurors. These 10 strikes resulted in the removal of 83% of qualified African Americans from the venire." Lane's brief, at 25. According to Lane, such "statistical evidence ... created a presumption of discrimination" against black veniremembers and "evince[s] a 'pattern of strikes' against African Americans." Id. However, "numbers and statistics do not, alone, establish a prima facie case of racial discrimination" in the State's use of its peremptory strikes. Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ––– So. 3d ––––, ––––, 2019 WL 181145 (Ala. Crim. App. 2019). Thus, the statistics Lane cites are insufficient in and of themselves to support a prima facie case of racial discrimination in the State's use of its peremptory strikes. Rather, those statistics are relevant, if at all, only when coupled with other evidence in the record that tends to indicate the State used its peremptory strikes in a racially discriminatory manner. Henderson, 248 So. 3d at 1018. As will become clear, no such evidence exists in this case.

To begin, Lane alleges that the Mobile County District Attorney's Office has a history of "repeatedly remov[ing] at least 75% of African American veniremembers." Lane's brief, at 27. However, the State contends that the prosecutor in this case, Ashley Rich, assumed office in 2011 –- a fact Lane does not dispute –- and all but three of the cases Lane cites in support of his allegation were tried before Rich assumed office. See Dotch v. State, 67 So. 3d 936, 982 (Ala. Crim. App. 2010) (noting that "none of the cases cited by Dotch as indicating a history of discrimination occurred within the last decade or involved the prosecutor in Dotch's case" (emphasis added)). Furthermore, as to those three cases Lane cites that were tried after Rich assumed office, this Court did not find evidence of a Batson violation in DeBlase v. State, [Ms. CR-14-0482, November 16, 2018] ––– So. 3d ––––, 2018 WL 6011199 (Ala. Crim. App. 2018), and did not even address a Batson claim in Horton v. State, 217 So. 3d 27 (Ala. Crim. App. 2016), and Kennedy v. State, 186 So. 3d 507 (Ala. Crim. App. 2015). See Stanley v. State, 143 So. 3d 230, 257 (Ala. Crim. App. 2011) (noting, in rejecting appellant's claim that the Colbert County District Attorney's Office has a history of gender discrimination in its jury selection, that appellant had "not cited even a single case in which a court has found that the Colbert County District Attorney's Office has" engaged in gender discrimination). Thus, this argument does not support a prima facie case of racial discrimination in the State's use of its peremptory strikes.

Lane also alleges that the State engaged in "disparate treatment of members of the jury venire who were similarly situated[.]" Henderson, 248 So. 3d at 1017. Specifically, Lane notes that the State struck black veniremembers L.R., C.P., K.H., E.B., M.M., A.W., D.B., and B.P., and although

the State proffered race-neutral reasons for the strikes, Lane argues that the reasons were pretextual because, he says, those black veniremembers were similarly situated to white veniremembers who were seated on the jury. To find a prima facie case of disparate treatment in the State's use of its peremptory strikes, the "disparate treatment [must be] 'obvious on the face of the record.' " White, 179 So. 3d at 202 (quoting Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007)).

***23** As to prospective juror L.R., the State noted that it struck L.R. because he "had only served one year in the military and he was discharged and it was honorable or dishonorable." (R. 1397.) See State v. Heard, 917 So. 2d 658, 665 (La. Ct. App. 2005) (striking prospective juror who had dishonorable or less-than-honorable military discharge was "a race-neutral decision to exclude anyone that may have had a problem with authority in the military"). Lane notes, however, that the State did not strike white juror S.W., who indicated that he was honorably discharged from the Navy. However, S.W. also indicated that he eventually "went back in the Navy and finished [his] Navy career." (R. 869-70.) Thus, L.R., who did not complete a term of military service, and S.W., who did complete a term of military service, were not so similarly situated as to support an inference of racial discrimination in the State's use of its peremptory strikes.[11] See Wiggins v. State, 193 So. 3d 765, 790 (Ala. Crim. App. 2014) (noting that plain-error review of a Batson claim requires this Court " 'to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers' " and that " '[p]otential jurors may possess the same objectionable characteristics, but in varying degrees' " (quoting, respectively, Leadon v. State, 332 S.W.3d 600, 612 (Tex. App. 2010), and Johnson v. State, 959 S.W.2d 284, 292 (Tex. App. 1997))). Furthermore, even if the failure to complete a term of military service as opposed to the completion of a term of military service is not a relevant distinction between prospective jurors, the State also struck L.R. because he "was a caretaker for his brother in their family home" (R. 1396), which was a characteristic not applicable to S.W. and is a valid race-neutral reason for striking a prospective juror. Jackson v. State, 791 So. 2d 979, 1007 (Ala. Crim. App. 2000). In addition, we note that L.R. did not indicate on his juror questionnaire whether he was in favor of the death penalty (R. 597), and during individual voir dire L.R. indicated that he did not "really have an opinion one way or the other" on the death penalty (R. 597) and that he had not "thought about the death penalty prior to [being selected] for jury service." (R. 601.) S.W., on the other hand, indicated that he was "in favor of" the death penalty. (R. 863.) See People v. Mai, 57 Cal.4th 986, 161 Cal.Rptr.3d 1, 305 P.3d 1175, 1222 (2013) (peremptory strike against prospective juror was race-neutral, despite the fact that both prospective juror and seated juror expressed ability to vote for death penalty, where seated juror "expressed much stronger views in favor of the death penalty"). Thus, because the State struck L.R. for valid race-neutral reasons that did not apply to S.W., "disparate treatment is not 'obvious on the face of the record,' " White, 179 So. 3d at 202 (quoting Ex parte Walker, 972 So. 2d at 753), by virtue of the fact that the State struck L.R. but did not strike S.W.

As to prospective juror C.P., the State noted that it struck C.P. because he indicated that he believed he had been wrongfully arrested in the past. See United States v. Brown, 809 F.3d 371 (7th Cir. 2016) (prospective juror's belief that he had been wrongfully arrested was race-neutral reason for peremptory strike). Lane notes, however, that the State did not strike white juror S.W., who, according to Lane, also indicated that he had been wrongfully arrested. However, contrary to Lane's allegation, S.W. did not indicate that he had been wrongfully arrested but, rather, stated that his case had been dismissed after he had completed 20 hours of community service. (R. 867.) In fact, S.W. indicated that he believed he had been treated fairly during his case and that he had "no issue with the process that [he] went through." (R. 867.) Thus, C.P., who believed that he had been wrongfully arrested, and S.W., who did not express such a belief, were not similarly situated. See Brown, 809 F.3d at 375 ("[T]he jurors that Brown points to were not similarly situated to Juror 74. With regard to Juror 81, having charges dropped is distinguishable from being wrongly arrested. ... As for Juror 3, being charged and convicted is readily distinguishable from being wrongly arrested."). In addition, the State notes that it also struck three white veniremembers who indicated that members of their families had been wrongfully arrested or convicted (R. 1387, 1389, 1392), which tends to indicate that striking C.P. did not constitute disparate treatment of black and white veniremembers by the State but, rather, was consistent with the State's attempt to strike any veniremembers, regardless of their race, who had had potentially negative experiences with law enforcement. See Whatley v. State, 146 So. 3d 437, 455 (Ala. Crim. App. 2010) (" ' "Where whites and blacks are struck for the same reason, there is no evidence of disparate treatment." ' " (quoting Bush v. State, 695 So. 2d 70, 100 (Ala. Crim. App. 1995), affirmed, 695 So. 2d 138 (Ala.), cert. denied, Bush v. Alabama, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997), quoting in turn Carrington v. State, 608 So. 2d 447, 449 (Ala. Crim. App. 1992))). Thus, for the foregoing reasons, "disparate treatment is not 'obvious on the

face of the record,' " White, 179 So. 3d at 202 (quoting Ex parte Walker, 972 at 753), by virtue of the fact that the State struck C.P. but did not strike S.W.

***24** As to prospective juror K.H., the State noted that it struck K.H. because her boyfriend had once worked as a law enforcement officer but had quit after deciding that "law enforcement was not for him." (R. 1383.) Lane notes, however, that the State did not strike white juror S.W., who also indicated that he had worked as a law enforcement officer for a brief period before deciding that "it wasn't for [him]." (R. 869.) However, the State struck K.H. for multiple race-neutral reasons that were not applicable to S.W., including that K.H. "did not believe in the death penalty and ... did not feel it was her right to determine if someone lives or dies" (R. 1382) and that she "had an uncle that was guilty of theft [and] another uncle that was guilty of assault." (R. 1382-83.) See Gobble, 104 So. 3d at 949 (noting that " '[t]he peremptory strike of a prospective juror who had expressed reservations about the death penalty [is] sufficiently race-neutral so as to not violate Batson' " and that " '[s]triking a prospective juror because a member of the juror's family has been convicted of a crime is a valid race-neutral reason under Batson' " (quoting, respectively, Acklin v. State, 790 So. 2d 975, 988 (Ala. Crim. App. 2000), and Lewis v. State, 741 So. 2d 452, 456 (Ala. Crim. App. 1999))). This Court has previously held that

> "merely because [a prospective juror and a seated juror] shared one commonality ... does not make those jurors similarly situated and does not establish disparate treatment on the part of the State. 'Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.' "

DeBlase, —— So. 3d at ——, 2018 WL 6011199 (quoting Luong v. State, 199 So. 3d 173, 191 (Ala. Crim. App. 2015)). See also Wiggins, 193 So. 3d at 790 (" 'The fact that jurors remaining on the panel possess one [or] more of the same characteristics as a juror that was stricken[ ] does not establish disparate treatment.' " (quoting Barnes v. State, 855 S.W.2d 173, 174 (Tex. App. 1993))). Thus, because K.H. and S.W. shared one common characteristic but were also different in meaningful ways, "disparate treatment is not 'obvious on the face of the record,' " White, 179 So. 3d at 202 (quoting Ex parte Walker, 972 So. 2d at 753), by virtue of the fact that the State struck K.H. but did not strike S.W.

In further support of the State's allegedly disparate treatment of similarly situated black and white veniremembers, Lane notes that the State struck black veniremembers K.H., E.B., M.M., A.W., D.B., and B.P. because they or members of their families had "contact with the criminal justice system" but "ignor[ed] similar involvement among four seated white jurors." Lane's brief, at 37. However, as noted, "merely because [prospective jurors and seated jurors] shared one commonality ... does not make those jurors similarly situated and does not establish disparate treatment on the part of the State." DeBlase, —— So. 3d at ——, 2018 WL 6011199. Rather, plain-error review of a Batson claim requires this Court to " 'look to the entire record to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers that would, under the facts of this case, justify the prosecutor treating them differently as potential members of the jury.' " Wiggins, 193 So. 3d at 790 (quoting Leadon, 332 S.W.3d at 612).

Here, in addition to "contact with the criminal justice system," the State provided additional race-neutral reasons for striking K.H., E.B., M.M., A.W., D.B., and B.P. As noted, the State struck K.H. because she "did not believe in the death penalty and ... did not feel it was her right to determine if someone lives or dies." See Gobble, supra. The State struck E.B. because "she put on her death penalty question it has to be guilty beyond a shadow of a doubt." (R. 1394.) See Whatley v. State, 146 So. 3d 437, 456 (Ala. Crim. App. 2010) (" '[T]he fact that a veniremember would hold the State to a higher burden of proof is a race-neutral reason for striking that veniremember.' " (quoting Blanton v. State, 886 So. 2d 850, 874 (Ala. Crim. App. 2003), cert. denied, 886 So. 2d 886 (Ala. 2004), cert. denied, Blanton v. Alabama, 543 U.S. 878, 125 S.Ct. 119, 160 L.Ed.2d 131 (2004))). The State struck M.M. not simply because she had had "contact with the criminal justice system" but because she failed to disclose her prior theft conviction and because she knew one of the State's witnesses. See Sharp v. State, 151 So. 3d 342, 368 (Ala. Crim. App. 2010) (prior conviction is race-neutral reason for peremptory strike and prospective jurors who failed to disclose prior convictions were not similarly situated to seated juror who did disclose prior conviction); and Creque v. State, 272 So. 3d 659, 709 (Ala. Crim. App. 2018) (fact that prospective juror knew potential witness was race-neutral reason for strike). The State struck A.W. because "she used to not believe in the death penalty ... when she was younger but now ... she does." (R. 1388.) See State v. Wilson, 938 So. 2d 1111, 1135 (La. Ct. App. 2006) (no error by trial court in accepting State's peremptory strike of juror who indicated that she did not believe in the death penalty in

the past but had changed her opinion). The State struck D.B. because she also once "didn't believe in [the death penalty] and then she changed her mind" (R. 1386) and because she believed the evidence "had to be without a doubt." (R. 1387.) See Wilson, supra, and Whatley, supra. The State struck B.P. not simply because her brother had had "contact with the criminal justice system" but because she believed her brother had been wrongfully convicted of murder and because she suffered from back pain, hypertension, and diabetes.[12] See Wilburn v. Commonwealth, 312 S.W.3d 321, 331 (Ky. 2010) (prospective juror's belief that friend had been wrongfully arrested was race-neutral reason for peremptory strike); and Scott v. State, 240 Ga.App. 50, 522 S.E.2d 535, 538 (1999) (peremptory strike based on prospective juror's health was racially neutral on its face).[13]

***25** None of the four white jurors Lane identifies had characteristics similar to the additional characteristics that caused the State to strike K.H., E.B., M.M., A.W., D.B., and B.P., which, as noted, were valid race-neutral reasons for peremptory strikes. Thus, although the four white jurors Lane identifies shared a single common characteristic with K.H., E.B., M.M., A.W., D.B., and B.P., "disparate treatment is not 'obvious on the face of the record,' " White, 179 So. 3d at 202 (quoting Ex parte Walker, 972 So. 2d at 753), by virtue of the fact that the State struck K.H., E.B., M.M., A.W., D.B., and B.P. because there were meaningful differences between those prospective jurors and the white jurors Lane identifies. DeBlase, supra; Wiggins, supra.

Based on the foregoing and our review of the entire voir dire process, we conclude that the record does not support a prima facie case of "purposeful discrimination by the State in the exercise of its peremptory challenges." Henderson, 248 So. 3d at 1016. Thus, we find no plain error with respect to Lane's Batson claim, and, in the absence of such error, Lane is not entitled to relief on this claim. See Gobble, 104 So. 3d at 949 ("There is nothing to establish a prima facie case of [racial] discrimination. Accordingly, we find no plain error.").

2.

Lane also argues that the trial court erred by denying his motion to strike for cause prospective jurors C.W., J.B., J.G., and M.S.[14] In support of that claim, Lane cites Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), in which the United States Supreme Court stated:

> "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."

Morgan, 504 U.S. at 729, 112 S.Ct. 2222. Relying on Morgan, Lane argues that the trial court should have granted his motion to strike for cause C.W., J.B., J.G., and M.S. because, Lane says, those prospective jurors "revealed that they would invariably vote for the death penalty if Lane was convicted of capital murder" and, as a result, were "mitigation impaired." Lane's brief, at 66.

> " 'The test for determining whether a strike rises to the level of a challenge for cause is "whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence." Marshall v. State, 598 So. 2d 14, 16 (Ala. Cr. App. 1991). "Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause." Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983). "The decision of the trial court 'on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion.' " Nettles, 435 So. 2d at 153.'

"Dunning v. State, 659 So. 2d 995, 997 (Ala. Crim. App. 1994).

" 'The qualification of a juror is a matter within the discretion of the trial court. Clark v. State, 443 So. 2d 1287, 1288 (Ala. Cr. App. 1983). The trial judge is in the best position to hear a prospective juror and to observe his or her demeanor.' Ex parte Dinkins, 567 So. 2d 1313, 1314 (Ala. 1990). ' "[J]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court." Johnson v. State, 820 So. 2d 842, 855 (Ala. Crim. App. 2000).' Sharifi v. State, 993 So. 2d 907, 926 (Ala. Crim. App. 2008).

> ***26** " 'It is well to remember that the lay persons on the panel may never have been subjected to the type of

> leading questions and cross-examination techniques that frequently are employed ... [during voir dire] .... Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge may properly choose to believe those statements that were the most fully articulated or that appeared to ... have been least influenced by leading.'
>
> "Patton v. Yount, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)."

Thompson v. State, 153 So. 3d 84, 115-16 (Ala. Crim. App. 2012). " 'Thus, even though a prospective juror admits to a potential bias, if further voir dire examination reveals that the juror can and will base his decision on the evidence alone, then a trial judge's refusal to grant a motion to strike for cause is not error.' " Osgood v. State, [Ms. CR-13-1416, Oct. 21, 2016] —— So. 3d ——, ——, 2016 WL 6135446 (Ala. Crim. App. 2016) (quoting Perryman v. State, 558 So. 2d 972, 977 (Ala. Crim. App. 1989)). " '[I]n order to determine whether the trial judge's exercise of discretion was proper, this Court will look to the questions directed to and answers given by the prospective juror on voir dire. Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985).' " Killingsworth v. State, 33 So. 3d 632, 637 (Ala. Crim. App. 2009) (quoting Holliday v. State, 751 So. 2d 533, 535 (Ala. Crim. App. 1999)). With these principles in mind, we address in turn Lane's claims the trial court erred by denying his motion to strike for cause prospective jurors C.W., J.B., J.G., and M.S.

A.

C.W. indicated on her juror questionnaire that she "believed that the death penalty should be imposed in all capital murder cases." (R. 1118.) During individual voir dire, the trial court asked C.W. if there was "any set of circumstances that [she] could impose life imprisonment without the possibility of parole" for a capital conviction, and C.W. replied: "Not right now, no, sir." (R. 1118.) However, after explaining the process of weighing the aggravating and mitigating circumstances, the prosecutor asked C.W. if she could recommend a life-imprisonment-without-parole sentence if her weighing of the aggravating and mitigating circumstances warranted such a sentence, and C.W. unequivocally stated that she could. (R. 1120-21.) The prosecutor and the trial court then questioned C.W. as follows:

> "[THE PROSECUTOR]: And you [indicated on your juror questionnaire that the death penalty] definitely should be imposed in all capital murder cases. But I think now that you understand the process --
>
> "[C.W.]: Right.
>
> "[THE PROSECUTOR]: — that's not the case, is it?
>
> "[C.W.]: No. You have to listen to everything.
>
> ***27** "[THE PROSECUTOR]: Right. And that's what we're asking. Can you listen to everything and make your decision based on what you hear?
>
> "[C.W.]: Yes, ma'am.
>
> "....
>
> "THE COURT: So I'm hearing you to say that there are circumstances --
>
> "[C.W.]: Right. There is circumstances. You have to listen to both sides."

(R. 1122.)

Thereafter, defense counsel questioned C.W. as follows regarding a hypothetical scenario in which a defendant was convicted of capital murder-burglary:

> "[DEFENSE COUNSEL]: Would it -- would it be of any importance to you or could you consider or would you consider whether or not the defendant maybe had a bad childhood, whether or not the defendant had a learning disability, if he maybe didn't have any prior criminal history, would those things be important to you or would you give those things meaningful consideration? Or would you vote to impose the death penalty because you'd convicted the person of capital murder?
>
> "[C.W.]: Well, he did it intentionally. I mean, I think people that had a bad childhood or whatever, I think they could overcome that.
>
> "....
>
> "[C.W.]: And I think that they would get the death penalty. They killed that person.

"[DEFENSE COUNSEL]: Okay. So the fact that you found the person guilty of a capital murder would be enough for you?

"[C.W.]: Right.

"[DEFENSE COUNSEL]: And it wouldn't be important to you whether or not that person had a bad childhood or --

"[C.W.]: No.

"[THE PROSECUTOR]: Judge, I object to it being important to her. It's whether she can listen.

"THE COURT: It's not a question of importance. It's a question of would you consider all these things before you reached a verdict?

"[C.W.]: Well, if I listened to them. I just -- I mean, I don't feel like having a bad childhood would, you know, make these people do this. I don't understand. I mean, I --

"Never mind. I'm not answering that right.

"THE COURT: Well, you've only heard four or five examples as to what mitigation may or may not be. We don't know.

"[C.W.]: Right.

"THE COURT: Would you promise me and commit to the Defense that you would consider whatever they put forward as mitigating circumstances?

"[C.W.]: Yeah. Yeah. I can listen. You're saying listen to what they have to say about it, yeah.

"THE COURT: And you would give it consideration?

"[C.W.]: Yes, I would give it consideration."
(R. 1125-27.)

As evidenced by the foregoing, once the process of weighing the aggravating and mitigating circumstances was explained to C.W., she unequivocally indicated that she would consider a life-imprisonment-without-parole sentence and that she could recommend such a sentence if her weighing of the aggravating and mitigating circumstances warranted such a sentence. Thus, the trial court, who was in the best position to observe C.W.'s demeanor and to gauge the veracity of her responses, Thompson, supra, could have reasonably found that C.W. had been rehabilitated of her initial response on her juror questionnaire that she believed the death penalty should be imposed for all capital convictions. See Osgood, ––– So. 3d at ––––, 2016 WL 6135446 (prospective juror who indicated that she believed anyone convicted of murder should be sentenced to death was sufficiently rehabilitated, and thus no abuse of discretion in trial court's refusal to strike her for cause, where she subsequently indicated that she would follow trial court's instructions and would consider a life-imprisonment-without-parole sentence).

***28** Lane argues, however, that the trial court was nevertheless required to grant his motion to strike C.W. for cause because, he says, "[w]hen the defense provided [C.W.] with examples of specific mitigating factors like childhood trauma, ... C.W. dismissed them, stating that people could 'overcome that.' " Lane's brief, at 67. We disagree.

"[T]here is no requirement that a court strike a juror based on his/her feelings towards certain types of mitigating evidence. ...

"....

"... In interpreting the scope of the United States Supreme Court's decision in Morgan, the Alabama Supreme Court has held:

" '[R]ather than simply attempting to identify those jurors who were not impartial and who would vote for the death penalty in every case regardless of the facts, Taylor's counsel sought to identify any prospective juror who would vote for death under the facts of this particular case and then to eliminate that prospective juror by using strikes for cause. The due process protections recognized in Morgan do not extend that far. ...'

"Ex parte Taylor, 666 So. 2d 73, 82 (Ala. 1995), disagreed with on other grounds, Ex parte Borden, 769 So. 2d 950 (Ala. 2000) (emphasis in original). Other courts have followed our Supreme Court's interpretation of Morgan.

" 'Morgan requires that defendants be afforded an opportunity during voir dire to identify, and to strike for cause, prospective jurors who would automatically impose the death penalty once guilt is found. See [State v.] Glassel, 211 Ariz. [33] 45–46, 116 P.3d [1193] 1205–06 [(2005)]. Morgan does not, however, entitle defendants to ask prospective jurors to identify circumstances they would find mitigating or to answer open-ended questions about their views on mitigation.'

"State v. Moore, 222 Ariz. 1, 18, 213 P.3d 150, 167 (2009).

> " 'Glassel contends that Morgan gives defendants the right to question a prospective juror to assess the likelihood that the prospective juror will assign substantial weight to the mitigation evidence the defendant plans to offer. Morgan's holding, however, is considerably narrower[.] ...'

"State v. Glassel, 211 Ariz. 33, 45, 116 P.3d 1193, 1205 (2005). See also Trevino v. Johnson, 168 F.3d 173 (5th Cir. 1999).

> "Because a prospective juror is not disqualified from serving on a capital jury based on that juror's views of certain types of mitigation, [a] circuit court commit[s] no error in failing to remove [a] prospective juror ... for cause based on [his or] her responses to questions concerning certain types of mitigating evidence."

Albarran v. State, 96 So. 3d 131, 161 (Ala. Crim. App. 2011).

Thus, as this Court noted in Albarran, Morgan prohibits only a juror who will automatically recommend the death penalty for every capital conviction, not a juror who is willing to consider a life-imprisonment-without-parole sentence but simply might not find specific types of mitigating circumstances to be particularly persuasive. As noted, C.W. stated that she would consider a life-imprisonment-without-parole sentence in Lane's case, that she would consider any mitigating circumstances the defense proffered, and that she would base her sentencing recommendation on her weighing of the aggravating and mitigating circumstances; that is all that Morgan requires. Therefore, the fact that C.W. did not find defense counsel's specific and limited examples of mitigating circumstances to be particularly weighty in a hypothetical scenario was not a basis for striking her for cause. See Albarran, 96 So. 3d at 161 ("[A] prospective juror is not disqualified from serving on a capital jury based on that juror's views of certain types of mitigation[.]"); and Taylor v. State, 666 So. 2d 36, 44-47 (Ala. Crim. App. 1994) (no error in trial court's refusal to strike for cause prospective jurors who indicated that they would consider any mitigating circumstances the defense proffered but also indicated that they did not find the specific mitigating circumstances defense counsel identified during voir dire to be particularly weighty).

***29** C.W.'s responses during individual voir dire provided a basis for concluding that she had been rehabilitated of her initial response on her juror questionnaire that she believed the death penalty should be imposed for all capital convictions. See Osgood, supra. Thus, we find no abuse of discretion in the trial court's refusal to grant Lane's motion to strike C.W. for cause. Thompson, supra. The fact that C.W. did not find specific examples of mitigating circumstances to be particularly weighty in a hypothetical scenario does not require a different conclusion. Albarran, supra; Taylor, supra.

B.

Lane alleges that J.B. "confirmed six times over the course of his individual voir dire that he would necessarily impose the death penalty in a case where the defendant was found guilty of 'intentional' or 'premeditated' murder." Lane's brief, at 68. However, contrary to Lane's allegation, J.B. unequivocally stated that he did not believe the death penalty was appropriate for every capital conviction (R. 1131-32, 1137) and that, instead, he would base his sentencing recommendation on his weighing of the aggravating and mitigating circumstances. (R. 1131.) Although J.B. expressed strong feelings that any intentional murder committed during the course of a robbery warranted the death penalty (R. 1134-36), that opinion had no relevance in this case, where the underlying charge was not robbery and there was no allegation of robbery.

After the trial court questioned J.B., defense counsel presented J.B. with hypothetical facts similar to those presented to C.W. –- a charge of capital murder-burglary or capital murder for pecuniary gain and mitigating circumstances such as "defendant's background, whether he had a bad childhood, whether he had a low IQ" (R. 1138) –- and asked J.B. if he would recommend the death penalty based on those facts. Although J.B. stated that he would recommend the death penalty "[w]ith the limited information that [defense counsel] just gave ... on that hypothetical situation," J.B. also stated that, after "going through a long trial," he would have "much more evidence and much more ... statements and facts ... to base [his] opinion ... on." (R. 1140.) In addition, J.B. reiterated that he would "consider everything" that was presented in the penalty phase before making a sentencing recommendation. (R. 1140.) As we have already concluded, the fact that J.B. indicated he would recommend the death penalty based on the specific facts of defense counsel's hypothetical scenario did not amount to an admission that he would automatically recommend the death penalty for every capital conviction or that he would not give consideration to any mitigating circumstances proffered

in Lane's case, which is the type of juror Morgan prohibits. Albarran, supra; Taylor, supra. Thus, because J.B. never indicated that he would automatically recommend the death penalty for every capital conviction, we find no abuse of discretion in the trial court's refusal to grant Lane's motion to strike J.B. for cause. Thompson, supra.

C.

During individual voir dire by the trial court and the prosecutor, J.G. unequivocally stated that he did not have a fixed opinion that the death penalty was appropriate for every capital conviction (R. 685) and that, instead, he would base his sentencing recommendation on his weighing of the aggravating and mitigating circumstances. (R. 686.) Thereafter, however, the following colloquy occurred:

"[DEFENSE COUNSEL]: You were asked as part of the death penalty questions to explain your views on the death penalty. You said you were in favor of it. And you circled the second option which is that you believe that the death penalty is appropriate in some capital murder cases and you could return a verdict resulting in death in a proper case.

***30** "... [B]ut you were asked to explain your views on the death penalty and you left it blank. And I just wondered if you've had any more chance to think about that and if you could give us an explanation of why you were in favor of the death penalty.

"[J.G.]: Well, I think if you take a man's life or a woman's life that that person should be punished.

"[DEFENSE COUNSEL]: Okay. And by punished, do you mean that they should get the death penalty?

"[J.G.]: Yeah.

"....

"[DEFENSE COUNSEL]: Okay. Let me give it to you this way then. Let's assume that a person is charged with capital murder and the State has proved to your satisfaction beyond a reasonable doubt that the person is guilty of capital murder, it wasn't an accident, it was no self-defense, it wasn't insane, he did it and, in your mind, meant to do it, carried it out beyond a reasonable doubt, then you're telling us that in that circumstance the only punishment that would be appropriate in your mind is the death penalty?

"[J.G.]: Yes, sir.

"....

"THE COURT: Well, you've confused me then and I'll tell you how. You told me earlier that you would consider both life in prison and ... death depending on what the facts of the case were.

"[J.G.]: If it -- if it had been proven without a doubt in my mind and what I hear in that courtroom, then I'm for capital punishment.

"THE COURT: Okay. What -- and I don't want to put words in your mouth because that's what sometimes happens in these situations.

"Are you telling me that in every single capital murder trial if you're convinced beyond a reasonable doubt of his guilt there's no other punishment that you would consider other than death?

"[J.G.]: No, I -- right. I would consider both. I'm sorry.

"....

"THE COURT: Oh, you would consider both?

"[J.G.]: I would.

"THE COURT: Okay. So — and I don't want words -- I mean, we can do hypotheticals all day long. I just want to know how you feel.

"[J.G.]: Sure.

"THE COURT: Did you come in here with a fixed opinion that if I believe this man committed a capital murder, I'm going to give him death without any other choice?

"[J.G.]: No.

"THE COURT: Okay. So you would consider life imprisonment without the possibility of parole if the facts showed such, even if he's guilty of a capital murder?

"[J.G.]: Sure. Yes, sir."

(R. 687-92.)

As evidenced by the foregoing, J.G. indicated during defense counsel's voir dire examination that he believed the death penalty is the only appropriate punishment for a capital conviction. However, upon further questioning by the trial

court, J.G. stated that he would not automatically recommend the death penalty for every capital conviction but, instead, would consider a life-imprisonment-without-parole sentence, which was consistent with the position he originally held before defense counsel's voir dire examination. Thus, the trial court -- which was in the best position to observe J.G.'s demeanor, to observe any confusion created by defense counsel's questions, and to gauge the veracity of J.G.'s responses, Thompson, supra –- could have reasonably found that J.G. had been rehabilitated of his statement that he believed the death penalty is the only appropriate punishment for a capital conviction. See Thompson, 153 So. 3d at 116 (“ ‘The trial judge may properly choose to believe those statements that were the most fully articulated or that appeared to ... have been least influenced by leading.’ ” (quoting Patton v. Yount, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)); and Osgood, —— So. 3d at ——, 2016 WL 6135446 (prospective juror who indicated that she believed anyone who was convicted of murder should be sentenced to death was sufficiently rehabilitated where she subsequently indicated that she would follow trial court's instructions and would consider a life-imprisonment-without-parole sentence). Accordingly, we find no abuse of discretion in the trial court's refusal to grant Lane's motion to strike J.G. for cause. Thompson, supra.

D.

***31** M.S. indicated on his juror questionnaire that he “believe[d] the death penalty should be imposed in all capital murder cases.” (R. 930.) However, when asked by the trial court during individual voir dire if he would recommend the death penalty “regardless of the facts,” M.S. replied: “No, sir. I'd like to hear it first.” (R. 930.) In addition, although M.S. indicated that he would “[m]ore than likely” (R. 931) recommend the death penalty for a capital conviction, he also indicated that he would consider a life-imprisonment-without-parole sentence and that he would base his sentencing recommendation on his weighing of the aggravating and mitigating circumstances. (R. 932.) Thus, the trial court, which was in the best position to observe M.S.'s demeanor and to gauge the veracity of his responses, Thompson, supra, could have reasonably found that M.S. had been rehabilitated of his initial response on his juror questionnaire that he believed the death penalty should be imposed for all capital convictions. See Osgood, supra.

As Lane notes, M.S. indicated that he would “probably” recommend the death penalty in defense counsel's hypothetical scenario of capital murder-burglary and that defense counsel's specific examples of mitigating circumstances –- that the defendant was “abused as a child or ... had a low IQ” –- “wouldn't make any difference.” (R. 935.) However, as we have already concluded, the fact that M.S. indicated he would likely recommend the death penalty based on the specific facts of a hypothetical scenario did not amount to an admission that he would automatically recommend the death penalty for every capital conviction or that he would not give consideration to any mitigating circumstances proffered in Lane's case, which, as noted, is the type of juror Morgan prohibits. Albarran, supra; Taylor, supra. Thus, we find no abuse of discretion in the trial court's refusal to grant Lane's motion to strike M.S. for cause. Thompson, supra.

3.

Lane argues that the trial court erred by granting, over defense counsel's objection, the State's motion to strike prospective juror B.C. for cause. In support of that claim, Lane contends that “the trial court removed [B.C.] because he had 'a stepson in the Mobile Metro Jail pending a murder prosecution that would be prosecuted by [the Mobile County district attorney.” Lane's brief, at 70-71. According to Lane, “a family member being prosecuted by the District Attorney's office was not a sufficient basis for removing a juror for cause.” Id. at 71. However, although the trial court acknowledged the fact that B.C. had a stepson against whom a murder charge was pending as a reason for removing B.C., Lane ignores the fact that the trial court's primary reason for removing B.C. was because B.C. indicated “several times” during individual voir dire that he would recommend the death penalty only if the State proved its case “100 percent.” (R. 510.) The trial court's finding is supported by the record.

During individual voir dire, B.C. indicated that he would recommend the death penalty only if there was “proof beyond a shadow of a doubt” (R. 500) and subsequently reaffirmed that he would require “100 percent” proof before he would recommend the death penalty. (R. 501.) During defense counsel's voir dire examination, however, B.C. indicated that he would follow the trial court's instructions with respect to “what the burden of the State is” (R. 507), which prompted the trial court to question B.C. further regarding his belief about the State's burden of proof:

> "THE COURT: I just want to make sure in my mind. Are you still telling me that you would need 100 percent certainty before you could impose the death penalty?
>
> "[B.C.]: Reasonable, without a reasonable doubt or --
>
> "THE COURT: No. Well, you told me earlier that you needed to be 100 percent certain before you could impose the death penalty.
>
> "[B.C.]: That's the way I feel."

(R. 508.)

A prospective juror's indication that he or she will hold the State to a higher burden of proof than that required by law reflects probable prejudice against the State that justifies the trial court in removing the prospective juror for cause. See Rule 18.4(e), Ala. R. Crim. P. (providing that a trial court may remove for cause any prospective juror if "it reasonably appears that the prospective juror cannot or will not render a fair and impartial verdict"); McGowan v. State, 88 So. 3d 916, 920 (Ala. Crim. App. 2010) (noting that a trial court " 'may remove a potential juror if probable prejudice exists, even if none of the statutory grounds [in § 12-16-150, Ala. Code 1975,] apply' " (quoting Motes v. State, 356 So. 2d 712, 718 (Ala. Crim. App. 1978))); United States v. Purkey, 428 F.3d 738, 752 (8th Cir. 2005) (no error in removing for cause prospective juror who "insisted that he would hold the government to a higher burden of proof than reasonable doubt"); and cf. Whatley, supra (fact that prospective juror will hold State to higher burden of proof than that required by law justifies peremptory strike). Here, B.C. provided conflicting responses during individual voir dire with respect to the burden of proof he would require the State to meet. However, it was the trial court, not this Court, who was in the best position to observe B.C.'s demeanor and to gauge the veracity of his responses. Thompson, supra. Thus, because B.C.'s responses during individual voir dire provided a basis for concluding that he would hold the State to a higher burden of proof than that required by law and that he therefore would not be a fair and impartial juror, we conclude that there was no abuse of discretion in the trial court's decision to grant the State's motion to remove B.C. for cause. McGowan, supra; Purkey, supra.

IV.

***32** Lane argues that the trial court erred by allowing Milroy, who was admitted as an expert "in the field of firearms and toolmarks analysis" (R. 1594), to testify to facts "outside of his field of training and experience."[15] Lane's brief, at 39. See Revis v. State, 101 So. 3d 247, 292 (Ala. Crim. App. 2011) (" ' "[I]t is error for a court to allow an expert witness to testify outside his area of expertise." ' " (quoting Bowden v. State, 610 So. 2d 1256, 1258 (Ala. Crim. App. 1992), quoting in turn Cook v. Cook, 396 So. 2d 1037, 1041 (Ala. 1981))); and Kyser v. Harrison, 908 So. 2d 914, 919-20 (Ala. Crim. App. 2005) (" '[A]n expert may not testify to his opinion on matters outside of his field of training and experience.' " (quoting Central Aviation Co. v. Perkinson, 269 Ala. 197, 203, 112 So. 2d 326, 331 (1959))). Specifically, Lane challenges Milroy's testimony that "not another chisel in the world" other than the chisel found in Lane's truck could have created the "impressed toolmark[s]" on Wilson's front door. In support of his claim that Milroy was not qualified to provide such testimony, Lane argues that Milroy's testimony "concerned 'impressed evidence,' which was a 'crossover' field distinct from firearm and toolmark analysis," and that Milroy "performed a chisel-mark analysis for the first time in his career in Lane's case; he had never previously matched a metal instrument to impressed wood." Lane's brief, at 39. Because Lane did not object to Milroy's testimony, this claim is subject to only plain-error review. See Largin v. State, 233 So. 3d 374 (Ala. Crim. App. 2015) (reviewing for plain error claim challenging admissibility of testimony where appellant did not object to testimony at trial).

After the trial court admitted Milroy as a firearms-and-toolmarks expert, the State asked Milroy to define a "toolmark," and Milroy testified:

> "Toolmarks are any mark, okay, that is produced by a tool. I mean, it's pretty simple.
>
> "This could happen where, you know, if you use a screwdriver, pliers, bolt cutters. If you're talking about the tool that's specific. Okay?
>
> "And what you have is you're going to have one material in contact with another material. And to make it easier, if you have a metal screwdriver and -- with a metal plate and you scratch it, you've got a toolmark."

(R. 1594.) Milroy then proceeded to identify the unique characteristics of the chisel found in Lane's truck and to explain at length how, by matching those characteristics to the "impressed toolmark[s]" on Wilson's front door, he was able to conclude that there was "not another chisel in the world"

that could have created the toolmarks on Wilson's front door. (R. 1596-1617.)

On cross-examination, defense counsel questioned Milroy as follows:

> "Q. Okay. What –- tell me what –- how do you classify the match that you stated in your opinion?
>
> "A. Okay. As I said, this to me was like a crossover. It's a toolmark, which fell in my wheelhouse at the time, but it's also impressed evidence. So I would lean more towards it being impressed evidence tha[n] it would be the typical toolmark where you have scraping on scraping.
>
> "....
>
> "Q. Back in 2003, how many identifications were you asked to make? And I don't necessarily mean positive or whatever, but I mean chisels would you say that you have examined and rendered opinions regarding their marks that they may have made on a wooden door?
>
> "A. In 2003?
>
> "Q. Yeah.
>
> "A. I mean, this is probably the one I did."

(R. 1623-24.)

As noted, Lane argues that Milroy should not have been allowed to testify regarding his analysis of the "impressed toolmark[s]" on Wilson's front door because, according to Lane, such an analysis was distinct from firearms-and-toolmarks analysis and was therefore outside Milroy's field of expertise. However, although Milroy acknowledged that the marks on Wilson's front door were "impressed evidence," he testified that the impressions were toolmarks, which, according to Milroy, "fell in [his] wheelhouse," i.e., were within his field of expertise. In addition, Milroy testified that, before he worked as a firearms-and-toolmarks examiner, he worked for seven years as a "trace-evidence examiner," which, according to Milroy, required him to "work on" other types of impression evidence such as "shoe print impression evidence [and] tire track impression evidence." (R. 1590.) Thus, we find no merit in Lane's argument that Milroy testified to facts outside his field of expertise by testifying to the conclusions he drew from his analysis of the "impressed toolmark[s]" on Wilson's front door.

***33** We also find no merit in Lane's argument that Milroy was not qualified to form an expert opinion from a "chisel-mark analysis" because, Lane says, Milroy "performed a chisel-mark analysis for the first time in his career in Lane's case; he had never previously matched a metal instrument to impressed wood." Initially, we note that, although the testimony is unclear, Milroy appears to have testified that the toolmarks analysis he performed in this case was the only "chisel-mark analysis" he performed in 2003, not the only one he had ever performed. Regardless, Milroy testified that the impressions on Wilson's front door were toolmarks, which were within Milroy's field of expertise, and, even if Milroy did have limited or no experience with that specific type of toolmark or with chisels in general, that fact goes to the weight of Milroy's testimony, not its admissibility. See State v. Boudoin, 106 So. 3d 1213, 1226 (La. Ct. App. 2012) (no error in allowing firearms-and-toolmarks expert to testify that "pry bar" found in defendant's trunk had created "pry marks" on a door, despite the fact that expert had "never examined a pry bar nor qualified as an expert in a case involving a pry bar"); and State v. Churchill, 231 Kan. 408, 646 P.2d 1049, 1054 (1982) (holding, where expert in toolmarks analysis "had not previously performed tests to determine whether marks upon the human body were made by a given tool," that "[t]he witness's experience or lack of experience in previously performing similar examinations goes to the weight of the testimony, not to its admissibility").

The record supports the conclusion that Milroy was qualified to testify as a firearms-and-toolmarks expert and that the marks on Wilson's front door fell within that field of expertise, i.e., were toolmarks. Any lack of experience Milroy might have had specifically with chisels or "impressed toolmark[s]" went to the weight of Milroy's testimony, not its admissibility. Thus, we find no error, much less plain error, in allowing Milroy to testify regarding his conclusions from the toolmarks analysis he performed in this case.

V.

Lane argues that the trial court erred by excluding what, he says, was evidence crucial to his defense. According to Lane,

> "[p]rior to Lane's first trial, defense counsel sought and received funding for a private investigator to examine whether the overflow drain was working properly [in the bathtub in which Theresa drowned]. This investigator made a video, which showed that when the water was above the

> overflow valve for one minute, the water did not appear to be draining properly. The investigator also noted, in the video, that '[t]he overflow drain barely allows any water to escape from the tub. It drains extremely slow.' "

Lane's brief, at 43-44 (citations to record omitted). In support of his claim that the private investigator's examination of the bathtub (hereinafter referred to as "the experiment") was crucial to his defense, Lane argues:

> "It was central to the defense to raise doubt about whether the overflow drain in the bathtub where Theresa Lane was killed was functioning properly. According to the State's evidence, Lane could have left Wilson's house, where [Theresa] was killed, no later than 9:13 a.m. on the day of the crime. The faucet on the bathtub in which [Theresa] was discovered was found running at 10:10 a.m., which means that, under this theory, water ran into the tub for a minimum of 57 minutes without overflowing onto the floor. As a result, to convict Lane of capital murder, the State was required to prove beyond a reasonable doubt that the overflow valve was functioning properly to prevent the water from overflowing during this timespan. Had the jury determined that the overflow valve was not properly draining or could not be expected to work for that length of time, or if it had some reasonable doubt about whether the overflow valve could prevent an hour's worth of water from escaping the tub onto the floor -- the jury could not have found Lane guilty of capital murder."

Id. at 42-43 (citations to record omitted).

Before trial, the State filed a motion in limine to exclude the experiment on the basis that "the conditions [in the experiment] are not substantially the same as at the time of the actual event." (C. 519.) At a hearing on the State's motion, the trial court noted that the experiment was conducted "some two years after the murder occurred," that "between the murder and the time of the so-called experiment ..., people had actually lived [in Wilson's house] and used that bathroom," and that "when the experiment ... was conducted, there was no human body lying in the bathtub." (R. 259.) Thus, the trial court concluded:

> ***34** "[I]t seems to me without a great deal of argument that there is a substance difference between the truth of what was going on at the time of the murder and how [Theresa] was found and how the [experiment] was conducted in addition to the fact that all kinds of things could have occurred between the time of the murder and the time of the [experiment] with regards to the tub itself.
>
> "Now, if you can give me reasons to show otherwise, I will be glad to hear from you."

(R. 259-60.) Thereafter, the trial court asked defense counsel: "What kind of similarities can you show existed in two years time that went by? I mean, how do you know that things haven't substantially changed?" (R. 261.) In response, defense counsel conceded that he could not know if the circumstances of the bathtub had substantially changed between the time Theresa was murdered and the time of the experiment but argued that, "while the conditions of the experiment and of the occurrence initially should be substantially similar, they need not be identical. A reasonable or substantial similarity suffices." (R. 262.) The trial court, however, was not persuaded and concluded: "I just don't think you've shown any kind of substantial or any likelihood that it bears any similarity over a two-year period of delay from the time your man did it and the time that the murder occurred. So I'm not going to allow that into evidence." (R. 263-64.) At trial, during a discussion outside the presence of the jury, the trial court reiterated that "[w]e're not going to talk about any experimentation, period." (R. 1969.)

On appeal, Lane argues that the trial court erred by excluding the experiment from evidence.

> "It has been held that the party offering the results of an experiment must pass the 'substantial similarity' test. In explaining this test, the Alabama Supreme Court in Neelley v. State, 261 Ala. 290, 74 So. 2d 436 (1954), stated:
>
> > " '[T]here must be similarity of conditions to give an experiment sufficient probative value to warrant its admission, and if the conditions were dissimilar in an essential particular, the evidence should be rejected. But the authorities are to the effect that it is not necessary that the conditions should be exactly identical. A reasonable or substantial similarity suffices, and the lack of exact identity affects only the weight and not the competency of the evidence. It is for the court to determine whether the conditions are sufficiently similar to warrant admission of this proof, and much must be left to the sound discretion of the trial judge. 22 C.J. 759, 756; 32 C.J.S., Evidence, §§ 590, 587.'
>
> "261 Ala. at 292, 74 So. 2d at 438, quoting Louisville & N.R. Co. v. Sullivan, 244 Ala. 485, 490, 13 So. 2d 877, 880 (1943). See also Nichols v. State, 267 Ala. 217, 100 So. 2d 750 (1958).

> "... Furthermore, the exercise of the trial judge's discretion in the admission or exclusion of an experiment or test will not be reversed on appeal unless such discretion has been grossly abused. Alonzo v. State ex rel. Booth, 283 Ala. 607, 219 So. 2d 858, cert. denied, 396 U.S. 931, 90 S. Ct. 269, 24 L. Ed. 2d 229 (1969)."

Morrison v. State, 500 So. 2d 36, 48-49 (Ala. Crim. App. 1985).

As noted in Morrison, the proponent of an experiment has the burden of demonstrating that the circumstances of the experiment are " 'substantial[ly] similar[ ]' " to the circumstances of the event the experiment attempts to recreate. Morrison, 500 So. 2d at 48. Here, however, Lane did not even make an attempt to demonstrate a substantial similarity of circumstances and, in failing to do so, did not provide the trial court with enough information to determine whether the circumstances of the bathtub at the time of the experiment and at the time of Theresa's death were substantially similar. For example, there was testimony indicating that, when Theresa's body was discovered, water was draining through both the overflow drain and the primary drain in the bottom of the bathtub, although Theresa's hair was clogging the primary drain to some extent. However, Lane did not even bother to inform the trial court as to whether the primary drain in the bathtub was open or closed during the experiment, yet it would obviously represent a crucial dissimilarity in circumstances if the primary drain, which was at least partially open at the time of Theresa's death, was closed during the experiment. See Morrison, 500 So. 2d at 49 (noting that, " 'if the conditions were dissimilar in an essential particular, the evidence should be rejected' " (quoting Neelley v. State, 261 Ala. 290, 292, 74 So. 2d 436, 438 (1954)) (emphasis added))). In addition, testimony indicated that, of the two knobs that control the volume of water flowing into the bathtub, one knob was on "[a]ll the way" and the other was on "[j]ust [a] little bit." However, Lane made no attempt to demonstrate that the water was flowing at the same rate in the experiment as it was flowing at the time of Theresa's death, which would obviously impact how effective the overflow drain would be in performing its intended function and thus also potentially represented a crucial dissimilarity in circumstances. See id. Also, as the trial court noted, the experiment occurred two years after Theresa was murdered, and other people had lived in the house after Wilson moved out –- and thus presumably had used the bathtub –- between the time of Theresa's death and the time of the experiment. After noting that fact, the trial court stated: "I mean, common sense tells me -- I mean, I have a bathtub that we fill up all the time. And sometimes I have to call a plumber to come out to do something with that overflow drain. I don't know what happened to it but something over a period of time happened to it." (R. 262.) Based on the fact that two years passed between the time of Theresa's death and the time of the experiment and the fact that other people used the bathtub during that time, it was reasonable for the trial court to conclude that the bathtub might have been more clogged -- and thus drained more slowly -- at the time of the experiment than it did at the time of Theresa's death. See id.

***35** As evidenced by the foregoing, any differences in the circumstances affecting the manner in which the bathtub was draining at the time of Theresa's death and at the time of the experiment were crucial dissimilarities, yet Lane made absolutely no attempt to demonstrate that such dissimilarities did not exist, i.e., that the circumstances of the bathtub at the time of the experiment were " 'substantial[ly] similar[ ],' " Morrison, 500 So. 2d at 48, to the circumstances of the bathtub at the time of Theresa's death. In fact, Lane conceded that he did not know whether the circumstances of the bathtub had changed during that two-year period and, instead, chose to argue that the circumstances did not have to be identical. Thus, because Lane failed to carry his burden of demonstrating that the experiment "pass[ed] the 'substantial similarity' test," id., we cannot say that the trial court abused its discretion by refusing to admit the experiment into evidence. Id.

Lane argues, however, that the lack of similarity in circumstances affected only the weight of the experiment, not its admissibility. In support of that argument, Lane cites Eddy v. State, 352 So. 2d 1161 (Ala. Crim. App. 1977) –- a manslaughter case in which the defendant objected to testimony from a toxicologist who had performed tests with the firearm that killed the victim in order to determine how close the firearm would have to be to the victim before it would leave gunpowder residue on the victim's body. According to the defendant, the toxicologist's tests were inadmissible because, the defendant said, the tests "did not show 'similarity in the essential conditions at the time of the occurrence and at the time of the experiment.' " Eddy, 352 So. 2d at 1164. In rejecting the defendant's claim, this Court stated:

> "We recognize the possibility of there being some difference between the results of a test for powder residue when bullets are fired into white paper and when fired into human flesh; but certainly there is nothing before us to show that such possible difference invalidates the tests as a

basis for the evidence of a proved expert in this particular field of science. Substantial similarity is sufficient, and, in the absence of dissimilarity in some essential particular, the lack of exact identity affects only the weight and not the competency of the evidence. Louisville & Nashville R. Co. v. Sullivan, 244 Ala. 485, 13 So. 2d 877; Neelley v. State, 261 Ala. 290, 74 So. 2d 436; Nichols v. State, 267 Ala. 217, 100 So. 2d 750."

Id. (emphasis added).

Thus, Eddy simply held that, when it is determined that there is substantial similarity in the circumstances of an experiment and the event the experiment attempts to recreate, the lack of exact identity affects the weight of the experiment, not its admissibility. Therefore, nothing in Eddy conflicts with the principle of law that " 'substantial similarity,' " Morrison, 500 So. 2d at 48, is the burden a party seeking admission of an experiment must meet. Here, we have already concluded that the trial court did not abuse its discretion in determining that Lane failed to demonstrate a substantial similarity in the circumstances of the bathtub at the time of Theresa's death and at the time of the experiment. Thus, Eddy does not support Lane's claim for relief.

Lane also relies on Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996), in which the United States Court of Appeals for the Tenth Circuit recognized an exception to the "substantial similarity" test required for the admission of an experiment:

"A recognized exception to [the substantial-similarity] rule exists when the experiment merely illustrates principles used to form an expert opinion. In such instances, strict adherence to the facts is not required. Therefore, experiments which purport to recreate an accident must be conducted under conditions similar to that accident, while experiments which demonstrate general principles used in forming an expert's opinion are not required to adhere strictly to the conditions of the accident."

***36** Pandit, 82 F.3d at 381 (emphasis added; internal citations omitted). Here, however, Lane did not proffer the experiment as evidence of a general principle that would form the basis of an expert witness's opinion. Rather, Lane sought to demonstrate as a matter of fact that the particular bathtub in which Theresa was murdered drained in a manner that undermined the State's theory of the case. Indeed, Lane concedes as much, noting that the experiment was "a demonstration of fact about the draining of the overflow valve." Lane's brief, at 46. Thus, because the purpose of the experiment was not to establish a general principle that would form the basis of an expert witness's opinion, Pandit does not support Lane's claim for relief.

VI.

In a related argument, Lane contends that the trial court erred by allowing Det. McRae to testify that the overflow drain on the bathtub in which Theresa was murdered was working properly on the day of the murder. At trial, the following colloquy occurred during redirect examination of Det. McRae:

"Q. And what is the purpose of the overflow valve?

"A. To keep the tub from overflowing.

"Q. And, in this case, did the overflow valve serve its purpose?

"A. I would assume so. There was no water on the floor.

"[DEFENSE COUNSEL]: Object to that. That calls for a conclusion of the witness.

"....

"THE COURT: I'm going to let [the prosecutor] go into it. You did on cross.

"....

"Q. So what is your conclusion about the overflow valve in this tub on the day of the murder?

"A. It was working properly because it prevented the water from overflowing onto the floor."

(R. 1992-93.)

Because defense counsel did not object until after Det. McRae answered the allegedly improper question and did not move to strike Det. McRae's testimony, Lane failed to preserve this issue for appellate review. See Woodward v. State, 123 So. 3d 989, 1022-23 (Ala. Crim. App. 2011) (" 'The general rule is, that, after a question is asked, and a responsive answer given, an objection comes too late, and the trial court will not be put in error in the absence of a motion to exclude or strike, and also an adverse ruling on the motion.' " (quoting Chambers v. State, 356 So. 2d 767, 768 (Ala. Crim. App. 1978))). Thus, this claim is subject to only plain-error review. See Woodward, 123 So. 3d at 1022-23 (reviewing for plain error claim that trial court erroneously allowed witness's testimony

where defendant did not object to allegedly improper question until after witness answered the question).

According to Lane, Det. McRae's testimony that he thought the overflow drain was working properly constituted a lay-witness opinion that was not based on facts Det. McRae personally observed. Thus, Lane argues, Det. McRae's testimony did not comply with Rule 701, Ala. R. Evid., which provides that a lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." See also Woodward, 123 So. 3d at 1023 ("It is ... well settled that a witness can testify to his beliefs, thoughts, or impressions where he had the opportunity to observe." (quoting Sheridan v. State, 591 So. 2d 129, 133 (Ala. Crim. App. 1991), quoting in turn Williams v. State, 375 So. 2d 1257 (Ala. Crim. App.), cert. denied, 375 So. 2d 1271 (Ala. 1979))). However, contrary to Lane's contention, Det. McRae's opinion that he thought the overflow drain was working properly was based on his personal observation that there "was no water on the floor," despite the facts that water was running from the bathtub faucet when Wilson discovered Theresa and that Theresa's body was almost completely submerged in water at that time. Thus, we find no error, much less plain error, in allowing Det. McRae to testify that he thought the overflow drain was working properly on the day Theresa was murdered.

VII.

***37** Lane argues that the trial court erred by admitting evidence indicating that he paid $1,000 in attorney fees to Buzz Jordan the day after Theresa was murdered and by allowing the State to argue that such evidence tended to establish Lane's guilt. Although Lane received an adverse ruling on his motion in limine to exclude evidence of the $1,000 payment, there is no indication in the record that the trial court's ruling was absolute or unconditional, and Lane did not object when the evidence was admitted at trial. Likewise, Lane did not object when the prosecutor referenced the $1,000 payment during closing arguments. Thus, Lane failed to preserve this claim for appellate review. See Saunders, supra; and Buford v. State, 891 So. 2d 423, 434 (Ala. Crim. App. 2004) (challenge to allegedly improper closing argument not preserved for appellate review in absence of objection at trial). Accordingly, this claim is subject to only plain-error review. See Saunders, supra, and Shanklin v. State, 187 So. 3d 734, 787 (Ala. Crim. App. 2010) ("Shanklin did not object to the prosecutor's comments in the circuit court; thus, we review Shanklin's arguments on appeal for plain error.").

Lane argues that the admission of evidence of the $1,000 payment to Jordan the day after Theresa was murdered violated his right to counsel guaranteed by the Sixth Amendment to the United States Constitution, which guarantees 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. Specifically, Lane argues that the State relied on such evidence to imply to the jury that Lane's "retention of counsel was probative of guilt," which, according to Lane, "penalized [him] for exercising his Sixth Amendment right to counsel." Lane's brief, at 61. In support of that argument, Lane relies on Arthur v. State, 575 So. 2d 1165 (Ala. Crim. App. 1990).

In Arthur, the defendant, Thomas Douglas Arthur, was convicted of capital murder for the killing of Troy Wicker, Jr. ("Troy"). At trial, the State elicited testimony from Judy Wicker, who had previously been convicted of murdering Troy, that Wicker "had given money to Arthur, who, in turn, had given it to Norman Roby[, an attorney,] to be put in an escrow account." Arthur, 575 So. 2d at 1178. Testimony also indicated that, before the State filed any charges for the murder of Troy, Roby had represented both Wicker and Arthur. Id. During closing arguments, the prosecutor stated:

> " 'Now, I don't know if you caught this in the testimony, but Judy Wicker testified without an objection, it's undisputed that the $10,000 that she paid to Tommy Arthur went in Norman Roby's trust fund. Do you recall her saying that. Went in Norman Roby's trust fund. Who was that? That was the lawyer who attempted to represent both Tommy Arthur and Judy Wicker. That's also the lawyer who dropped [Wicker's] appeal after it went to the Court of Criminal Appeals.' "

Id. In considering the propriety of Wicker's testimony and the prosecutor's closing argument, this Court stated:

> "The unavoidable inference from the above-stated testimony and closing remarks is that since Arthur was, at one time, represented by the same attorney who represented Wicker (who readily admits her guilt) and who apparently decided it would be futile to pursue further appellate review of Wicker's conviction, surely Arthur is also guilty. Even the attorney general asserts that the testimony of Roby's joint representation 'was competent evidence from which

the jury could reasonably infer Appellant's guilt.' However, we find that therein lies the problem.

"In McDonald v. State, 620 F.2d 559 (5th Cir. 1980), the court, in determining that the prosecutor's elicitation of testimony that the appellant's lawyer was present when law enforcement officials searched his home pursuant to a search warrant and his closing comments on this testimony violated the appellant's Sixth Amendment right to counsel, stated the following:

> " 'The Supreme Court has held that prosecutorial comments on an accused's failure to testify[, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965),] or on his silence at the time of his arrest[, Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976),] infringe upon his Fifth Amendment r i g h t a g a i n s t c o m p u l s o r y self-incrimination. The Supreme Court has not yet addressed the effect of prosecutorial comments on an accused's exercise of his right to counsel. Several circuit courts have.
>
> ***38** " 'In United States ex rel. Macon v. Yeager, 476 F.2d 613 (3rd Cir. 1973), the court reversed a murder conviction because the prosecutor had claimed in his closing argument that the defendant's actions immediately after the commission of the crime, including his hiring of an attorney, were inconsistent with his claim of innocence. The Macon court further held that the evidence in the case was such that the error could not be considered harmless. In United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974), and United States v. Williams, 556 F.2d 65 (D.C. Cir. 1977), the court found error in references to the defendants' exercise of their right to counsel but held that the errors were harmless. In Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978), the court, without discussing the issue of harmless error, reversed a manslaughter conviction because the prosecutor had suggested that the defendant's post-arrest telephone call to his lawyer indicated his guilt.'

"Id. at 562 (footnotes omitted). Then, after discussing its treatment of a similar situation in Stone v. Estelle, 556 F.2d 1242 (5th Cir. 1977), cert. denied, 434 U.S. 1019, 98 S. Ct. 742, 54 L. Ed. 2d 767 (1978), the court explained that, to be impermissible, the questioning and comment must be directed at the defendant's story rather than some collateral matter. 620 F.2d at 563. Applying this standard, the court held that the reference to the attorney's presence penalized McDonald for exercising his Sixth Amendment right to counsel because the real purpose of the reference was to cause the jury to infer that McDonald was guilty. Id. at 564.

"In answer to the government's contention that, given the quantity of evidence against McDonald, this error was harmless, the McDonald court stated the following:

> " 'Violations of some constitutional rights may be considered harmless errors. Chapman v. California, 386 U.S. 18, [87 S. Ct. 824, 17 L. Ed. 2d 705] ... (1967). However, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23, [87 S. Ct. at 827] .... We held in United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979), that the denial through governmental misconduct of a defendant's right to present witnesses to establish a defense may never be considered harmless error. We consider the error in this case to be harmful per se.
>
> " 'Comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error. The right to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error.'

"Id.

"We readily admit that the Sixth Amendment may not now be a permissible basis upon which to decide such an issue. The Supreme Court has clearly held that the existence of an attorney-client relationship does not trigger the protections of the Sixth Amendment; that rather the right to counsel attaches at the first formal charging proceeding. Moran v. Burbine, 475 U.S. 412, 428, 430, 106 S. Ct. 1135, 1144, 1145, 89 L. Ed. 2d 410 (1986). See also Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, 460 U.S. 1043, 103 S. Ct. 1439, 75 L. Ed. 2d 796 (1983). Even assuming that our cited authorities do erroneously rest their holdings on the Sixth Amendment, we still find them to be authoritative. They illustrate the intense distaste that courts have for like testimony and comments. See also United States v. Milstead, 671 F.2d 950, 953 (5th Cir. 1982) (wherein the court declared such questioning as '[r]eprehensible ... and severely to be condemned').

***39** "We can conceive of no legitimate reason why the testimony and subsequent comments were proper. 'A

> defendant's decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not "imply that only guilty people contact their attorneys."' Commonwealth v. Person, 400 Mass. 136, 508 N.E.2d 88, 91 (1987) (quoting Zemina v. Solem, 438 F. Supp. 455, 466 (D. S.D. 1977), aff'd, 573 F.2d 1027 (8th Cir. 1978)).
>
> > " '[I]n no situation in a criminal trial ... do we feel the mere act of hiring an attorney is probative in the least of the guilt or innocence of defendants. "[L]awyers in criminal cases are necessities not luxuries," Gideon v. Wainwright, 372 U.S. 335, [83 S. Ct. 792, 9 L. Ed. 2d 799] ... (1963), and even the most innocent individuals do well to retain counsel. See also, Powell v. Alabama, 287 U.S. 45, 68–69, [53 S. Ct. 55, 63–64, 77 L. Ed. 158] ... (1932); Sulie v. Duckworth, 689 F.2d 128, 131 (7th Cir. 1982).'
>
> "Bruno v. Rushen, 721 F.2d 1193, 1194–95 (9th Cir.1983), cert. denied sub nom. McCarthy v. Bruno, 469 U.S. 920, 105 S. Ct. 302, 83 L. Ed. 2d 236 (1984). 'The right to the advice of counsel would be of little value if the price for its exercise is the risk of an inference of guilt.' Commonwealth v. Person, 400 Mass. at 141, 508 N.E.2d at 91 (quoting Commonwealth v. Burke, 339 Mass. 521, 533, 159 N.E.2d 856, 863 (1959))."

Arthur, 575 So. 2d at 1178-80.

As a threshold matter, we note that the Arthur Court reversed Arthur's conviction based on the erroneous admission of statements Arthur made after invoking his right to counsel. Then, the Court noted that, "[a]lthough we reverse, we feel constrained to comment on several issues raised by Arthur," Arthur, 575 So. 2d at 1176, which included the discussion quoted above. Thus, that discussion was not necessary to the Court's decision and is therefore dicta, which does not constitute binding authority. Ivey v. Wiggins, 276 Ala. 106, 159 So. 2d 618 (Ala. 1964). Regardless, we conclude that Arthur does not warrant reversal in this case.

Arthur did not hold that there is an absolute bar precluding evidence of, and references to, the fact that a defendant sought legal counsel, only that the State cannot make such references when "the real purpose of the reference [is] to cause the jury to infer that [the defendant] [is] guilty." Arthur, 575 So. 2d at 1179. Thus, Arthur implicitly recognized that there are circumstances where such evidence and references are not improper –- an interpretation consistent with the Arthur Court's conclusion that it could "conceive of no legitimate reason why the testimony and subsequent comments" in that case were proper. Id. See also Arthur, 575 So. 2d at 1179 (" '[T]o be impermissible, the questioning and comment must be directed at the defendant's story, rather than some collateral matter.' " (quoting McDonald v. State, 620 F.2d 559, 563 (5th Cir. 1980))). We find strength for this interpretation in caselaw from other jurisdictions. For example, in United States v. Frazier, 944 F.2d 820 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit stated:

> "Here, we ... refuse to expand McDonald to preclude totally references to a defendant's use of counsel. Prosecutors may not use the simple fact of representation by counsel to imply a defendant is guilty; but when the defendant's particular choice of counsel is relevant to an issue (such as, means or motive) in dispute, defense counsel is not exempt from being talked about at trial."

***40** Frazier, 944 F.2d at 826-27. Similarly, in United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit expressly stated that it made no determination whether the rule prohibiting evidence of, and references to, a defendant's retention of counsel was an absolute rule and left open the possibility that the rule might not "apply where the request for or retainer of counsel was part of the actions constituting the offense, sometimes called the res gestae[.]" Liddy, 509 F.2d at 445. Likewise, in addressing a related argument, the United States Court of Appeals for the First Circuit has stated: "When the prosecution reveals at trial that a defendant asked for a lawyer after his arrest, courts have looked at all the circumstances under which the disclosure was made in order to determine how seriously in the eyes of the jury it may have penalized defendant's exercise of his right to counsel." United States v. Daoud, 741 F.2d 478, 480 (1st Cir. 1984). Thus, the mere fact that a prosecutor references a defendant's retention of counsel does not necessarily warrant reversal. Rather, the question is whether the State relied on "the simple fact of representation by counsel to imply [the] defendant is guilty," Frazier, 944 F.2d at 826, i.e., whether that is the "unavoidable inference," Arthur, 575 So. 2d at 1178, from such references, or whether the specific facts and circumstances of the case indicate that such references served a legitimate purpose tied to relevant issues in the case.

Unlike Arthur, where this Court concluded that the "unavoidable inference," Arthur, 575 So. 2d at 1178, from Wicker's testimony and the prosecutor's closing argument was that Arthur was guilty, here we conclude that evidence of the $1,000 payment did not give rise to an unavoidable inference that Lane was guilty of Theresa's murder. To begin, the only evidence of the $1,000 payment was a receipt reflecting the

payment, which was seized from Lane's person after Lane was arrested and which was signed by someone identified only as "Donna." (3d Supp. C. 179.) However, there was no evidence indicating that Lane communicated with Jordan at all on the day Lane made the payment and no evidence indicating that Jordan ever represented Lane in conjunction with Theresa's murder.[16] The evidence did establish, however, that, at the time Theresa was murdered, Jordan was already representing Lane with respect to Theresa's instanter motion for the return of her truck (R. 2037), which was scheduled to occur two days after Lane made the $1,000 payment. Thus, the jury could have inferred that the $1,000 payment was for services completely unrelated to Theresa's murder.

In addition, although the prosecutor's closing argument included brief references to the fact that Lane had made the $1,000 payment, the prosecutor never suggested or even so much as implied that the payment was for Jordan's defense of impending murder charges or that the payment was evidence of Lane's guilt. Rather, when arguing that the State had proven Lane murdered Theresa for pecuniary gain, the prosecutor stated:

> "In this case, we know why [Lane murdered Theresa] and it's for this pecuniary or other valuable consideration. We've proven that. We've proven that by his actions.
>
> "....
>
> "The defendant called Chaplain Pierce and wanted to know about the insurance right away, the same day. The defendant went to Wal-Mart and asked for the insurance money right away the same day he murdered her.
>
> "The defendant went back the following day to collect on the life insurance policy. The next day.
>
> "He had a negative balance in his checking account. We know he's been wiring money to Lorna Abe. He paid $1,000 in cash to his attorney. He had $300 in cash in his wallet when he was arrested.
>
> "And he had plans to go back to the Philippines and get his new bride. He had to make financial arrangements for that. And he had already done all these payments. He had gotten this far. He had made it to September 27th. He paid all this money, set up a phone, had his plane ticket. He knew he had to go in December and the divorce just wasn't moving fast enough for him. He did it so he could get the insurance money."

(R. 2144-45.) During rebuttal, the prosecutor again referenced the $1,000 payment after defense counsel argued that Lane attempted to collect the proceeds of Theresa's life-insurance policy so that he could pay to have her buried:

> ***41** "Now, the Defense would have you think that there was nobody to bury Theresa. Nobody to bury Theresa. ...
>
> "I mean, it was clear at that point he didn't like her. He didn't want to have anything to do with her. And they want you to think he's a good Samaritan by going to Wal-Mart and trying to collect life insurance so he can bury her? That's preposterous.
>
> "....
>
> "And what's really important on that day is he had $1,300 cash in his pocket. Because, if you remember, that was on the 12th. On the 13th, he paid Buzz Jordan $1,000 in cash and he had $300 when he was arrested in cash. Okay?
>
> "So he had enough money. The day he went to the funeral home, he had enough money to just take that $1,300 and pay for her cremation. He didn't have to go get her life insurance money. He didn't have to. He had no reason to go and get her life insurance money. But he really did, didn't he? Because he wanted it for his new life and his new bride. And he, in his mind, was the beneficiary."

(R. 2215-16.)

Read in context, it is evident that the prosecutor did not imply that the $1,000 payment was in and of itself incriminating evidence. Rather, it is clear that the prosecutor referenced the $1,000 payment in an attempt (1) to demonstrate that, around the time Theresa was murdered, Lane was making significant expenditures, despite his limited financial resources, in an attempt to finalize his divorce and to marry Abe –- facts that, the prosecutor argued, tended to prove Lane murdered Theresa because he needed to collect the proceeds of her life-insurance policy –- and (2) to cast doubt on defense counsel's argument that Lane sought to collect the proceeds of Theresa's life-insurance policy so that he could pay to have Theresa buried. See Frazier, 944 F.2d at 826-27 (noting that a reference to the fact that defendant sought legal counsel "is especially permissible when the prosecutor is responding to a potentially misleading argument by defense counsel"). Thus, it is clear to this Court that the prosecutor's references to the $1,000 payment were directly tied to relevant issues in the case and were not intended to imply that the payment was in and of itself proof of Lane's guilt. Compare Dendy v. State, 896 So. 2d 800, 804 (Fla. Dist. Ct. App. 2005) (where prosecutor

argued that defendant's "request ... for a lawyer before his arrest was evidence of his 'consciousness of guilt' "); People v. Meredith, 84 Ill.App.3d 1065, 40 Ill.Dec. 214, 405 N.E.2d 1306, 1312 (1980) (where prosecutor argued that defendant " 'knew he had shot those people that is why he went to call his lawyer in the morning' "); and Zemina v. Solem, 438 F. Supp. 455, 465 (D. S.D. 1977) (where prosecutor argued that "[t]he fact that [defendant] called his lawyer is a telling sign").

Based on the foregoing, we conclude that evidence of the $1,000 payment and the prosecutor's arguments regarding that evidence did not give rise to an "unavoidable inference," Arthur, 575 So. 2d at 1178, that the payment was proof of Lane's consciousness of guilt. In fact, when such evidence and arguments are considered in context, we conclude that it was unlikely that the jury drew such an inference. Moreover, we reiterate that Lane's failure to object to evidence of the $1,000 payment or the prosecutor's argument weighs against a finding that Lane was prejudiced by such evidence and arguments. Towles, supra. Thus, we find no plain error in the trial court's admission of evidence of the $1,000 payment or in the prosecutor's arguments regarding that evidence, and, in the absence of such error, Lane is not entitled to relief on this claim.[17]

VIII.

***42** Lane argues that the trial court erred by allowing Pierce, a chaplain with the Mobile County Sheriff's Department, to testify that Lane sought his assistance in collecting the proceeds of Theresa's life-insurance policy. According to Lane, Pierce's testimony violated the privilege accorded communications to the clergy. See Rule 505, Ala. R. Evid. Although Lane filed a motion in limine to exclude Pierce's testimony, there is no indication in the record that the trial court's denial of that motion was absolute or unconditional, and Lane did not object to Pierce's testimony at trial. Thus, Lane failed to preserve this claim for appellate review, and, as a result, this claim is subject to only plain-error review. Saunders, supra.

Rule 505(b) affords a privilege against disclosure of any communication "with a clergyman in the clergyman's professional capacity and in a confidential manner." "Thus, for a communication with a clergyman to be privileged, the communication must be made 1) to a clergyman 2) 'in the clergyman's professional capacity' and 3) 'in a confidential manner.' Rule 505(b), Ala. R. Evid." Ex parte Zoghby, 958 So. 2d 314, 321 (Ala. 2006). In discussing whether a clergyman received a communication in his "professional capacity," the Alabama Supreme Court, relying on and quoting Nussbaumer v. State, 882 So. 2d 1067 (Fla. Dist. Ct. App. 2004), has stated:

> " 'The clergy communications privilege does not apply unless the confider consults the member of the clergy "for the purpose of seeking spiritual counsel or advice." § 90.505(1)(b) [Fla. Statutes (2003)]. No reported Florida decisions address this requirement of the privilege. Courts from other jurisdictions have interpreted similar statutory provisions to exclude from the operation of the privilege communications made for purposes not related to religious or spiritual concerns. E.g., Magar v. State, 308 Ark. 380, 826 S.W.2d 221 (1992) (finding privilege inapplicable to defendant's admission to minister's accusation of sexual abuse of minors where conversation was initiated by minister for disciplinary purposes and not for spiritual counseling); Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977) (holding defendant could not claim privilege concerning conversational statements to clergy member who was his friend and frequent companion concerning defendant's intent to kill his wife and her lover); Keenan v. Gigante, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151 (1979) (finding privilege inapplicable to defendant's communications to priest where the communications were made for purpose of securing defendant's entrance into a work release program). The common thread in such cases "is that the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister." People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959, 962 (1993).'
>
> "[Nussbaumer,] 882 So. 2d at 1075.
>
> "Thus, considering the plain meaning of the words in the phrase 'in the clergyman's professional capacity' and the observations of the Nussbaumer court, we hold that the phrase means that the clergyman is serving in his professional capacity when he is serving as a specialist in the spiritual matters of his religious organization. In other words, the communication must be made to the clergyman in his role as a provider of spiritual care, guidance, or consolation to the individual making the communication."

Ex parte Zoghby, 958 So. 2d at 322 (emphasis added).

Here, Pierce testified that Lane telephoned him on the day Theresa was murdered and asked if Pierce had been to Wilson's house, if anything in Wilson's house was "out of place," if Pierce knew the cause of Theresa's death, and if "there was some way [Pierce] could help [Lane] get the papers to get the insurance from Wal-Mart." Even construing the communications-to-clergy privilege in its " 'broadest sense,' " Tankersley v. State, 724 So. 2d 557, 560 (Ala. Crim. App. 1998) (quoting Rule 505, Advisory Committee's Notes), Lane's conversation with Pierce was " 'not related to religious or spiritual concerns,' " Ex parte Zoghby, 958 So. 2d at 322 (quoting Nussbaumer, 882 So. 2d at 1075), but, rather, was clearly related to secular concerns –- namely, ascertaining information about the crime and seeking assistance with a financial matter. In fact, Pierce himself testified that, when he assists people with financial needs, "that's secular." (R. 1798.) Thus, Lane was not entitled to invoke the communications-to-clergy privilege " ' " 'to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister." ' " Id. (quoting Nussbaumer, 882 So. 2d at 1075), quoting in turn People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959, 962 (1993)). Therefore, we find no error, much less plain error, in allowing Pierce's testimony.

***43** Moreover, even if Pierce's testimony violated the communications-to-clergy privilege, "[i]t is well settled that the harmless-error rule applies in capital cases." Penn v. State, 189 So. 3d 107, 116 (Ala. Crim. App. 2014). The harmless-error rule provides that "[n]o judgment may be reversed or set aside, ... unless in the opinion of the court to which the appeal is taken ..., it should appear that the error complained of has probably injuriously affected substantial rights of the parties." Rule 45, Ala. R. App. P. To apply the harmless-error rule, this Court must be satisfied beyond a reasonable doubt that the error was in fact harmless. See Young v. State, 246 So. 3d 1077 (Ala. Crim. App. 2017) (refusing to apply the harmless-error rule because the Court could not say that the error was harmless beyond a reasonable doubt). Here, the most damning part of Pierce's testimony was that, within hours of Theresa's death, Lane sought to collect the proceeds of Theresa's life-insurance policy. However, Gabel, the human-resources manager at the Wal-Mart store where Theresa worked, also testified that Lane sought to collect the proceeds of Theresa's life-insurance policy on the day of Theresa's death; thus, Pierce's testimony in that regard was merely cumulative of Gabel's testimony. Therefore, even if the admission of Pierce's testimony was erroneous, which it was not, we conclude beyond a reasonable doubt that such error was harmless and does not entitle Lane to relief. See Jackson v. State, 169 So. 3d 1, 33 (Ala. Crim. App. 2010) (admission of cumulative evidence is harmless error); Rule 45, Ala. R. App. P.

IX.

Lane argues that the trial court erred by admitting into evidence, over defense counsel's objection, the pornographic photograph of Abe, which had been set as the background on Lane's computer monitor at 9:45 a.m. on the day Theresa was murdered. According to Lane, the photograph "was irrelevant to any issue relating to Lane's guilt or innocence" and "amounted to prejudicial character evidence" in violation of Rule 404, Ala. R. Evid. Lane's brief, at 88. The State argues, however, that the photograph was admissible as evidence of Lane's motive to murder Theresa.

> " ' " 'It is well settled that 'a determination of admissibility of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion.' " State v. Mason, 675 So. 2d 1, 3 (Ala. Cr. App. 1993), quoting Jennings v. State, 513 So. 2d 91, 95 (Ala. Cr. App. 1987).' Ballard v. State, 767 So. 2d 1123, 1130 (Ala. Crim. App. 1999)."

Hulsey v. State, 866 So. 2d 1180, 1191 (Ala. Crim. App. 2003).

It is also well settled that

> " '[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.' Rule 404(b), Ala. R. Evid. However, Alabama has recognized several exceptions to this general exclusionary rule. Prior bad acts may be admissible to show motive ... to commit the charged offense. See Rule 404(b), Ala. R. Evid."

Burgess v. State, 962 So. 2d 272, 281-82 (Ala. Crim. App. 2005).

> > " ' " ' "Motive is defined as 'an inducement, or that which leads or tempts the mind to do or commit the crime charged.' Spicer v. State, 188 Ala. 9, 11, 65 So. 972, 977 (1914). Motive has been described as 'that state of mind which works to "supply the reason that nudges the will and prods the mind to indulge the criminal intent."' [Charles Gamble, Character Evidence: A Comprehensive Approach 42 (1987).]

> > > > "Furthermore, testimony offered for the purpose of showing motive is always admissible. McClendon v. State, 243 Ala. 218, 8 So. 2d 883 (1942). Accord, Donahoo v. State, 505 So. 2d 1067 (Ala. Cr. App. 1986). ' "It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense." McAdory v. State, 62 Ala. 154 [(1878)]. 'Nickerson v. State, 205 Ala. 684, 685, 88 So. 905, 907 (1921)."'
>
> > > " ' "Hatcher v. State, 646 So. 2d 676, 679 (Ala. 1994) (emphasis added)."'
>
> "Bedsole v. State, 974 So. 2d 1034, 1038–39 (Ala. Crim. App. 2006), quoting Estes v. State, 776 So. 2d 206, 210–11 (Ala. Crim. App. 1999)."

E.L.Y. v. State, 266 So. 3d 1125, 1137 (Ala. Crim. App. 2018).

We agree with the State's argument that the photograph of Abe on Lane's computer monitor was relevant evidence of Lane's motive to murder Theresa. The evidence tended to establish that, as early as July 2003, Lane was making preparations to marry Abe while Lane and Theresa's divorce was pending and that Lane was still making preparations to marry Abe and was discussing those plans with his neighbors the day before Theresa was murdered. The evidence also tended to establish that, because Lane could not marry Abe until the divorce was finalized, he was frustrated with the delay of the divorce and that he blamed Theresa for the delay. The evidence further tended to establish that Lane made repeated attempts to expedite the divorce and that he was in fact so desperate to finalize the divorce that he falsified a certificate of divorce, which he submitted to the United States Immigration Services with his petition for alien fiancée. However, despite Lane's attempts to expedite the divorce, the trial of the divorce action was not scheduled to occur until January 2004, but testimony from Lane's neighbor indicated that Lane planned to travel to the Philippines in December to marry Abe.

***44** The foregoing evidence tended to establish that Lane had a motive to murder Theresa –- namely, his need to terminate their marriage so that he could marry Abe –- and the fact that Lane placed a photograph of Abe on his computer monitor near the time Theresa was murdered tended to confirm that Lane's continuing infatuation with Abe, i.e., his motive to murder Theresa, was at the forefront of his mind at that time. That is to say, the fact that Lane placed a photograph of Abe on his computer monitor near the time Theresa was murdered tended to establish "that there was an influence, an inducement, operating on [Lane], which may have led or tempted him to commit the offense." E.L.Y., 266 So. 3d at 1137 (citations omitted). Cf. Vanpelt v. State, 74 So. 3d 32 (Ala. Crim. App. 2009) (evidence that defendant proposed to another woman shortly before marrying his wife was admissible as proof of defendant's plan and intent to murder wife). See also State v. Booker, 200 Kan. 166, 434 P.2d 801, 808 (1967) ("In a case where a husband is charged with the murder of his wife, and the state contends that the motive was defendant's infatuation for ... another woman, causing defendant to want to get rid of his wife, any evidence of circumstances before or soon after the homicide, which fairly tend to establish such infatuation and intimacy at the time of the homicide[,] may be received." (citation omitted)); State v. Floyd, 143 N.C. App. 128, 545 S.E.2d 238 (2001) (evidence indicating that defendant told his neighbor he was in love with another woman was circumstantial evidence of defendant's motive to murder his wife); and State v. Shank, 327 N.C. 405, 394 S.E.2d 811 (1990) (evidence indicating that defendant was having an affair with another woman supported legitimate inference that defendant had motive to murder his wife). Thus, because the photograph of Abe on Lane's computer monitor tended to shed light on Lane's motive to murder Theresa, which is an exception to the Rule 404(b) prohibition of evidence of collateral acts, Burgess, supra, we cannot say that the trial court abused its discretion by admitting the photograph into evidence. Hulsey, supra. Accordingly, this claim does not entitle Lane to relief.

Moreover, any error in the admission of the photograph of Abe was harmless. Rule 45, Ala. R. App. P. Excluding the photograph of Abe, there was overwhelming evidence indicating that Lane murdered Theresa. Specifically, Lane's neighbors saw Lane leave his mobile home in his truck approximately 15 minutes before Jay saw Lane's truck park across the street from Wilson's house, and evidence established that it took approximately 15 minutes to drive from Lane's mobile home to Wilson's house. Jay also observed the driver of Lane's truck walk onto the front porch of Wilson's house, and there was evidence tending to establish that the front door of Wilson's house had been forcibly opened, that there were impression marks on Wilson's front door, and that "there's not another chisel in the world" other than the chisel found in Lane's truck that could have made those marks. Approximately 90 minutes after Jay saw Lane's truck near Wilson's house, Wilson discovered Theresa's body, which reflected evidence of "defense wounds," in a bathtub nearly full of water. When law enforcement officers initiated

a traffic stop of Lane's truck a few hours later, they observed scratches on Lane's legs and a wet bath towel in the cab of Lane's truck. There was also evidence indicating that Lane attempted to establish an alibi with his neighbors after Theresa was murdered. Finally, multiple witnesses, including Lane's father, testified that Lane expressed a desire to kill Theresa, and both Dueitt and Bruno testified that Lane admitted to them that he had murdered Theresa. Thus, the photograph of Abe, while relevant evidence of Lane's motive to murder Theresa, was not crucial to the State's case. To the contrary, we conclude beyond a reasonable doubt that the jury's verdicts were based on the evidence tending to establish Lane's guilt and did not hinge on the jury's observation of the pornographic photograph of Abe. Therefore, even if the trial court erred by admitting the photograph of Abe, the error was harmless and does not entitle Lane to relief. See Bailey v. State, 75 So. 3d 171, 190 (Ala. Crim. App. 2011) ("[T]he proper harmless-error inquiry asks whether, absent the improperly introduced evidence, it is clear beyond reasonable doubt that the jury would have returned a guilty verdict." (citing Ex parte Greathouse, 624 So. 2d 208, 210 (Ala. 1993))); and Perkins v. State, 27 So. 3d 611, 613 (Ala. Crim. App. 2009) (" 'Reviewing the entire record as a whole, '[it] is ... clear beyond a reasonable doubt that the jury would have returned a verdict of guilty' even without Humphrey's testimony about the statements Campbell made to him.' " (quoting United States v. Hasting, 461 U.S. 499, 510, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983))).

X.

Lane argues that the trial court erred by allowing the State to introduce evidence indicating that, four days after Theresa was murdered, Wilson reported to the police that $3,600 and various items of jewelry were missing from her house. Although Lane filed a motion in limine to exclude such evidence, there is no indication in the record that the trial court's denial of that motion was absolute or unconditional, and Lane did not object when the evidence was introduced at trial. Thus, Lane failed to preserve this claim for appellate review, and, as a result, this claim is subject to only plain-error review. Saunders, supra.

***45** At Lane's first trial, the trial court submitted three capital-murder charges to the jury –- murder made capital because it was committed during a burglary, § 13A-5-40(a)(4); murder made capital because it was committed for pecuniary gain, § 13A-5-40(a)(7); and murder made capital because it was committed during a robbery, § 13A-5-40(a)(2), Ala. Code 1975. See Lane, 80 So. 3d at 283 n.2. As to the charge of capital murder-robbery, the indictment alleged that Lane intentionally caused Theresa's death while committing a theft of Wilson's property –- namely, $3,600 and various items of jewelry. (3d Supp. C. 58.) As to that charge, however, the jury found Lane guilty of the lesser-included offense of murder. See Lane, 80 So. 3d at 283 n.2. According to Lane, by finding him guilty of murder instead of capital murder-robbery, the jury acquitted him of the theft of Wilson's property. Thus, Lane argues, introducing evidence of the theft of Wilson's property at Lane's second trial violated the doctrine of collateral estoppel, which provides that " ' "when an issue of material fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." ' " State v. Peterson, 922 So. 2d 972, 976 (Ala. Crim. App. 2005) (quoting Ex parte Howard, 710 So. 2d 460, (Ala. 1997), quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)).

The problem with Lane's argument is that, in Lane's first trial, the theft of Wilson's property was an essential element of the charge of capital murder-robbery because robbery in any degree requires proof of a theft or attempted theft. Ex parte Byner, 270 So. 3d 1162, 1167 (Ala. 2018). In Lane's second trial, however, Lane was not charged with capital murder-robbery, nor was the theft of Wilson's property an element of any of the charges for which Lane was on trial. Indeed, Lane conceded as much at trial by arguing that evidence of the theft of Wilson's property did not "constitute relevant evidence to the proof of any elements of ... the indictment." (C. 566.) Rather, count one of the indictment alleged that Lane murdered Theresa during the course of a first-degree burglary by unlawfully entering Wilson's house with the intent to commit murder or assault (3d Supp. C. 58), not theft. See § 13A-7-5, Ala. Code 1975 (first-degree burglary requires proof of defendant's unlawful presence in a dwelling with the intent to commit a crime therein). Similarly, count two of the indictment alleged that Lane murdered Theresa so that he could collect the proceeds of her life-insurance policy (3d Supp. C. 58), not that he murdered Theresa so that he could commit a theft of Wilson's property. Consistent with the indictment, the prosecutor argued during closing arguments that the State had proven Lane murdered Theresa during the course of a burglary because it had proven Lane unlawfully entered Wilson's house with the intent to murder Theresa (R. 2116, 2141-43) and argued that the State had proven Lane murdered Theresa for pecuniary gain because it had proven

Lane sought to collect the proceeds of Theresa's life-insurance policy within hours after she was murdered. (R. 2144-45.) Thus, unlike the jury in Lane's first trial, the jury in this case was not required to make any determination as to whether Lane was guilty of the theft of Wilson's property; that is to say, the parties were not "relitigating" the issue of whether Lane committed the theft of Wilson's property.

Moreover, to the extent Lane argues that evidence of the theft of Wilson's property was inadmissible because it was not relevant, we conclude that any error in the admission of such evidence was harmless. Rule 45, Ala. R. App. P. As we noted in our discussion of the issue in Part IX of this opinion, even without evidence of the theft of Wilson's property, there was overwhelming evidence of Lane's guilt, and it is clear beyond a reasonable doubt to this Court that the jury's verdicts were based on that evidence and did not hinge on the minimal evidence of the theft of Wilson's property. Indeed, there was no evidence indicating that the theft of Wilson's property occurred on the day Theresa was murdered, and, in fact, Wilson did not notice the missing property until four days after Theresa was murdered, despite the fact that Wilson returned to her house every day after the murder to collect personal belongings. In addition, the evidence indicated that none of Wilson's jewelry was found during the search of Lane's mobile home. In short, there was no evidence at trial connecting Lane to the theft of Wilson's property. Thus, even if it was error to admit evidence of the theft of Wilson's property, our review of the entire record convinces us that the error was harmless because it is clear beyond a reasonable doubt to this Court that the jury would have convicted Lane even in the absence of such evidence. See Bailey, 75 So. 3d at 190 ("[T]he proper harmless-error inquiry asks whether, absent the improperly introduced evidence, it is clear beyond reasonable doubt that the jury would have returned a guilty verdict[.]"); and Perkins, 27 So. 3d at 613 (" 'Reviewing the entire record as a whole, '[it] is ... clear beyond a reasonable doubt that the jury would have returned a verdict of guilty' even without Humphrey's testimony about the statements Campbell made to him.' " (quoting Hasting, 461 U.S. at 510, 103 S.Ct. 1974). We also reiterate that Lane's failure to object to evidence of the theft of Wilson's property weighs against any claim that he was prejudiced by such evidence. Towles, supra. Accordingly, Lane is not entitled to relief on this claim.

XI.

***46** Lane argues that his convictions violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides that no person "shall ... be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S Const., Amend. V.

As noted, at Lane's first trial, the jury found Lane guilty of two capital-murder charges but, as to the third capital-murder charge, found Lane guilty of the lesser-included offense of intentional murder. At the sentencing hearing in that trial, the trial court entered a "judgment of acquittal" (3d Supp. C. 72) on Lane's intentional-murder conviction based on the court's conclusion that it violated double-jeopardy principles to convict Lane of both capital murder and murder for the killing of the same victim. According to Lane, because he was "acquitted" of intentional murder in his first trial, which is a necessary element of a capital-murder conviction, Towles, 263 So. 3d at 1085, his capital-murder convictions violate double-jeopardy principles.

However, we disagree with Lane's contention that the trial court in Lane's first trial entered a judgment of acquittal as to Lane's intentional-murder conviction. In addressing the difference between acquittals and procedural dismissals, the United States Supreme Court has stated:

> "[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. See [United States v. Scott, 437 U.S. 82, 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)], and n.11; Burks v. United States, 437 U.S. 1, 10, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). Thus an 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.' Scott, 437 U.S. at 91, 98, and n. 11, 98 S. Ct. 2187 (internal quotation marks omitted). These sorts of substantive rulings stand apart from procedural rulings .... Procedural dismissals include rulings on questions that 'are unrelated to factual guilt or innocence,' but 'which serve other purposes,' including 'a legal judgment that a defendant, although criminally culpable, may not be punished' because of some problem like an error with the indictment. Id., at 98, 98 S. Ct. 2187."

Evans v. Michigan, 568 U.S. 313, 318-19, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013) (emphasis added).

Here, although styled a "judgment of acquittal" as to Lane's intentional-murder conviction, the trial court's ruling was not a judgment of acquittal because it was not " 'a ruling that the evidence [was] insufficient to convict' " Lane of intentional murder or a finding that " 'necessarily establish[es] [Lane's] lack of criminal culpability' " for that offense. Evans, 568 U.S. at 319, 133 S.Ct. 1069 (quoting United States v. Scott, 437 U.S. 82, 91 and 98, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)). See Evans, 568 U.S. at 322, 133 S.Ct. 1069 ("[L]abels do not control our analysis in this context; rather, the substance of a court's decision does."). Rather, it is obvious that the trial court intended to vacate Lane's intentional-murder conviction solely because the conviction violated double-jeopardy principles. This much is evident not only from the face of the trial court's order, but also from the fact that the basis for the court's ruling was this Court's decision in Cooper v. State, 912 So. 2d 1150 (Ala. Crim. App. 2005), in which this Court remanded the case for the trial court to vacate the defendant's intentional-murder conviction because the defendant had also been convicted of capital murder for killing the same victim, which, this Court held, violated double-jeopardy principles. Cooper, 912 So. 2d at 1152-53. Thus, the trial court's ruling was clearly " 'unrelated to factual guilt or innocence,' " Evans, 568 U.S. at 319, 133 S.Ct. 1069 (quoting Scott, 437 U.S. at 99, 98 S.Ct. 2187), and, instead, was merely " 'a legal judgment that [Lane], although criminally culpable, [could] not be punished' " for both the intentional-murder conviction and the capital-murder conviction. Evans, 568 U.S. at 319, 133 S.Ct. 1069 (quoting Scott, 437 U.S. at 98, 98 S.Ct. 2187). Indeed, had the trial court in Lane's first trial concluded that there was insufficient evidence to find Lane guilty of the intentional murder of Theresa, the court would have been required to enter a judgment of acquittal as to all three of Lane's convictions because the intentional murder of Theresa was an essential element of each conviction. Towles, 263 So. 3d at 1085. Therefore, because Lane was not acquitted of the intentional murder of Theresa in his first trial, his capital-murder convictions in this trial do not violate double-jeopardy principles. Accordingly, Lane is not entitled to relief on this claim.

XII.

***47** Lane argues that his trial was rendered fundamentally unfair by what, he alleges, was prosecutorial misconduct. Specifically, Lane argues that, during closing argument, the prosecutor (1) relied on excluded evidence and (2) shifted the burden of proof to Lane. We address each argument in turn.

1.

At trial, the following colloquy occurred during the prosecutor's direct examination of Gabel, who was Theresa's manager at Wal-Mart:

> "Q. Tell us about Theresa.
>
> "A. Theresa was one of those I always said if I could clone her and have a hundred more like her --
>
> "[DEFENSE COUNSEL]: Judge.
>
> "THE WITNESS: -- I wouldn't have to worry.
>
> "[DEFENSE COUNSEL]: Judge, I'm going to object to this. This is not relevant to the -- to this case.
>
> "[THE STATE]: Well, it's relevant about her employment, Your Honor.
>
> "THE COURT: What kind of person she was or what she thinks of her? Let's just get on with the case."

(R. 2088.) During closing arguments, the prosecutor relied on that part of Gabel's testimony to argue that Theresa "didn't have any enemies" other than Lane. (R. 2191.) According to Lane, however, the prosecutor's argument was improper because, he says, the argument relied on excluded victim-impact testimony. Because Lane did not object to the prosecutor's argument, he failed to preserve this claim for appellate review, Buford, supra, and, as a result, this claim is subject to only plain-error review. Shanklin, supra.

Contrary to Lane's contention that the prosecutor relied on excluded evidence, Gabel's testimony was not excluded from trial. As evidenced by the colloquy quoted above, although defense counsel objected to Gabel's testimony, the trial court did not rule on the objection but, instead, merely instructed the parties to "get on with the case." See Laakkonen v. State, 21 So. 3d 1261, 1270 (Ala. Crim. App. 2008) (noting that trial court did not rule on defendant's objection where trial court merely instructed parties to "move on" (Welch, J., dissenting)); and Scott v. State, 305 Ga.App. 710, 700 S.E.2d 694, 696-97 (2010) (same). Thus, because the trial court did not sustain Lane's objection, Gabel's testimony was not excluded from evidence but, rather, was part of the evidence before the jury. Therefore, the prosecutor was permitted to

comment upon Gabel's testimony during closing arguments. See Johnson v. State, 823 So. 2d 1, 47 (Ala. Crim. App. 2001) (“ ‘ “The test of a prosecutor's legitimate argument is that whatever is based on facts and evidence is within the scope of proper comment and argument.” ’ ” (quoting Ballard v. State, 767 So. 2d 1123, 1135 (Ala. Crim. App. 1999), quoting in turn Watson v. State, 398 So. 2d 320, 328 (Ala. Crim. App. 1980))). Thus, we find no error, much less plain error, in the prosecutor's argument. See Broadnax v. State, 825 So. 2d 134, 187-88 (Ala. Crim. App. 2000) (no plain error “[b]ecause the arguments advanced by the prosecutor were derived from the evidence admitted at trial” (emphasis added)). Accordingly, Lane is not entitled to relief on this claim.[18]

2.

***48** During closing arguments, defense counsel argued that, if Lane left his mobile home at 8:15 a.m. as the evidence indicated, he did not have time to murder Theresa and return to his mobile home by 9:30 a.m. if he stopped anywhere other than Wilson's house. In support of that theory, defense counsel argued that the employee of a gas station near Lane's mobile home had seen Lane in the gas station around 9:00 a.m. on the day Theresa was murdered and that Det. McRae had been unable to verify whether Lane had stopped at the gas station. (R. 2157.) On rebuttal, the following colloquy occurred:

> “[THE PROSECUTOR]: ... Now, you know, when the Defense got up here and did their closing arguments, they said the store clerk at the Chevron that day, the store clerk at the Chevron. Well, they could have brought you the store clerk at the Chevron. They didn't want to bring the store clerk from the Chevron --
>
> “[DEFENSE COUNSEL]: I'm going to object to that. That's improper.
>
> “THE COURT: Sustained.”

(R. 2196-97.) According to Lane, the prosecutor's closing argument erroneously shifted the burden of proof to Lane. However, the trial court sustained Lane's objection, and Lane did not move for a mistrial. Thus, as to this claim, there is no adverse ruling from which to appeal, and, as a result, this claim is subject to only plain-error review. See Minor v. State, 914 So. 2d 372, 422 (Ala. Crim. App. 2004) (plain-error review applies to claim regarding propriety of prosecutor's closing argument where defendant does not receive adverse ruling on objection).

Assuming, without deciding, that the prosecutor's argument was improper, we conclude that the argument does not require reversal. Although a prosecutor “ ‘must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence,’ ” such conduct requires reversal only “ ‘ “if so pronounced and persistent that it permeates the entire atmosphere of the trial[.]” ’ ” DeBruce v. State, 651 So. 2d 599, 604 (Ala. Crim. App. 1993) (quoting, respectively, United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992)), and Simon, 964 F.2d at 1086, quoting in turn United States v. Alanis, 611 F.2d 123, 126 (5th Cir. 1980)). Here, the prosecutor's suggestion that Lane could have produced a witness at trial was neither persistent nor “ ‘ “permeate[d] the entire atmosphere of the trial,” ’ ” id., but, rather, was an isolated statement made in response to defense counsel's closing argument. Furthermore, the trial court sustained Lane's objection to that isolated statement, which indicated to the jury that the prosecutor's statement was improper.

In addition, although the trial court did not instruct the jury to disregard the prosecutor's argument at the time of Lane's objection, the trial court did instruct the jury during the jury charge that Lane “enters this courtroom presumed to be innocent and that presumption of innocence stays with him throughout the course of this trial until or unless the State of Alabama proves his guilt beyond a reasonable doubt.” (R. 2232.) Thereafter, the trial court reiterated approximately 20 times that the State had the burden of proof and was required to prove Lane's guilt beyond a reasonable doubt. (R. 2232-47.) Thus, taking into consideration the entire trial, we conclude that no reasonable juror would have misconstrued the burden of proof based on the prosecutor's isolated statement during closing arguments that defense counsel could have produced a witness at trial. See Broadnax, 825 So. 2d at 185 (no plain error as to claim that prosecutor's argument shifted the burden of proof where trial court instructed the jury at conclusion of closing arguments as to defendant's presumption of innocence and State's burden of proof). Accordingly, we find no plain error in the prosecutor's argument, and, in the absence of such error, Lane is not entitled to relief on this claim.

XIII.

***49** Lane argues that the trial court erroneously instructed the jury as to the charge of capital murder-burglary. Because Lane did not object to the trial court's jury instructions, this claim is subject to only plain-error review. See Henderson,

248 So. 3d at 1010 (reviewing for plain error claim that trial court erroneously instructed jury where defendant did not object to jury instructions at trial).

In support of his claim that the trial court erroneously instructed the jury as to the charge of capital murder-burglary, Lane alleges that the trial court failed to instruct the jury that a conviction for capital murder-burglary required proof that the murder occurred during the burglary. Lane's argument is wholly without merit. The trial court began its instructions as to the charge of capital murder-burglary by instructing the jury that, to convict Lane of that charge, the jury had to find that the State had proven beyond a reasonable doubt that Lane committed "intentional murder during the commission of a burglary in the first or second degree." (R. 2236.) (Emphasis added.) The trial court then instructed the jury as to the elements of intentional murder, including the real-and-specific-intent element required for a capital-murder conviction, Daniels v. State, 650 So. 2d 544 (Ala. Crim. App. 1994), and the elements of first- and second-degree burglary. (R. 2236-2238.) In concluding its instructions on the charge of capital murder-burglary, the trial court stated:

> "If you find from the evidence that the State has proved beyond a reasonable doubt each of the elements of the offense of intentional murder during a burglary in the first or second degree, then you shall find the defendant guilty of the offense of capital murder in Count One."

(R. 2238.) (Emphasis added.) Thereafter, the trial court charged the jury on intentional murder as a lesser-included offense of capital murder-burglary and concluded its instructions on the intentional-murder charge as follows:

> "Bear in mind that if the defendant is guilty of intentional murder he may also be guilty of capital murder if committed or coupled with additional circumstances such as I stated earlier, that the intentional murder was committed during the commission of a burglary first or second degree."

(R. 2240.) (Emphasis added.)

Contrary to Lane's contention, the trial court clearly instructed the jury that a conviction for capital murder-burglary required proof that the murder occurred during the burglary. Thus, we find no error, much less plain error, in the trial court's jury instruction.

XIV.

Lane argues that the prosecutor's decision to charge him with capital murder was arbitrary. In support of that claim, Lane raises the following allegation:

> "While non-capital murder charges were pending against Lane, other capital murder defendants in Mobile County alleged that the district attorney's capital charging process was arbitrary and pointed specifically to the State's decision to not seek the death penalty in Lane's case. As a result of these allegations, the State initiated a capital review process in this case, and ultimately indicted Lane for capital murder."

Lane's brief, at 93. Because Lane did not raise this claim at trial, this claim is subject to only plain-error review. Rule 45A, Ala. R. App. P.

Initially, we note that, even if we accept as fact Lane's allegation that the prosecutor's decision to charge him with capital murder was based on complaints from other capital-murder defendants in Mobile County, that fact tends to indicate that the prosecutor's decision was not arbitrary but, rather, was consistent with charges pending against similarly situated defendants. Furthermore, this Court has stated:

> ***50** " 'In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978).'
>
> "United States v. Armstrong, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).
>
> "....
>
> " 'A prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings; he is protected from judicial oversight by the doctrine of separation of powers. ...'
>
> "Piggly Wiggly No. 208, Inc. v. Dutton, 601 So. 2d 907, 910 (Ala. 1992), quoting 63 Am. Jur. 2d Prosecuting Attorneys § 24 (1984)."

Doster v. State, 72 So. 3d 50, 94-95 (Ala. Crim. App. 2010) (emphasis added).

Thus, as a general rule, a prosecutor is vested with the discretion to select which charges to file against a person who there is probable cause to believe has committed a

criminal offense, and that decision is generally not subject to judicial review. See United States v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) ("A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive."); and Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (noting that "the decision to prosecute is particularly ill-suited to judicial review"). Likewise, a prosecutor is also vested with the discretion to choose whether to seek the death penalty for a capital charge. Albarran, 96 So. 3d at 203. However,

> "although prosecutorial discretion is broad, it is not ' "unfettered." Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints.' United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 2205, 60 L. Ed. 2d 755 (1979) (footnote omitted). In particular, the decision to prosecute may not be ' "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," ' Bordenkircher v. Hayes, supra, 434 U.S. at 364, 98 S. Ct. at 668, quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S. Ct. 501, 505, 7 L. Ed. 2d 446 (1962), including the exercise of protected statutory and constitutional rights, see United States v. Goodwin, supra, 457 U.S. [368], at 372, 102 S. Ct. [2485], at 2488, [73 L.Ed.2d 74] [(1982)]."

Wayte, 470 U.S. at 608, 105 S.Ct. 1524.

Here, the prosecutor had probable cause to believe Lane committed capital murder, and, thus, the decision to charge Lane with capital murder and to seek the death penalty rested within the prosecutor's discretion. Doster, supra; Albarran, supra. Furthermore, the exercise of that discretion is not subject to judicial review absent evidence indicating that the prosecutor's decision was " ' "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." ' " Wayte, 470 U.S. at 608, 105 S.Ct. 1524 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), quoting in turn Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). However, there is absolutely no indication in the record, nor does Lane allege, that the prosecutor's decision to charge Lane with capital murder was grounded upon a constitutionally impermissible basis. Thus, we find no error, much less plain error, as to this claim.

XV.

***51** Lane argues that the trial court erred by excluding "evidence at both the guilt-innocence and penalty phases of the trial that he rejected the State's plea offer and that the State had not sought the death penalty prior to that rejection." Lane's brief, at 90. As Lane notes, Rule 410, Ala. R. Evid., and Rule 14.3(d), Ala. R. Crim. P., prohibit the State from introducing evidence of plea discussions against a defendant but do not expressly prohibit a defendant from introducing such evidence in his or her favor. "The admission or exclusion of evidence is a matter within the sound discretion of the trial court. We review the trial court's ruling on the admissibility of evidence for an abuse of discretion." Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000).

According to Lane, evidence indicating that he rejected a plea offer was relevant at the guilt phase of trial because, he says, the "rejection of a plea deal, despite the resulting exposure to the death penalty, was probative of his innocence." Lane's brief, at 91. The Supreme Court of New Hampshire considered a similar argument in State v. Woodsum, 137 N.H. 198, 624 A.2d 1342 (1993), in which the defendant sought to introduce "as proof of his consciousness of innocence his rejection of the lenient [plea] offer and his willingness to risk up to fourteen years in prison if a trial were to result in convictions on both felony charges." Woodsum, 624 A.2d at 1343. In affirming the defendant's convictions, the New Hampshire Supreme Court first noted that public-policy considerations weigh against the admissibility of evidence of a rejected plea offer:

> "The defendant would have us allow the admission of a rejected plea offer in a subsequent criminal trial because the rejection is probative of the accused's consciousness of innocence. Confronting analogous facts and a similar argument, the Ohio Court of Appeals concluded that
>
> > " 'the rule sought by defendant would have a serious and perhaps devastating effect on the use of plea bargaining as a device to accomplish ... legitimate purposes. If the prosecutor must bargain with a defendant whose responses are framed with an eye toward their self-serving use at trial, we see little profit to be anticipated from their discussions, and little incentive to begin the process. The essence of plea bargaining is obviously negotiation, and a precondition of successful negotiations is an assurance of confidentiality which will encourage the candid give-and-take essential to reaching an agreeable compromise. ...'

"State v. Davis, 70 Ohio App. 2d 48, 51, 434 N.E.2d 285, 287–88 (1980); accord United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976); State v. Pearson, 818 P.2d 581, 583 (Utah Ct. App. 1991)."

Woodsum, 624 A.2d at 1343-44. In addition, the New Hampshire Supreme Court concluded that evidence of a rejected plea offer has little, if any, probative value as to the question of a defendant's innocence and that the admission of such evidence carries the risk of misleading the jury into consideration of irrelevant issues:

"The relevance of the evidence and its potential for confusing the issues or misleading the jury are important considerations in assessing whether the rejection of a beneficial plea offer could ever be 'favorable' proof. Many inferences follow from a defendant's decision to exercise his or her right to a jury trial, rather than to accept a plea offer. 'A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea.' United States v. Biaggi, 909 F.2d 662, 691 (2d Cir. 1990), cert. denied, 499 U.S. 904, 111 S. Ct. 1102, 113 L. Ed. 2d 213 (1991). An 'extraordinarily beneficial' plea offer is especially likely to induce a defendant to risk a trial, regardless of his or her guilt or innocence, for the offer of a beneficial plea may indicate that there are problems with the State's case, such as a key witness's disappearance, refusal to cooperate, or reluctance to testify.

***52** "It is also plausible to infer from the rejection of a beneficial plea offer, as the defendant argues, that a defendant believes he or she did not commit the crime. Cf. id. at 690 (jury may infer from defendant's rejection of offer of immunity that defendant lacked guilty knowledge); 2 J. Wigmore, Evidence § 293, at 232 (Chadbourn rev. 1979). This belief is, however, only marginally relevant to the issues in any criminal trial. Every criminal trial begins with a recitation of the defendant's plea of not guilty to the charges. The rejection of a plea offer is, in effect, nothing more than a prior statement consistent with the defendant's plea at trial, and thus adds little to the information before the jury. See United States v. Greene, 995 F.2d 793, 798–99 (8th Cir. 1993). Furthermore, a defendant's posture in plea negotiations at a date after the alleged offense, reflecting his or her counselled decision to seek a jury's acquittal, is at best weak evidence of the defendant's state of mind at the time of the alleged crime, and is not relevant to any other element of a chargeable offense. See Pearson, 818 P.2d at 584 n.6.

"Set against the marginal relevance of the rejection of a plea offer is the great likelihood that its admission will draw extraneous, misleading information into a criminal trial. Introducing evidence of a defendant's rejection of a lenient plea offer inevitably invites an exploration of such collateral matters as the prosecutor's reasons for making the offer, see Davis, 70 Ohio App. 2d at 51, 434 N.E.2d at 288, or the defendant's motives for rejecting it, see Greene, 995 F.2d at 798–99. See also N.H. R. Ev. 410(4)(i) & reporter's notes. A jury may be led far afield by such evidence, for '[t]he considerations involved in plea bargaining are infinitely variable and complex.' Davis, 70 Ohio App. 2d at 51, 434 N.E.2d at 288.

" '[C]onsiderations may include: the seriousness of the offense, the availability or suitability of lesser included offenses, the record of the accused, the quality and quantity of the evidence on both sides, the availability and cooperativeness of witnesses or accomplices, unresolved legal issues, ... probable length of trial and difficulty of trial preparation[, and a host of other no-less significant factors, very few of which bear directly upon the only question the triers of fact will be called upon to decide, i.e., the guilt or innocence of the accused of the crime charged.] ....'

"Id. ...

"Because there is little, if any, probative value in the rejection of a plea offer, while there is invariably a high risk that its admission would infuse extraneous, confusing issues into a trial, we conclude as a matter of law that evidence of a defendant's rejection of a plea offer is not admissible in the ensuing criminal trial."

Woodsum, 624 A.2d at 1344-45. As the New Hampshire Supreme Court noted, other jurisdictions that have considered this issue have reached the same conclusion. See, e.g., United States v. Goffer, 721 F.3d 113 (2d Cir. 2013); United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976); State v. Davis, 70 Ohio App. 2d 48, 434 N.E.2d 285 (1980); Wright v. State, 266 Ind. 327, 363 N.E.2d 1221 (Ind. 1977); and State v. Pearson, 818 P.2d 581, 583 (Utah Ct. App. 1991) (holding that, although a rule of evidence might not expressly prohibit a defendant from introducing evidence of plea discussions, "[f]airness dictates that the restriction should apply to both parties in the negotiations").

We agree with those jurisdictions that have concluded that evidence of a rejected plea offer is not admissible in the

defendant's trial. As the New Hampshire Supreme Court noted, a defendant might reject a plea offer for reasons unrelated to guilt or innocence –- such as, for example, if the defendant believes there are "problems with the State's case," Woodsum, 137 N.H. at 201, 624 A.2d at 1344, and is therefore willing to risk a trial and a harsher sentence in exchange for the opportunity to obtain an acquittal. Thus, because "[m]any inferences follow from a defendant's decision to exercise his or her right to a jury trial, rather than to accept a plea offer," id., evidence of a rejected a plea offer is not probative of the defendant's innocence. At most, evidence of a rejected a plea offer is arguably probative of the defendant's belief that he or she is innocent, but that belief is "only marginally relevant," if relevant at all, to the actual issues in a criminal trial and is wholly irrelevant to "any ... element of a chargeable offense." Id. Furthermore, the limited probative value, if any, of a rejected plea offer pales in comparison to "the great likelihood that its admission will draw extraneous, misleading information into a criminal trial," id., which creates the risk that the jury "may be led far afield by such evidence," id. at 1345, rather than focusing on the issues and evidence that are actually relevant to a determination of the defendant's guilt or innocence. See Davis, 70 Ohio App. 2d at 51, 434 N.E.2d at 288 ("It seems obvious that any testimony concerning [plea] negotiations will far more likely than not reflect ... legally extraneous considerations, rather than anything relevant to, or probative of, the ultimate issue on trial.").

***53** In addition, public-policy concerns weigh against the admission of evidence of a rejected plea offer. "Plea bargaining has been recognized as an essential component of the administration of justice," Verdoorn, 528 F.2d at 107, and the plea-bargaining process benefits both the State and defendants. See also Davis, 70 Ohio App. 2d at 50, 434 N.E.2d at 287 (noting that plea bargaining "has become a generally accepted, and probably essential, component of the administration of criminal justice"); and People v. Parker, 711 N.Y.S.2d 656, 660, 271 A.D.2d 63, 68 (2000) (noting that the plea-bargaining process "plays a vital role in the criminal justice system"). For the State, plea bargains serve "the important function of alleviating some of the burdens placed on prosecutors and the courts by reducing the number of cases to be tried and appealed," Whitson v. State, 854 So. 2d 619, 624 (Ala. Crim. App. 2003), which in turn ensures that "scarce judicial and prosecutorial resources are conserved[.]" Brady v. United States, 397 U.S. 742, 752, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). For a defendant, a plea bargain provides the opportunity for leniency, Maddox v. State, 502 So. 2d 790, 794 (Ala. Crim. App. 1986), and allows the defendant to "avoid[ ] extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation." Blackledge v. Allison, 431 U.S. 63, 71, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). See also Davis, 70 Ohio App. 2d at 50, 434 N.E.2d at 287 (noting that plea bargains "reliev[e] the distress of those incarcerated in pretrial confinement and enhanc[e] the rehabilitative prospects of those ultimately found guilty and imprisoned"). These benefits would be jeopardized, however, if a rejected plea offer was admissible at trial as favorable evidence for the defendant. As the New Hampshire Supreme Court noted, " '[i]f the prosecutor must bargain with a defendant whose responses are framed with an eye toward their self-serving use at trial, we see ... little incentive [for the State] to begin the [plea-bargaining] process.' " Woodsum, 624 A.2d at 1343 (quoting Davis, 434 N.E.2d at 287). That is to say, the possibility that a rejected plea bargain will be admissible at trial could have " 'a serious and perhaps devastating effect on the use of plea bargaining,' " id., and the many significant benefits it affords both the State and defendants. See Pearson, 818 P.2d at 583 ("The policy of promoting plea discussions between defendants and the government would be substantially undermined by allowing a defendant to use the government's offer to plea bargain as evidence in his or her favor."); and Verdoorn, 528 F.2d at 107 ("Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."). Thus, in addition to the fact that evidence of a rejected plea offer has little to no probative value, excluding such evidence ensures that the plea-bargaining process, which serves vital purposes in the criminal-justice system, is not inhibited.

For the foregoing reasons, we hold that evidence of a rejected plea offer is not admissible in the guilt phase of the defendant's trial. Thus, the trial court did not abuse its discretion by excluding such evidence from the guilt phase of Lane's trial. Taylor, supra.

Lane also argues that the trial court erred by preventing him "from presenting penalty–phase evidence that the State did not seek the death penalty until after [he] rejected the State's plea offer." Lane's brief, at 91. According to Lane, the fact that the prosecutor offered him a plea bargain indicated that the prosecutor "did not initially believe even ... a death sentence was warranted," id. at 92, which, Lane argues, constituted a mitigating circumstance upon which the jury could have

determined that a life-imprisonment-without-parole sentence was the proper sentence for Lane. We disagree.

To begin, Lane concedes that, at the time of the plea offer, he had been charged with murder and had not yet been indicted for capital murder. See Lane's brief, at 90. Thus, the death penalty was not an option for the State at that time, and, consequently, the plea offer was not, as Lane suggests, indicative of the prosecutor's belief that Lane's crime did not warrant the death penalty. Moreover, even if Lane had been indicted for capital murder at the time of the plea offer,

> "[s]uch a plea offer does not by itself show that the prosecutor believed the defendant did not deserve the death penalty. A plea offer of a non-capital sentence in a capital case may simply reflect a desire to conserve prosecutorial resources, to spare the victim's family from a lengthy and emotionally draining trial, to spare them the possibility of protracted appeal and post-conviction proceedings ..., or to avoid any possibility, however slight, of an acquittal at trial."

Hitchcock v. Secretary, Florida Dep't of Corr., 745 F.3d 476, 483 (11th Cir. 2014). In addition, just as evidence of a rejected plea offer in the guilt phase of a capital trial could have a chilling effect on the State's incentive to initiate the plea-bargaining process in the first place, "the admission of rejected plea offers as mitigating evidence in capital cases could have the pernicious effect of discouraging prosecutors from extending plea offers in the first place, lest those offers come back to haunt them at sentencing. That would be in no one's best interest." Id. at 484 (internal citation omitted). See also Wright v. Bell, 619 F.3d 586, 600 (6th Cir. 2010) (" 'Allowing a defendant to use plea negotiations in mitigation would clearly discourage plea negotiations in capital cases as prosecutors would correctly fear that during the second stage proceedings, they would be arguing against themselves. Plea bargaining is to be encouraged, not discouraged, and therefore is improper evidence to present in mitigation.' " (quoting Ross v. State, 717 P.2d 117, 122 (Okla. Crim. App. 1986))).

***54** Furthermore, it is well settled that, " '[a]lthough a defendant's right to present proposed mitigating evidence is quite broad, evidence that is irrelevant and unrelated to a defendant's character or record or to the circumstances of the crime is properly excluded.' " Johnson v. State, 120 So. 3d 1130, 1153 (Ala. Crim. App. 2009) (quoting Woods v. State, 13 So. 3d 1, 33 (Ala. Crim. App. 2007)). Evidence indicating that the State offered, and the defendant rejected, a plea bargain is irrelevant and unrelated to the defendant's character, the defendant's record, or the circumstances of the crime and therefore is not admissible as a mitigating circumstance. See Hitchcock, 745 F.3d at 483 ("We agree with the seven courts (we make it eight) on the majority side of this issue .... Evidence of a rejected plea offer for a lesser sentence ... is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of his crime.").

For the foregoing reasons, we hold that evidence of a rejected plea offer is not admissible in the penalty phase of the defendant's trial. Thus, the trial court did not abuse its discretion by excluding such evidence from the penalty phase of Lane's trial. Taylor, supra.

XVI.

Lane argues that the trial court erred by denying his motion to preclude a penalty phase of trial. According to Lane, because the jury in his first trial recommended a life-imprisonment-without-parole sentence, the State was prohibited from seeking the death penalty in his second trial; thus, Lane argues, the trial court was required to impose a life-imprisonment-without-parole sentence in this second trial. In support of his claim, Lane relies on Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

> "In Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986), we find the following synopsis of Bullington:
>
> > " 'In Bullington v. Missouri, supra, this Court held that a defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he obtains reversal of his conviction and is retried and reconvicted. The Court recognized the usual rule to be that when a defendant obtains reversal of his conviction on appeal,
> >
> > > " ' "the original conviction has been nullified and 'the slate wiped clean.' Therefore, if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served." Id., 451 U.S. at 442, 101 S. Ct. at 1860 (quoting North Carolina v. Pearce, 395 U.S. 711, 721, 89 S. Ct. 2072, 2078, 23 L. Ed. 2d 656 (1969)).

" 'However, the Court found that its prior decisions had created an exception to this rule: "[T]he 'clean slate' rationale ... is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." Bullington, supra, 451 U.S. at 443, 101 S. Ct. at 1860. Although it is usually "impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case,' " ibid. (quoting Burks v. United States, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149, 57 L. Ed. 2d 1 (1978)), the Court found that Missouri, by "enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, ... explicitly requires the jury to determine whether the prosecution has 'proved its case,' " id., at 444, 101 S. Ct. at 1861 (emphasis in original).* Accordingly, the Court held that the jury's decision to sentence Bullington to life imprisonment after his first conviction should be treated as an "acquittal" of the death penalty under the Double Jeopardy Clause.

" '_____

" '*The "case" to which the Court referred in Bullington was the prosecution's case that the defendant deserved the death penalty. The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent. The Court emphasized that the sentencer was required to make a choice between "two alternative verdicts," 451 U.S. at 438, 101 S. Ct. at 1858 .... (Footnote in original.)'

***55** "476 U.S. at 151–152, 106 S. Ct. at 1753–54.

"....

"When Bullington is considered in conjunction with Alabama's capital sentencing proceeding (in which the trial court, not the jury, is the ultimate sentencing authority)[2] it stands for the proposition that a defendant sentenced to life imprisonment without parole by the trial court is protected against the later imposition of the death sentence in the event that he obtains a reversal of the conviction and is retried and reconvicted for the same offense.

"_____

"[2]Alabama's capital sentencing proceeding is indistinguishable for double jeopardy purposes from the capital sentencing proceeding discussed in Bullington. See 476 U.S. at 152, 106 S. Ct. at 1754, n.4."

Ex parte Godbolt, 546 So. 2d 991, 993-94 (Ala. 1987) (final emphasis added; some emphasis omitted).

As noted previously, at the time of Lane's first and second trials, the jury's sentencing verdict was an advisory recommendation for the trial court, which had the final determination as to sentence. See note 2, supra. Thus, the fact that the jury in Lane's first trial recommended a life-imprisonment-without-parole sentence is not dispositive of this issue. Rather, as the Alabama Supreme Court noted in Ex parte Godbolt, the principle expounded in Bullington would have applied at Lane's second trial only if the trial court in Lane's first trial had imposed a life-imprisonment-without-parole sentence. However, the trial court in Lane's first trial sentenced Lane to death; thus, sentencing Lane to death in his second trial did not violate Bullington. Compare Ex parte State, 675 So. 2d 548, 548 (Ala. Crim. App. 1996) (" 'In this case, because Bell's first trial resulted in a sentence of life imprisonment without parole and because the retrial involves the same charge as the original trial, the State is precluded from seeking the death sentence on retrial.' " (quoting Ex parte Bell, 511 So. 2d 519, 521 (Ala. Crim. App. 1987)) (emphasis added)). Accordingly, Lane is not entitled to relief on this claim.

XVII.

Lane argues that the trial court erred by admitting at the penalty phase the testimony of Dr. Kirk Kirkland, a court-appointed forensic psychologist who, before trial, had evaluated Lane's competency to stand trial and his mental condition at the time of the offense. Lane did not object to Dr. Kirkland's testimony.

At the sentencing hearing, Lane presented the testimony of Dr. Marianne Rosenzweig, a forensic psychologist who interviewed people familiar with Lane and who conducted a mental evaluation of Lane, including the administration of the Rorschach inkblot test, which, according to Dr. Rosenzweig, "gives ... insight into how people typically think, their feelings, how they defend themselves psychologically." (R. 2413.) Based on the data she collected, Dr. Rosenzweig diagnosed Lane with "narcissism" (R. 2418) and "antisocial personality disorder" (R. 2419), which, Dr. Rosenzweig testified, resulted from Lane's experiences with "abuse or neglect, unstable parenting, or inconsistent discipline in

childhood"; "[p]arental rejection, disapproval, or hostility"; "[e]xposure to personal cruelty and domination" from his mother; and "low socioeconomic status." (R. 2421.) Based on her diagnoses, when asked if there was "anything in [her] evaluation ... which may explain why" Lane murdered Theresa (R. 2425), Dr. Rosenzweig testified that Lane "seems to be lacking in the ability to empathize with other people, and that would include Theresa. And in the circumstance where she was leaving him, he could only focus on himself and his own needs ... in that situation." (R. 2426.) Dr. Rosenzweig also testified that the actions of a person who is "fueled by a personality disorder" can often be "impulsive" and that "the history [she] got indicates that [Lane] acts on impulse." (R. 2452.) However, Dr. Rosenzweig also testified that the difference between acting impulsively and acting by "conscious choice" is not "black and white" (R. 2452), that "to some extent [actions are] choice" (R. 2452), and that she was not suggesting that Lane did not have the capacity to "appreciate the nature and wrongfulness of his actions." (R. 2457-58.)

***56** On rebuttal, Dr. Kirkland testified that, in addition to evaluating Lane, he had reviewed Dr. Rosenzweig's data and that "[his] feeling was ... pretty much like [Dr. Rosenzweig] testified. She said there were multiple features of both antisocial and narcissistic personality there." (R. 2495.) Dr. Kirkland also confirmed that he "personally went over Dr. Rosenzweig's test results" (R. 2495), that he "went back and scored [Lane's Rorschach test] and it came out the same way" (R. 2495), and that he "didn't find a lot to disagree with about [Dr. Rosenzweig's] interpretation of the test anyway." (R. 2496.) In addition, Dr. Kirkland testified that

> "part of the features of both antisocial and narcissism is that the person ... has trouble with empathy.
>
> "The –- what that means is that they're focused so much on their needs and perceptions that they have a hard time regarding other people as other people. Sometimes they're seen as objects or, worse, even pawns. And there was certainly some evidence of that in the history and in the testing."

(R. 2498-99.) Although Dr. Kirkland conceded that the actions of a person suffering with narcissism and antisocial personality disorder can be influenced by the person's background, he testified that "often the deciding factor is individual choice." (R. 2498.) On cross-examination, Dr. Kirkland testified as follows:

> "Q .... [Y]ou were asked to be here to review Dr. Rosenzweig's testimony and for whatever reason that the State wanted you to testify regarding her findings. Is that true?
>
> "A. Correct.
>
> "Q. Okay. And you don't have any great disagreement with Dr. Rosenzweig regarding either her socioeconomic investigation, psychosocial investigation, what we call a mitigation investigation?
>
> "A. Right. In looking at the testing that she did and ... the conclusions that she drew from that, I think we came to the same diagnosis."

(R. 2500-01.)

On appeal, Lane asserts multiple grounds in support of his claim that the trial court erred by admitting Dr. Kirkland's testimony. We need not address those arguments, however, because even if Dr. Kirkland's testimony was inadmissible –- an assumption we do not make -- we conclude beyond a reasonable doubt that Lane was not prejudiced by the testimony and that any error in admitting the testimony was therefore harmless. Rule 45, Ala. R. App. P.

Dr. Kirkland's brief testimony was essentially entirely consistent with Dr. Rosenzweig's extensive testimony. In fact, Dr. Kirkland confirmed that he "came to the same diagnosis" as that of Dr. Rosenzweig and that he "didn't find a lot to disagree with" in Dr. Rosenzweig's testimony. Although Lane makes much of the fact that Dr. Kirkland emphasized the "individual choice" aspect of Lane's actions, Dr. Rosenzweig also testified that Lane's actions were, to some extent, the result of his "conscious choice." Thus, as the State notes, the difference between Dr. Rosenzweig's testimony and Dr. Kirkland's testimony on that issue "was one of degree, not kind." State's brief, at 79. In addition, the trial court apparently found Dr. Rosenzweig's testimony on that issue to be more persuasive, as evidenced by the fact that the trial court found the existence of, and gave weight to, the statutory mitigating circumstance that Theresa's murder was committed "under the influence of extreme mental or emotional disturbance." § 13A-5-51(2), Ala. Code 1975. (C. 97.) Although the trial court relied on Dr. Kirkland's testimony in finding that there was no evidence indicating that Lane lacked the capacity to appreciate the criminality of his conduct, § 13A-5-51(6), Ala. Code 1975, the trial court correctly noted that both Dr. Rosenzweig and Dr. Kirkland

testified that Lane's narcissism and antisocial personality disorder did not result in diminished capacity. (C. 98-99.)

***57** Given the foregoing, there is absolutely no basis for concluding that Lane would have received a different sentence in the absence of Dr. Kirkland's testimony, which was almost wholly harmonious with Dr. Rosenzweig's testimony. Moreover, we reiterate that Lane's failure to object to Dr. Kirkland's testimony weighs against a finding that Lane was prejudiced by such evidence. Towles, supra. Therefore, we conclude beyond a reasonable doubt that any error in the admission of Dr. Kirkland's testimony was harmless and does not entitle Lane to relief. See Broadnax, 825 So. 2d at 216 ("The purpose of the harmless error rule is to avoid setting aside a sentence for defects the correction of which would have little, if any, likelihood of changing the result of sentencing.").

XVIII.

Lane argues that the trial court erroneously instructed the jury regarding the weighing of the aggravating and mitigating circumstances. Lane also argues that the trial court erred by sentencing him to death because, Lane says, the trial court "fail[ed] to address the real possibility that Lane's lack of a criminal record, mental illness, and childhood trauma equaled the aggravating factors." Lane's brief, at 97-98. Because Lane did not raise these claims at trial, the claims are subject to only plain-error review. Henderson, supra; Rule 45A, Ala. R. App. P.

In support of his argument that the trial court erroneously instructed the jury regarding the weighing of aggravating and mitigating circumstances, Lane contends that the trial court failed to instruct the jury that it should recommend a life-imprisonment-without-parole sentence if it found that the aggravating and mitigating circumstances carried equal weight. However, contrary to Lane's allegation, the trial court expressly instructed the jury that it should recommend a life-imprisonment-without-parole sentence if it found that the mitigating circumstances "outweigh[ed] [the aggravating circumstances] or [were] equal to" the aggravating circumstances. (R. 2519.) (Emphasis added.) Thus, we find no error, much less plain error, in the trial court's jury instructions regarding the weighing of aggravating and mitigating circumstances. Accordingly, Lane is not entitled to relief on this claim.

With respect to Lane's argument that the trial court failed to consider whether the mitigating circumstances were equal to the aggravating circumstances, Lane's argument is once again contradicted by the record. The trial court's sentencing order clearly states that the court "agrees with the jury's finding beyond a reasonable doubt that the aggravating circumstances exist and that they outweigh the mitigating circumstances." (C. 100.) (Emphasis added.) A finding that the aggravating circumstances outweighed the mitigating circumstances necessarily constitutes a finding that the aggravating and mitigating circumstances were not of equal weight. Thus, Lane is not entitled to relief on this claim.

XIX.

As noted, Lane's convictions were made capital by the facts that the Theresa's murder was committed during the course of a burglary, § 13A-5-40(a)(4), and was committed for pecuniary gain, § 13A-5-40(a)(7) -- facts that also constituted aggravating circumstances for purposes of sentencing. See § 13A-5-49(4) and (6), Ala. Code 1975. On appeal, Lane contends that the process of " 'double-counting certain circumstances as both an element of the offense and an aggravating circumstance' "is unconstitutional, Hicks v. State, [Ms. CR-15-0747, July 12, 2019] —— So. 3d ——, ——, 2019 WL 3070198 (Ala. Crim. App. 2019) (quoting Vanpelt, 74 So. 3d at 89), while at the same time acknowledging that both the United States Supreme Court and Alabama's appellate courts have upheld "double-counting" against constitutional challenges.

***58** "As this Court has held:

> " '[T]here is no constitutional or statutory prohibition against double counting certain circumstances as both an element of the offense and an aggravating circumstance. See § 13A–5–45(e), Ala. Code 1975 (providing that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing"). The United States Supreme Court, the Alabama Supreme Court, and this court have all upheld the practice of double counting. See Lowenfield v. Phelps, 484 U.S. 231, 241–46, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988) ("The fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm."); Tuilaepa v. California, 512 U.S. 967, 972, 114 S. Ct.

> 2630, 129 L. Ed. 2d 750 (1994) ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."); Ex parte Kennedy, 472 So. 2d 1106, 1108 (Ala. 1985) (rejecting a constitutional challenge to double counting); Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007); Jones v. State, 946 So. 2d 903, 928 (Ala. Crim. App. 2006); Peraita v. State, 897 So. 2d 1161, 1220–21 (Ala. Crim. App. 2003); Coral v. State, 628 So. 2d 954 (Ala. Crim. App. 1992); Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991)....'

"Vanpelt, 74 So. 3d at 89."

Hicks, —— So. 3d at ——, 2019 WL 3070198. Thus, although Lane apparently disagrees with the constitutionality of "double-counting," he essentially concedes that his claim must fail. Accordingly, Lane is not entitled to relief on this claim.

XX.

Finally, Lane argues that Alabama's former capital-sentencing scheme, under which he was sentenced, is unconstitutional under Hurst v. Florida, 577 U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and that his death sentence must therefore be reversed. Specifically, Lane argues that Hurst and Ring prohibit a capital-sentencing scheme that provides that the jury's sentencing verdict is a recommendation and that allows the jury to recommend a death sentence on a less-than-unanimous verdict. These claims have been repeatedly rejected by the Alabama Supreme Court. See, e.g., Ex parte Bohannon, 222 So. 3d 525, 534 (Ala. 2016) ("[T]he making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst."); Capote v. State, [Ms. CR-17-0963, January 10, 2020] —— So. 3d ——, ——, 2020 WL 113875 (Ala. Crim. App. 2020) (noting that the Alabama Supreme Court "has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring"); and Brownfield v. State, 44 So. 3d 1, 39 (Ala. Crim. App. 2007) (rejecting claim that jury's sentencing recommendation must be unanimous and noting that "both this Court and the Alabama Supreme Court have upheld death sentences imposed after the jury made a less-than-unanimous recommendation that the defendant be sentenced to death"). Thus, Lane is not entitled to relief on this claim.

XXI.

***59** Pursuant to § 13A-5-53(a), Ala. Code 1975, this Court must review Lane's death sentence to determine whether any error adversely affecting Lane's rights occurred during the sentencing proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence, and whether death is the proper sentence in this case. In determining whether death is the proper sentence, this Court must determine

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

§ 13A-5-53(b), Ala. Code 1975. The determinations required by § 13A-5-53(b) must be "explicitly address[ed]" by this Court in all cases in which the death penalty has been imposed. § 13A-5-53(c), Ala. Code 1975.

In this case, the jury convicted Lane of capital murder-burglary and capital murder for pecuniary gain, and those convictions, as noted, constituted unanimous findings beyond a reasonable doubt of the existence of the aggravating circumstances that the Theresa's murder was committed during the course of a burglary, § 13A-5-49(4), and was committed for pecuniary gain, § 13A-5-49(6). See § 13A-5-45(e), Ala. Code 1975 (providing that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing"). Following the guilt phase of trial, the trial court conducted the penalty phase of trial in accordance with §§ 13A-5-45 and -46, Ala. Code 1975, as those statutes read before they were amended by Act No. 2017-131. See note 2, supra. After hearing evidence and receiving proper instructions regarding the applicable law, including proper instructions regarding the burden of proof and the weighing of aggravating and

mitigating circumstances, the jury recommended by a vote of 11-1 that Lane be sentenced to death.

Thereafter, the trial court proceeded to sentence Lane in accordance with § 13A-5-47, Ala. Code 1975, as that statute read before it was amended by Act No. 2017-131. See note 2, supra. Before sentencing Lane, the trial court received a written presentence investigation report, see § 13A-5-47(b), and gave both parties the opportunity to present arguments regarding the proper sentence to be imposed in Lane's case, see § 13A-5-47(c). In addition, the trial court entered a written sentencing order that set forth specific written findings of fact summarizing the crime and Lane's participation in it; addressing the existence or nonexistence of each aggravating circumstance enumerated in § 13A-5-49, Ala. Code 1975; addressing the existence or nonexistence of each mitigating circumstance enumerated in § 13A-5-51, Ala. Code 1975; and addressing the existence of any additional mitigating circumstances offered pursuant to § 13A-5-52, Ala. Code 1975. See § 13A-5-47(d). Specifically, the trial court found that the existence of two aggravating circumstances had been proven beyond a reasonable doubt –- that the murder was committed during the course of a burglary, § 13A-5-49(4), and was committed for pecuniary gain, § 13A-5-49(6) –- and found that the State had neither alleged nor offered any evidence of the other aggravating circumstances enumerated in § 13A-5-49. As to the mitigating circumstances, the trial court found the existence of the statutory mitigating circumstances that Lane had "little, if any, criminal history" and that Lane suffered from "extreme mental or emotional disturbance." (C. 97.) See § 13A-5-51(1) and (2). The trial court also found the existence of a nonstatutory mitigating circumstance –- Lane's "childhood problems," including that "as a child [Lane] was abused by his mother and experienced difficulties related to his mother's behavior." (C. 100.) After setting forth its findings regarding the aggravating and mitigating circumstances, the trial court indicated that it had considered the jury's sentencing recommendation, see § 13A-5-47(e), and concluded that it "agree[d] with the jury's finding beyond a reasonable doubt that the aggravating circumstances exist and that they outweigh the mitigating circumstances." (C. 100.)

***60** As evidenced by the foregoing, the sentencing proceedings complied with the procedures required by §§ 13A-5-45-47, as those statutes read before they were amended by Act No. 2017-131. See note 2, supra. Thus, we conclude that no error adversely affecting Lane's rights occurred in the sentencing proceedings. See § 13A-5-53(a). In addition, we note from our thorough review of the sentencing proceedings that the trial court's written findings regarding the aggravating and mitigating circumstances are supported by the evidence. Having made those determinations, we turn to the determination of whether a death sentence is the proper sentence in this case.

To begin with, there is no indication that Lane's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1). To the contrary, it is clear from the trial court's sentencing order that the trial court based Lane's sentence solely on the evidence and the court's weighing of the aggravating and mitigating circumstances. In addition, this Court has thoroughly reviewed the evidence presented in the sentencing proceedings and has independently weighed the aggravating and mitigating circumstances, see § 13A-5-53(b)(2), and we agree with the trial court's conclusion that the aggravating circumstances outweigh the mitigating circumstances. Finally, considering Lane and the crime he committed, we conclude that Lane's death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases. See § 13A-5-53(b)(3). As noted, Lane was convicted of capital murder-burglary and capital murder for pecuniary gain, and we recognize that the death sentence has been imposed in similar cases. See, e.g., Floyd v. State, 289 So. 3d 337, 357-58 (Ala. Crim. App. 2017) (affirming death sentence for defendant who murdered former girlfriend during burglary of girlfriend's home and citing additional cases in which murder committed during the course of a burglary has been punished by death); and Vanpelt, 74 So. 3d at 98 (holding that death sentence for capital-murder-for-pecuniary-gain conviction was neither excessive nor disproportionate and citing additional cases in which murder committed for pecuniary gain has been punished by death). Thus, for the foregoing reasons, we conclude that death was the proper sentence in this case.

Conclusion

Lane has not demonstrated any reversible error in either the guilt phase or penalty phase of his trial. In addition, pursuant to Rule 45A, Ala. R. App. P., this Court has meticulously reviewed the record for any error in either phase of Lane's trial that did or probably did adversely affect Lane's substantial rights and has found no such error. Accordingly, Lane's capital-murder convictions and his death sentence are affirmed.

AFFIRMED.

Kellum, Cole, and Minor, JJ., concur. Windom, P.J., recuses herself.

All Citations

--- So.3d ----, 2020 WL 2830015

Footnotes

1 This case was reassigned to Judge McCool on November 9, 2018. Although Judge McCool was not a member of the Court when the case was orally argued, he has reviewed the audio recording of the oral argument.

2 Effective April 11, 2017, §§ 13A-5-46 and -47, Ala. Code 1975, were amended by Act No. 2017-131, Alabama Acts 2017, to provide that the jury's sentencing verdict is no longer a recommendation but, instead, is binding upon the trial court. However, Act No. 2017-131 does not apply retroactively to Lane, see § 2, Act No. 2017-131; thus, in Lane's trial, the jury's sentencing verdict was a recommendation only.

3 As noted, Dr. Chrostowski ultimately concluded that Theresa's death was a homicide after he conducted the autopsy.

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

5 At Lane's first trial, there was evidence indicating that, the day after Theresa was murdered, Lane's divorce attorney, Buzz Jordan, had instructed Lane to bring the computer to Jordan's office and that law enforcement officers had subsequently obtained the computer from Jordan. See Lane, 80 So. 3d at 288. No such evidence was presented at Lane's second trial, however. Rather, Det. McRae merely testified that the computer "was missing" (R. 1875) when Lane's mobile home was searched but that "[l]ater on we were able to recover it." (R. 1876.)

6 Lane's father was unavailable by virtue of his lack of memory and multiple medical conditions that prevented him from traveling to Mobile from his home in North Carolina. Mixon and LaPointe were deceased by the time of Lane's second trial. Neither the record nor the parties' briefs clarify why Raley was unavailable, although it appears Raley might also have been deceased (R. 217), but Lane conceded at trial and concedes on appeal that Raley was unavailable. (C. 562-63; Lane's brief, at 13.)

7 In 2004, Scott Peterson was convicted for murdering his pregnant wife and was sentenced to death, and the case generated widespread publicity.

8 Lane does not identify any alleged deficiencies in defense counsel's cross-examination during Lane's first trial but, rather, merely suggests that his counsel of choice might have conducted cross-examination differently. Lane's brief, at 12.

9 Lane contends that he might have been handcuffed as long as 90 minutes. In support of that contention, Lane relies on Deputy Leddick's testimony that he stopped Lane sometime between 1:00 p.m. and 2:00 p.m. and that Lane signed a form waiving his Miranda rights at 2:35 p.m. Thus, Lane argues, he was handcuffed anywhere from approximately 30 to 90 minutes. However, Det. McRae testified unequivocally that he arrived at the scene of the traffic stop within 20 minutes of the time Deputy Leddick initiated the traffic stop and that he immediately uncuffed Lane. Thus, the evidence indicates that Lane was handcuffed only approximately 20 minutes.

10 We recognize that Lane argues, correctly, that Miranda warnings alone cannot cure the taint of a statement that was made subsequent to an illegal arrest. Brown, 422 U.S. at 603, 95 S.Ct. 2254. However, as should be obvious by now, our conclusion is not based solely on the fact that Det. McRae advised Lane of his Miranda rights but, rather, is based on the totality of the circumstances, which happen to include the relevant, but not dispositive, fact that Det. McRae advised Lane of his Miranda rights before Lane made a statement.

11 Lane also contends that white veniremember C.S. served in the military and notes that the State did not strike C.S. from the jury. However, there is no indication in the record, or allegation from Lane, that C.S. failed to complete a term of military service.

12 Lane argues that B.P.'s health was a pretextual reason for striking her because the State did not strike white juror B.T., who disclosed that he suffers from diabetes. However, as noted, the State also struck B.P. because she believed her brother had been wrongfully convicted –- a characteristic not applicable to B.T.

13 This Court has reviewed the entirety of the voir dire examination, and the State's reasons for striking K.H., E.B., M.M., A.W., D.B., and B.P. are supported by those prospective jurors' responses.

14 We note that C.W., J.B., J.G., and M.S. did not serve on the jury because defense counsel used its peremptory strikes to remove them.

"That fact is not necessarily dispositive of this issue, however, if the trial court erred by refusing to remove [C.W., J.B., J.G., and M.S.] for cause because the Alabama Supreme Court has held that it is reversible error for a trial court to fail to remove multiple prospective jurors that should have been removed for cause, despite the fact that those jurors were ultimately removed from the jury by peremptory strikes, if the jury consists of jurors who likely would have been the subject of peremptory challenge. See Ex parte Colby, 41 So. 3d 1 (Ala. 2009)."

Kemp v. State, [Ms. CR-18-0362, September 20, 2019] —— So. 3d ——, ——, 2019 WL 4564568 (Ala. Crim. App. 2019).

15 Lane does not allege that Milroy was not qualified to testify as a firearms-and-toolmarks expert, only that Milroy testified to facts outside that field of expertise. Nevertheless, we have reviewed the record and find no plain error in the trial court's determination that Milroy was qualified to testify as a firearms-and-toolmarks expert.

16 Neither Jordan nor the person identified as Donna testified at trial.

17 Lane also argues that the admission of evidence of the $1,000 payment violated the attorney-client privilege. However, the payment of attorney fees generally is not protected by the attorney-client privilege –- a fact Lane concedes. Lane's brief, at 64. See O'Neal v. United States, 258 F.3d 1265, 1276 (11th Cir. 2001) ("[I]nformation involving receipt of attorneys' fees from a client is not generally privileged."); In re Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000) (same); and Matter of Grand Jury Proceeding, Cherney, 898 F.2d 565, 567 (7th Cir. 1990) (same). Nevertheless, Lane argues that an exception to this principle exists when evidence of an attorney-client fee arrangement "would itself reveal a confidential communication." In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 926 F.2d 1423, 1431 (5th Cir. 1991). That "narrow exception," id., is not applicable here, however, because evidence of the $1,000 payment to Jordan did not reveal any confidential communications between Lane and Jordan.

18 To the extent Lane argues that the trial court should have excluded Gabel's testimony as victim-impact testimony during the guilt phase of trial, we disagree. "As the United States Supreme Court held in Payne v. Tennessee, 501 U.S. 808, 821, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), victim-impact statements typically 'describe the effect of the crime on the victim and his family.' " Lewis v. State, 24 So. 3d 480, 502-03 (Ala. Crim. App. 2006) (emphasis added). Here, Gabel merely testified that she desired more employees similar to Theresa –- testimony that did not describe the effect of Theresa's death on Gabel but, instead, was merely a commentary on Gabel's opinion of Theresa as an employee. Thus, Gabel's testimony did not constitute victim-impact testimony. See Petersen v. State, [Ms. CR-16-0652, January 11, 2019] —— So. 3d ——, ——, 2019 WL 181145 (testimony that did not "describe the impact the crime had on [the victim] or her family" did not constitute victim-impact testimony).

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

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September 4, 2020

CR-15-1087 **Death Penalty**

Thomas Robert Lane v. State of Alabama (Appeal from Mobile Circuit Court: CC05-1499.80)

NOTICE

You are hereby notified that on September 4, 2020, 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. James Patterson, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
John William Dalton, Attorney
David Dawson Schoen, Attorney
Randall S. Susskind, Attorney
Thomas Govan, Asst. Attorney General
Audrey K. Jordan, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

November 20, 2020

1191036

Ex parte Thomas Robert Lane. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas Robert Lane v. State of Alabama) (Mobile Circuit Court: CC05-1499.80; Criminal Appeals : CR-15-1087).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on November 20, 2020:

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

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

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

Witness my hand this 20th day of November, 2020.

Julia Jordan Weller

Clerk, Supreme Court of Alabama