APPENDIX A

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Court of Criminal Appeals of Alabama.

Michael David BELCHER
v.
STATE of Alabama

CR-18-0740
|
December 16, 2020

Synopsis
Background: Defendant was convicted in the Circuit Court, Tuscaloosa County, No. CC-16-161, of murder during the course of a kidnapping and was sentenced to death.

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

the display of defendant's "mug shot" to the jury during voir dire examination of prospective jurors did not constitute obvious error;

defendant failed to establish that the State removed prospective jurors based solely on their race and gender;

trial court's admission of prior bad acts evidence that defendant manufactured methamphetamine was not error;

defendant's statement during police interview did not constitute an unequivocal request for a lawyer;

evidence was sufficient to corroborate accomplices' testimony; and

defendant failed to establish that he was entitled to a jury instruction on voluntary intoxication and manslaughter.

Affirmed.

Appeal from Tuscaloosa Circuit Court (CC-16-161); Michael Brad Almond, Judge

Attorneys and Law Firms

Angela L. Setzer, Alicia A. D'Addario, and Adam B. Murphy of Equal Justice Initiative, Montgomery, for appellant.

Steve Marshall, atty. gen., and Morgan B. Shelton, asst. atty. gen., for appellee.

Opinion

KELLUM, Judge.

***1** Michael David Belcher was convicted of murdering Samantha Payne during the course of a kidnapping, an offense defined as capital by § 13A-5-40(a)(1), Ala. Code 1975. The jury unanimously recommended that Belcher be sentenced to death, and the circuit court sentenced Belcher to death. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-53, Ala. Code 1975.

The State's evidence tended to show that on November 9, 2015, a hunter discovered the nude, decapitated, and decomposed body of Samantha Payne tied to the base of a tree in Talladega National Forest. Samantha's hands were stretched upward and bound to the base of the tree with a leather belt, and "coaxial cable" was tied around Samantha's wrists. (R. 920.) Her head was approximately 14 feet from her body. Dr. Steven Dunton, a medical examiner with the Alabama Department of Forensic Sciences, testified that because Samantha's body was so decomposed it was impossible for him to determine her exact cause of death. (R. 923.) He said that X-rays revealed that Samantha had fractures to four of her ribs and that those fractures were caused by a "crushing trauma of some type." (R. 928.) Samantha was alive, he said, when she was tied to the tree. Dr. Dunton testified that, based on his experience, he did "not believe" that Samantha died of natural causes. (R. 928.)

Two of Belcher's codefendants testified in exchange for plea agreements with the State. Chylli Bruce testified that she pleaded guilty to her role in the kidnapping and murder of Samantha and that, as part of that agreement, she agreed to testify truthfully at her codefendants' trials.[1] (R. 464.) She testified that she was a drug addict; that she was using crystal methamphetamine at the time of the murder; that she met Belcher when she was 18 years old; and that they "hung out" together for several months before the murder. (R. 469.)

On the night of the murder, Bruce said, she, Belcher, Steven George, Alyssa Watson, and Marcus George were at a place called Wee Racing ("the Shop"), a motorcycle-repair shop that was owned by Belcher's father, when Samantha arrived at around 2:00 a.m. At around 3:00 a.m., Belcher forced Samantha into the backseat of his vehicle and held her down while Bruce drove the vehicle to Belcher's house. Steven, Alyssa, and Marcus,[2] followed in a separate vehicle. When Belcher got out of his vehicle, Samantha was screaming and Belcher was hitting her in the face. (R. 478.) Instead of going into Belcher's house, they got back into the vehicles and drove to an abandoned trailer on Highway 82. According to Bruce:

> "[Samantha] is taken out of the car. [Belcher] is trying to tie her up in the back seat, but she won't be still. So I place my foot on her face, and I guess he's tying her up with the belt or something. The next thing I remember she's laying on the ground, she's tied up. I'm asked to take her fingernails off."

(R. 480.) Bruce got a knife and "popped" off Samantha's artificial fingernails (R. 480), Belcher and Marcus beat and kicked her, and then they put Samantha into the trunk of one of the vehicles and drove to Talladega National Forest. At one point, Samantha fell out of the trunk when the vehicle hit a pothole, and Bruce helped Belcher put Samantha back into the trunk and they drove into the forest. Bruce testified:

> ***2** "We come to a bridge. Marcus says that -- tells [Belcher] that we're going to have to kill her. [Belcher] says that we will have to. So we get back on the road, and we keep going into this forest. We run out of gas."

(R. 484.) At that point, Marcus and Alyssa drove past them in their vehicle. Belcher and Steven then took Samantha out of the trunk and led her into the forest. Shortly thereafter, Bruce said, Steven returned and she and Steven walked to a campsite and called Steven's brother to bring them gas. After Bruce and Steven put gas in the car and tried to leave, police arrived. Belcher's vehicle was searched, and Bruce was arrested, charged with possession of drug paraphernalia, and taken to jail. About four days after she was released from jail, Bruce said, she saw Belcher and he confessed to her that he had killed Samantha by stabbing her.

Steven testified that he pleaded guilty to murder in exchange for his testimony at his codefendants' trials. He testified that in September 2015, he started spending a lot of time with Belcher and the two would hang out together and "do drugs" at the Shop. (R. 547.) On the evening of November 1, 2015, Belcher, Marcus, Alyssa, and Samantha were at the Shop. Steven said that he took Samantha's vehicle when she went to the bathroom and left her keys on a counter. He and Marcus drove down Highway 219, but he decided that he wanted the vehicle's catalytic converter, so he drove back to the Shop. After removing the catalytic converter, he set the vehicle on fire. He and Marcus then went to Belcher's house so that he could change clothes. When they returned to the Shop, Steven said, Belcher and Bruce were in Belcher's vehicle and were driving away from the Shop. They followed them to Belcher's house. Belcher pulled Samantha from the backseat of his vehicle and started kicking and slamming Samantha into the floor. Samantha's face was bleeding badly. (R. 562.) The group then got into two vehicles and drove to an abandoned trailer and house. (R. 563.) When they arrived, Belcher continued to kick and stomp Samantha in the face. Belcher told Steven to get something he could use to tie up Samantha, so Steven went and got some cable wire from the trailer. Samantha was crawling around and telling them that she "loved them" and that she would not tell anyone what they had done. (R. 565.) Belcher, Bruce, and Steven then left in Belcher's vehicle with Samantha in the trunk and Belcher driving. Samantha fell out of the trunk and Belcher stopped. Bruce helped Belcher put Samantha back in the trunk. Belcher said that he knew a place that they could take her, and they headed to the Talladega National Forest. They ran out of gas. According to Steven:

> ***3** "And then [Belcher] said, 'We got to get her out of the car.' So he gets her out of the car, starts dragging her in the woods. [Belcher] told me to come help him. So I get out of the car, go help him drag her in the woods."

(R. 572.)

> "[S]he kept trying to get loud with him. So [Belcher] started stomping her in the face. Said, Shut up. If you don't shut up, I'm going to kill you. He told me to get some more rope out of the car. So I was fixing to go get -- He said, Well, hand me your knife. I gave him the knife, and I went to the car. When I got to the car, [Bruce] was already walking back. I told [Bruce] to get in the car. I got the car cranked up. It might have went a few feet and cut off. Then me and her went up the hill to the firing -- shooting range. We got in a conversation with the game wardens, asking for some gas. They didn't have no gas, so we kept walking. So I got up the road."

(R. 575.) The last time he saw Samantha, Steven said, she was fully dressed and alive.

Deputy Enoch Rose of the Hale County Sheriff's Department testified that he was dispatched to Talladega National Forest on November 2, 2015, in response to an emergency 911 call that "somebody was up there, supposedly one of Tuscaloosa

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County's most wanted ... and that subject was up there walking on the road and asking for gas." (R. 615.) He approached a vehicle and found Steven and Bruce. Deputy Rose said that he verified with dispatch that the vehicle belonged to Belcher. After searching the vehicle and the surrounding area, he found a knife near the passenger side front tire of the vehicle. (R. 627.) That knife was identified as belonging to Steven and as the knife that Steven said he gave to Belcher before Samantha was taken into the forest.

Michelle Koster testified that on November 2, 2015, she was visiting her daughter, Lauren Harvey, on Bear Creek Road and that, at around 11:00 a.m., she went to her vehicle and looked down the road and saw someone walking up the street. She said that she got Lauren and her grandchildren to go inside the house but that the man knocked on the door and tried to get into the house. Koster said that the man had no shirt, but she did not notice anything else about him. Lauren telephoned her father-in-law and emergency 911.

James Harvey testified that on the morning of November 2, 2015, Lauren telephoned him and said that a "half-naked man" was beating on her door and trying to get into her house. (R. 655.) He lived about four miles from Lauren, so he got into his vehicle and drove to her house. As Harvey approached Lauren's driveway, he said, Lauren called him. The man had left her house, and she told Harvey the direction that the man was walking. Harvey found a man, who he identified at trial as Belcher, sitting on the guardrail of a bridge. He said that Belcher had no shirt and had scratches all over him, and that there was a "red tint" to his hands that Harvey believed was some type of blood. (R. 662.) Harvey said that Belcher told him that his friends had played a trick on him; that they had left him in the woods; and that he had been walking all night. Harvey drove Belcher to a local store. Lauren called Harvey and told him that deputies wanted to talk to Belcher. Harvey said that he then drove Belcher back to where he had picked up Belcher and that deputies were waiting for them.

***4** Lieutenant Al Jackson with the Tuscaloosa County Sheriff's Office testified that he was called to South Sandy Road in response to a call about a "wanted person." (R. 668.) When he arrived, he found a vehicle on the side of the road and two people in custody, Steven and Bruce. While there he received another call from dispatch regarding a person knocking on doors on Bear Creek Road. Eventually, he met up with Harvey; a man who he identified as Belcher was in the car with Harvey. Belcher had no shirt on, was wearing shorts, and had "scratches on him, like briar scratches." (R. 675.)

Investigator J.C. Bryant of the Tuscaloosa Police Department testified that he was called to the scene when a body was discovered in Talladega National Forest on November 9, 2015. He said that, after he learned that Steven and Bruce had been detained a week earlier in the general area where the body was found, he spoke to Steven, who was still in police custody. He said that Steven told him what had happened to Samantha and he then interviewed Belcher on November 9, 2015. Belcher denied all involvement in Samantha's murder. On November 10, 2015, Inv. Bryant obtained a search warrant for Belcher's house. As a result of the search, he discovered a car battery inside a clothes dryer.

Investigator Richard Wilkins of the Tuscaloosa Police Department testified that he was the lead investigator into Samantha's death. He testified that a search was conducted at the location where Steven and Bruce said that Samantha had first been tied up. The cable retrieved from that location was consistent, he said, with the cable wire that had been used to tie Samantha's wrists.

A forensic biologist with the Alabama Department of Forensic Sciences, Hannah Payne, testified that she conducted biological tests on swabs and clothing that had been collected from the crime scene and sent to her office. She testified that Belcher's DNA was found on the handle of Steven's pocketknife (R. 896), and that Samantha's blood was found on a jacket that had been taken from Belcher's vehicle and on Steven's shirt.

Belcher's defense was that, although he participated in the events that ultimately led to Samantha's murder, Steven was the person who actually killed her. Belcher testified on his own behalf that on the evening of November 1, 2015, he was at the Shop working on a customer's motorcycle when he "looked up" and saw Samantha. (R. 957.) He was surprised, he said, to see her because he had already told her not to have any contact with him. Belcher said that he, Steven, Marcus, Alyssa, and Bruce were "snorting methamphetamine." (R. 959.) Sometime later, he said, Samantha "stormed" into where he had been working and asked him what happened to her vehicle because it was missing from the Shop. (R. 960.) He said that the "others" had a "violent argument" with Samantha and that Alyssa and Bruce physically attacked Samantha. (R. 963.) They all drove to his house, Belcher said, and all the others, except himself, were debating about what to do with Samantha. He testified that Steven and Bruce pulled Samantha from the car and started punching and stomping

her face. He watched it all happen and did not intervene to help Samantha. According to Belcher, Marcus handed Steven a hammer, Steven hit Samantha in the head, and then they put Samantha in a vehicle and took her to Watson's father's house off Highway 82. He testified:

> "Steven opens the trunk up. And me and Steven take [Samantha] out of the trunk. [Bruce is] still in the car. Me and Steven are still arguing. And it's -- we didn't just leave her in the middle of the road. We sat her a few feet off on the edge of the woods in the bushes. At that point, Steven was walking around the car. I turn around and walk back off up the road the way we had just came in. I didn't know where I was at. I didn't know where the road led to. I knew we came in the way we came in, and I just walked. I continued to walk, took several different roads; but I didn't remember where we come from. It was daylight at this point."

***5** (R. 975.) A man picked him up, he said, and took him to a store. Shortly thereafter, he was taken into custody. On cross-examination, Belcher said that he just "followed the crowd." (R. 990.)

At the penalty phase of the trial, Belcher called several witnesses to testify in mitigation. Deputy Mike Byars of the Tuscaloosa County Sheriff's Office testified that while incarcerated Belcher had been a well-behaved inmate. Dr. Randall Griffith, a psychologist, testified that he conducted a neuropsychological evaluation of Belcher and that he interviewed Belcher at the Tuscaloosa County jail. It was his opinion that Belcher suffered from a "mild neuro-cognitive disorder," which, he said, means that Belcher had "some degree of impairment in one area of his thinking ability." (R. 1109.) Belcher also presented the testimony of several family members who said that Belcher was a doting father, that he was a kind and loving person, and that he loved animals. Belcher's mother testified that since Belcher had been arrested his faith had grown and that when she spoke to him they frequently prayed together.

The jury unanimously found, and noted on a special verdict form, that the murder was especially heinous, atrocious, or cruel as compared to other capital murders, and it unanimously recommended that Belcher be sentenced to death. A presentence report was prepared, and a separate sentencing hearing was held before the circuit court, after which the circuit court issued an order sentencing Belcher to death. This appeal followed.

Standard of Review

Because Belcher was sentenced to death, this Court, pursuant to Rule 45A, Ala. R. App. P., must search the record of the proceedings for "plain error." Rule 45A, provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

In discussing the scope of Rule 45A, Ala. R. App. P., the Alabama Supreme Court has stated:

> " ' "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." ' Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
>
> > " 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 [102 S.Ct. 1584, 71 L.Ed.2d 816] (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [56 S.Ct. 391, 80 L.Ed. 555 (1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S. at 163, n.14.'
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> ***6** "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))."

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

" 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Although [the appellant's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992)."

Knight v. State, 300 So. 3d 76, 90 (Ala. Crim. App. 2018).

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

Guilt-Phase Issues

I.

Belcher first argues that displaying his "mug shot" to the jury during voir dire examination of prospective jurors violated state and federal law. He argues that, according to Ex parte Long, 600 So. 2d 982 (Ala. 1992), overruled on other grounds, Ex parte Edwards, 816 So. 2d 98 (Ala. 2001), the "mug shot" was not admissible because it implied that he had a criminal record and destroyed his presumption of innocence.

During voir dire, the State displayed a "billboard" with photographs of all five defendants who had been charged with Samantha's murder. This billboard was not admitted into evidence; thus, it is not a part of the record on appeal. The following occurred:

"[DEFENSE COUNSEL]: And I'm also objecting to them putting up a billboard up there with mug shots and other evidence that -- other items of evidence that have not been admitted into evidence, mug shots of all five people and --

"[PROSECUTOR]: The pictures of the people, we're going to introduce them. I'm going to ask if they know of them. They are pictures that will be introduced during the course of trial.

"THE COURT: Overruled. But get to some questions."

(R. 290.) The only other reference to the photographs was later during voir dire when the prosecutor asked a group of prospective jurors to look at the "pictures" of all the defendants to see if they knew any of them. (R. 308-09.) Belcher argues that his identity was not at issue and that it was not necessary to display his photograph because he was in the courtroom. He asserts that the photograph was a "mug shot" and that displaying the photograph to the jury was unduly prejudicial. This error was compounded, Belcher argues, because the prosecutor told the court that the State would admit the photographs at trial but failed to do so. The State asserts that this Court cannot find reversible error on this issue because the record does not include a copy of the "billboard" that was displayed to the jury. We agree with the State.

"Speculation from a silent record will not support a finding of prejudice. Ex parte Walker, 972 So. 2d 737, 755 (Ala. 2007), cert. denied, Walker v. Alabama, 552 U.S. 1077, 128 S.Ct. 806, 169 L.Ed.2d 608 (2007). A reviewing court cannot presume error from a silent record. ' "This court is bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record." Webb v. State, 565 So. 2d 1259, 1260 (Ala. Cr. App. 1990). See also Acres v. State, 548 So. 2d 459 (Ala. Cr. App. 1987). Further, we cannot predicate error from a silent record. Owens v. State, 597 So. 2d 734 (Ala. Cr. App. 1992); Woodyard v. State, 428 So. 2d 136 (Ala. Cr. App. 1982), aff'd, 428 So. 2d 138 (Ala.), cert. denied, 462 U.S. 1136, 103 S.Ct. 3120, 77 L.Ed.2d 1373 (1983).' Whitley v. State, 607 So. 2d 354, 361 (Ala. Crim. App. 1992)."

***7** Dotch v. State, 67 So. 3d 936, 961 (Ala. Crim. App. 2010). Dotch was a death-penalty case, and its holding has been applied in other death-penalty cases: Revis v. State, 101 So. 3d 247 (Ala. Crim. App. 2011); Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996).

"A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error. Our precedent holds that the record must at least present an inference of error before an appellate court will hold that reversible error occurred." Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007). Because the billboard with the photographs is not contained in the certified record on appeal and was not introduced into evidence, this Court cannot predicate error on this claim.

In the alternative, the State argues that, even if the photograph was a mug shot, "nothing in the record indicates that Belcher's photograph was displayed in violation of [Ex parte] Long." (State's brief at p. 17.) Specifically, the State argues that the photograph was used for identification purposes; that there was no indication that the photograph showed that

Belcher had a criminal record; and that the State did not draw undue attention to the source of the photograph.

The Alabama Supreme Court in Ex parte Long recognized that mug shots generally imply that a defendant has a criminal history and that before a mug shot may be properly admitted into evidence the State must satisfy a three-pronged inquiry:

> " '1. The Government must have a demonstrable need to introduce the photographs; and
>
> " '2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
>
> " '3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.' "

Ex parte Long, 600 So. 2d at 989 (quoting United States v. Harrington, 490 F.2d 487, 494 (2d Cir. 1973)).

There is nothing in the record that suggests that the photograph of Belcher contained any criminal history. Nor is there any indication that the photograph related to a case separate from the one for which Belcher was on trial. Based on the record, we cannot say that there is a violation of Ex parte Long. See Townes v. State, 253 So. 3d 447, 465 (Ala. Crim. App. 2015). For these reasons, Belcher is due no relief on this claim.

II.

Belcher next argues that death-qualifying prospective jurors produced a biased jury prone to convict and, he says, significantly more prone to sentence him to death. He further argues that the exclusion of jurors based on their views regarding the death penalty resulted in the exclusion of more minorities and women.[3] There was no objection to the prospective jurors being qualified concerning their views on the death penalty; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

***8** The appellate courts in Alabama have repeatedly held that there is no violation of state or federal law in death-qualifying prospective jurors in a capital-murder case.

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

Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (footnote omitted). See also Largin v. State, 233 So. 3d 374 (Ala. Crim. App. 2015); Wiggins v. State, 193 So. 3d 765 (Ala. Crim. App. 2014); Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

Death-qualifying the prospective jurors in this case did not violate state and federal law. Thus, Belcher is due no relief on this claim.

III.

Belcher next argues that the circuit court erred in refusing to remove six prospective jurors -- J.S., C.J., P.G., R.L., Ce.C., and S.B. -- for cause because, he says, they were biased against him.[4]

> "The test for deciding a challenge for cause is whether the juror can ignore his preconceived ideas and render a verdict according to the evidence and the law. Ex parte Taylor, 666 So. 2d 73, 82 (Ala. 1995). A juror 'need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.' Kinder v. State, 515 So. 2d 55, 61 (Ala. Crim. App. 1986). For a juror to be disqualified, the juror's opinion of the defendant's guilt or innocence 'must be so fixed that it would bias the verdict a juror would be required to render.' Oryang v. State, 642 So. 2d 979, 987 (Ala. Crim. App. 1993) (quoting Siebert v. State, 562 So. 2d 586, 595 (Ala. Crim. App. 1989)) (emphasis added). See also § 12–16–150, Ala. Code 1975.
>
> > "This Court has recognized that
> >
> > " '[o]nce a juror makes an initial statement that is vague, ambiguous, equivocal, uncertain, or unclear or that shows confusion, it is the trial judge's function to question the juror further, so as to ascertain whether the juror can be impartial.'

"Knop v. McCain, 561 So. 2d 229, 234 (Ala. 1989). 'The qualification of prospective jurors rests within the sound discretion of the trial judge.' Morrison v. State, 601 So. 2d 165, 168 (Ala. Crim. App. 1992); Ex parte Cochran, 500 So. 2d 1179, 1183 (Ala. 1985). This Court will not disturb the trial court's decision 'unless there is a clear showing of an abuse of discretion.' Ex parte Rutledge, 523 So. 2d 1118, 1120 (Ala. 1988). 'This court must look to the questions propounded to, and the answers given by, the prospective juror to see if this discretion was properly exercised.' Knop, 561 So. 2d at 232. We must consider the entire voir dire examination of the juror 'in full context and as a whole.' Ex parte Beam, 512 So. 2d 723, 724 (Ala. 1987); Ex parte Rutledge, 523 So. 2d at 1120."

***9** Ex parte Burgess, 827 So. 2d 193, 197–98 (Ala. 2000). "The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)." Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985).

" 'A trial judge is in a decidedly better position than an appellate court to assess the credibility of the jurors during voir dire questioning. See Ford v. State, 628 So. 2d 1068 (Ala. Crim. App. 1993). For that reason, we give great deference to a trial judge's ruling on challenges for cause. Baker v. State, 906 So. 2d 210 (Ala. Crim. App. 2001).' Turner v. State, 924 So. 2d 737, 754 (Ala. Crim. App. 2002)."

Largin v. State, 233 So. 3d 374, 409 (Ala. Crim. App. 2015).

With these principles in mind, we review Belcher's arguments regarding each of the six prospective jurors Belcher claims should have been removed for cause.

A.

First, Belcher argues that the circuit court should have sua sponte removed prospective juror J.S. for cause because, he says, J.S. wrote on his juror questionnaire and stated during voir dire examination that he did not believe he could be impartial because of all he had heard and read about the case. Belcher did not move that J.S. be removed for cause; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

On his questionnaire, J.S. indicated that he had seen television news reports about the case and had read about the case in newspapers and that this knowledge would affect his ability to be impartial. During voir dire, J.S. stated:

"[J.S.]: I read several articles in different newspapers along with TV news about the abduction of Ms. Payne ... the fact that she was tortured, beaten, bound, taken out to the forest, tied to a tree, and had her throat cut and she was found a few days later.

"THE COURT: Okay.

"[J.S.]: I also know that there was -- In a different article that I have read and news reports that I've seen, there was more than one person involved in the crime, there were several people.

"THE COURT: This information that you read or saw, was it 2015, was it more recently than that, was it both?

"[J.S.]: Both. I had read it in the paper. And, you know, some things stick in your memory about certain crimes, the heinous crimes and things. You know, and there's other things you don't. Every time I saw an article about it or a newscast, I paid attention to it. I know that's kind of a ghoulish thing, but it was one of those things where I kept up with it.

"THE COURT: All right. So did that cause you to -- Do you have a fixed opinion about any issue?

"[J.S.]: I do.

"THE COURT: What are those opinions?

"[J.S.]: I don't -- I don't think I could be partial -- impartial I mean. I think I already have a conceived idea [sic]. The nature of the crime, the violence that was committed, it sticks in my mind.

"THE COURT: Are you saying that you have an opinion as to Mr. Belcher's guilt in this case?

"[J.S.]: I do.

"THE COURT: Okay. Well, let me -- I want to make sure --

"[J.S.]: I understand.

***10** "THE COURT: I'm clear.

"[J.S.]: No. I understand totally.

"THE COURT: I'm not changing your answer. My job is to have jurors -- And there's no right answer or wrong answer.

"....

"THE COURT: We need jurors who can decide the case based on the evidence, based on the law I instruct you on.

"[J.S.]: I could do that, I can do that. But the problem is that I have a preconceived notion in my mind about the guilt of the parties involved. Even if they did not commit the crimes themselves, they were part of it, they didn't do anything to stop it.

"THE COURT: Right. Okay.

"[J.S.]: And I can't -- I couldn't be impartial. I really couldn't.

"THE COURT: All right. I appreciate your honesty."

(R. 162-65.)

Neither the prosecutor nor defense counsel asked J.S. any follow-up questions concerning his responses to the circuit court's questions and, as already noted, Belcher did not request that J.S. be removed for cause. One reason may have been that J.S. also stated that there were no circumstances under which he would vote for the death penalty. The State used its 16th peremptory strike to remove J.S. Although J.S. was one of the State's last two strikes and served as an alternate, he was excused before the start of deliberations. J.S. did not serve on Belcher's jury. The State argues that because J.S. was not on Belcher's jury, the error in failing to sua sponte remove J.S. was harmless.

In Bethea v. Springhill Memorial Hospital, 833 So. 2d 1 (Ala. 2002), the Alabama Supreme Court returned to the harmless-error analysis when reviewing a circuit court's refusal to remove a prospective juror for cause. The Supreme Court stated:

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

" 'The appellant was convicted of the crime of murder in the second degree. While it was error to refuse to allow the defendant to challenge the juror C.S. Rhodes for cause, because of his having been on the jury which had tried another person jointly indicted with the defendant, yet it was error without injury, as the record shows that the defendant challenged said juror peremptorily, and that, when the jury was formed the defendant had not exhausted his right to peremptory challenges.'

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

***11** "As noted in the language quoted above from Dailey [v. State, 828 So. 2d 340 (Ala. 2001)], this Court has returned to the 'harmless-error' analysis articulated in the Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and [United States v.] Martinez–Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const. 1901 § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right."

833 So. 2d at 6–7 (footnotes omitted). Subsequently, the Alabama Supreme Court limited the Bethea holding in Ex parte Colby, 41 So. 3d 1 (Ala. 2009). In Ex parte Colby, the defendant was forced to use three of his peremptory strikes to remove prospective jurors who should have been removed for cause. The Court, in part, found that the error was not harmless because, as a result, the final jury had jurors "who knew witnesses for the State, jurors who expressed strong support for the death penalty, and jurors who felt that it was defense counsel's job to prove the defendant's innocence." 41 So. 3d at 5.

J.S. should have been removed for cause. Nonetheless, J.S. was removed by the State's use of a peremptory strike and did not serve on Belcher's jury. Belcher cannot establish that the failure to remove J.S. for cause prejudiced him by leaving him "with a less-than-impartial jury." Bethea, 833 So. 2d at 7. Thus, pursuant to the holding in Bethea, we find that the

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circuit court's error in not sua sponte removing J.S. for cause was harmless and that Belcher is due no relief on this claim.

B.

Belcher next argues that prospective juror C.J. should have been removed for cause because, he says, C.J. lived near the area where Samantha's body was found, had heard a lot about the case, and had formed an opinion about the case. Belcher did not move to have C.J. removed for cause; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

The following occurred during voir dire of C.J.:

> "THE COURT: Do you remember what you read or what you surmised?
>
> "[C.J.]: If I -- If it's the same case, I just -- three or four people kidnapped somebody and --
>
> "THE COURT: Okay.
>
> "[C.J.]: Left a party, went to ... Talladega National Forest and went from there ... you know.
>
> "THE COURT: All right. And I guess being in that part of the county there was some scuttlebutt around where you live; is that right?
>
> "[C.J.]: Yes, sir.
>
> "....
>
> "THE COURT: All right. So some information. Has that caused you to have an opinion about this case at this point [C.J.]?
>
> "[C.J.]: To some degree.
>
> "THE COURT: Okay. Explain what you mean.
>
> "[C.J.]: If that's what was -- If that's what happened, I would have -- I think, have a tendency to believe that after I heard evidence that would be --
>
> "THE COURT: All right. Let me ask you -- Let me follow up. I would instruct -- Every criminal case, the instruction to the jury and at this point before the jury is selected, the folks who compose the jury are to decide the case based on the evidence you hear.
>
> "[C.J.]: Right.
>
> "THE COURT: And at the end of the case, I'll give the legal instruction to the jury, decide the case based on that --
>
> "[C.J.]: Yes, sir.
>
> "....
>
> "THE COURT: Could you set that other information aside? Even if what you heard was similar to what you had heard before, could you set it aside and decide this case?
>
> ***12** "[C.J.]: Yeah. I would decide it based on what we hear and the evidence."

(R. 179-83.)

While C.J. did initially indicate that he had reservations about his ability to be impartial, C.J. later stated that he would follow the court's instructions and decide the case based on the evidence presented. In other words, C.J. was rehabilitated.

> " '[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). 'The crucial inquiry is whether the veniremen could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment.' McNabb v. State, 887 So. 2d 929, 944 (Ala. Crim. App. 2001), quoting other cases."

Brownfield v. State, 44 So. 3d 1, 34 (Ala. Crim. App. 2007). See also Ex parte Land, 678 So. 2d 224, 240 (Ala. 1996); Travis v. State, 776 So. 2d 819, 866-67 (Ala. Crim. App. 1997).

Accordingly, the circuit court did not err in failing to sua sponte remove C.J. for cause, and Belcher is due no relief on this claim.

C.

Belcher next argues that the circuit court erred in not removing prospective juror P.G. for cause because, he says, P.G.'s sister had been shot and that could have affected her ability to be impartial. Again, Belcher did not request that Juror P.G. be removed for cause; therefore, we are limited to determining whether plain error exists. Rule 45A, Ala. R. App. P.

During voir dire, P.G. indicated that her sister had been shot 30 years previously and that her family was not happy with

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the defendant's sentence in her sister's case or with the way the case had been handled by authorities. The following occurred during voir dire examination:

> "THE COURT: Can [you] fairly and truly consider life in prison without the possibility of parole? Could you consider those things?
>
> "[P.G.]: Well, I hope I could without having all that history with my sister. I think that's affected our whole family too.
>
> "THE COURT: Certainly.
>
> "[P.G.]: I think it's case-by-case, depends on that.
>
> "THE COURT: Would you listen to the evidence in the case?
>
> "[P.G.]: Uh-huh.
>
> "THE COURT: Is that yes?
>
> "[P.G.]: Uh-huh, yes."

(R. 233.)

P.G. indicated that she would follow the law and the evidence; thus, there was no valid reason to remove P.G. for cause.[5] See Brownfield, 44 So. 3d at 34. Therefore, Belcher is due no relief on this claim.

D.

Belcher next argues that the circuit court should have removed prospective juror R.L. for cause because, he says, R.L. had heard about the case and was equivocal in his responses regarding whether he could be impartial. There was no request from Belcher to remove R.L. for cause; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

The following occurred during the voir dire of R.L.:

> "THE COURT: What did you see? Was that television, or was that newspaper?
>
> "[R.L.]: It was the newspaper, Tuscaloosa News.
>
> "THE COURT: The question is: Did that cause you to have an opinion before you hear any evidence in this case if you were a juror?
>
> ***13** "[R.L.]: No.
>
> "THE COURT: Okay.
>
> "[R.L.]: I don't think it does.
>
> "THE COURT: Well, would you -- If you sat as a juror -- What we need as an impartial jury is a jury that sets aside any outside influences and decides the case based on the law that I instruct them on and based on the evidence that you hear form the stand. What I tell jurors is that there are two judges in every case. The judge who judges the law and the jury, who judges the facts. They determine what happened. Could you serve as a juror, setting aside anything -- and I just need an honest answer. Don't -- Whatever your answer is.
>
> "[R.L.]: Yes, I think I could."

(R. 160.) A review of the record shows that R.L.'s responses were not equivocal;[6] he stated that he had not formed an opinion about the case and that he could be impartial. Therefore, there was no valid reason to remove R.L. for cause, and Belcher is due no relief on this claim.

E.

Belcher next argues that the circuit court erred in not removing prospective juror Ce.C. for cause because, he says, Ce.C. indicated that if person kills another that person should not get to live.

The following occurred during voir dire of Ce.C.:

> "[PROSECUTOR]: The judge would charge you, if Mr. Belcher is convicted of capital murder, that when you go to the back that you have to consider two options to make a recommendation.
>
> "[Ce.C.]: Uh-huh.
>
> "[PROSECUTOR]: Those two options are life without the possibility of parole and the death penalty.
>
> "[Ce.C.]: Uh-huh.
>
> "[PROSECUTOR]: And he'll instruct you that you have to consider both of those options. And obviously, you'll do then based what -- You know, you'll make your own decision based on what you heard in the evidence, right?
>
> "[Ce.C.]: Uh-huh, uh-huh.

"[PROSECUTOR]: But would you at least fairly consider life without the possibility of parole?

"[Ce.C.]: Oh, yeah. Uh-huh, yes."

(R. 259-61.)

Belcher challenged Ce.C. for cause on the ground that she had indicated that she would automatically vote for death if Belcher was convicted of capital murder. The State responded that Ce.C. indicated that she would be able to consider both death or life imprisonment without the possibility of parole as a sentence. The circuit court denied Belcher's motion, and Belcher used his fifth peremptory strike to remove Ce.C. Ce.C. indicated that she could follow the law as instructed by the court. Therefore, there was no valid reason to remove Ce.C. for cause, and Belcher is due no relief on this claim. See Brownfield, supra.

F.

Belcher last argues that the circuit court erred in not removing prospective juror S.B. for cause because, he says, S.B. indicated that her husband had been beaten to death in 1988; that she was dissatisfied with the sentence that the defendant had received for killing her husband; and that, if convicted, a capital-murder defendant should receive the death penalty. There was no request to remove S.B. for cause; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

***14** After S.B. was asked during voir dire if the circumstances of her husband's death would cause her to be partial, the following occurred:

"THE COURT: Can you decide this case based on this evidence and the law that applies here ... and not be influenced by a horrible situation?

"[S.B.]: Yes, sir. I honestly think I can. I know I can."

(R. 370.) S.B. indicated that she would be impartial; therefore, there was no valid ground for the circuit court to remove S.B. for cause, and Belcher is due no relief on this claim.[7] See Ex parte Burgess, supra.

IV.

Belcher next argues that the State violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), by removing prospective jurors based solely on their race and gender. Because Belcher did not make a Batson or J.E.B. objection at trial, we review these claims for plain error. Rule 45A, Ala. R. App. P.

"[P]lain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error." Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007). Thus, "[f]or an appellate court to find plain error in the Batson context, the court must find that the record raises an inference of purposeful discrimination by the State in the exercise of its peremptory challenges." Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007).

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

Ex parte Trawick, 698 So. 2d 162, 167–68 (Ala. 1997). "Alabama appellate courts have rarely found plain error in the Batson context." Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ––– So. 3d ––––, –––– (Ala. Crim. App. 2019).[8]

***15** The venire consisted of 59 prospective jurors. After several prospective jurors were excused for medical and hardship reasons and for cause, 45 prospective jurors remained, of which 9 were minorities (8 blacks and 1 identified as Asian) and 23 were female. The State had 17 peremptory strikes and Belcher had 16 peremptory strikes.

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The State struck 6 minorities. Belcher argues that the State struck 12 females; however, there is a discrepancy in the record in that regard. The strike worksheet indicates that the State struck prospective juror A.B., a female, but the more detailed strike list indicates that A.B. was struck by Belcher. The record does not contain the reporter's transcript of the actual striking process and, therefore, it is unclear from the record whether the State struck 11 or 12 females.[9] The record shows that juror questionnaires were used and that those questionnaires consisted of 16 pages and 57 questions.[10] The voir dire examination shows that both the State and defense counsel relied heavily on the answers prospective jurors provided in those questionnaires and that many follow-up questions were asked based on answers given in those questionnaires. A review of voir dire examination is difficult given that prospective jurors were not always identified by name but merely identified as "prospective juror." However, this Court can discern that the State struck prospective jurors who had indicated that they had close relatives who had been shot or killed and that they were unsatisfied with the manner that those cases had been handled by the authorities; who had indicated that they were opposed to the death penalty; who had indicated that they had criminal convictions or had an immediate family member or close friend with a criminal conviction; or who knew defense counsel.

The record shows that the prospective jurors who were struck had more similarities than their race or gender. The record does not indicate that veniremembers were questioned disparately. And the State did not remove all the minorities or females from the venire -- three blacks and three women served on Belcher's jury. The number of black or female jurors on the jury is "a relevant circumstance to consider in determining whether a prima facie case of racial [or gender] discrimination has been established." McCray v. State, 88 So. 3d 1 (Ala. Crim. App. 2010). We also note that Belcher does not argue in his appellate brief that prosecutors in Tuscaloosa County have a recent history of discrimination in striking juries. Based on our review of the record, we cannot say that the record discloses an inference of race or gender discrimination. Therefore, there was no plain error and Belcher is due no relief on these claims.

V.

Belcher next argues that the admission of the DNA report resulted in reversible error because, he says, his right to confront his accusers was violated. Specifically, he argues that the forensic scientist who testified concerning the results of the DNA tests and the DNA report that was prepared did not conduct all the tests that were utilized to reach the conclusions contained in the report. Defense counsel stated that he had no objection to the report being admitted into evidence. Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

The record reflects that Hannah Payne, a forensic biologist with the Alabama Department of Forensic Sciences, testified that DNA tests were conducted on a Gerber pocketknife that had been collected from the crime scene; that blood was found on the handle of that knife; that she swabbed the knife and had a DNA analysis conducted on that swab; that she prepared a report on the testing procedures used in the analysis; that all the testing done was "either validated by [Payne], approved by [Payne], or performed by [Payne]"; and that she ensured that all the protocols were followed in the case. The DNA tests revealed the presence of Belcher's blood on the Gerber knife handle.

On appeal, Belcher argues that the admission of the DNA report denied him the right to confront all the witnesses who were offering evidence against him, a violation of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Ex parte Ware, 181 So. 3d 409 (Ala. 2014), the Alabama Supreme Court addressed a similar issue:

> "The Sixth Amendment of the United States Constitution provides in part that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....' In Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the United States Supreme Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears 'adequate "indicia of reliability." '
>
> ***16** "In Crawford[v. Washington, 541 U.S. 36 (2004),] the United States Supreme Court overruled Roberts, rejecting the 'reliability' standard and holding that the right to confront witnesses applies to all out-of-court statements that are 'testimonial.' 541 U.S. at 68. Although the Crawford Court did not arrive at a comprehensive definition of 'testimonial,' it noted that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.' 541 U.S. at 50.

"....

"Since Crawford, the Supreme Court has released three decisions addressing the application of the Confrontation Clause to forensic-testing evidence. In Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Supreme Court held that a sworn certificate of analysis attesting that certain materials were cocaine was a testimonial statement. The Court in Melendez–Diaz declined to create a forensic-testing exception, and it rejected the argument that the certificate at issue there was not testimonial because it was not 'accusatory.'

"In Bullcoming v. New Mexico, [564] U.S. [647], 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Supreme Court held that the Confrontation Clause applied to an unsworn forensic-laboratory report certifying the defendant's blood-alcohol level, where the report was specifically created to serve as evidence in a criminal proceeding and there was an adequate level of formalities in the creation of the report.

"In Williams v. Illinois, [567] U.S. [50], 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the United States Supreme Court held, in a plurality opinion, that the Confrontation Clause was not violated where an expert was allowed to offer an opinion based on a DNA-profile report prepared by persons who did not testify and who were not available for cross-examination. Williams involved a bench trial in which a forensic specialist from the Illinois State Police laboratory testified that she had matched a DNA profile prepared by an outside laboratory to a profile of the defendant prepared by the state's lab. The outside lab's DNA report was not admitted into evidence, but the testifying analyst was allowed to refer to the DNA profile as having been produced from the semen sample taken from the victim.

"The plurality opinion concluded that the analyst's testimony was not barred by the Confrontation Clause for two independent reasons, neither of which received the concurrence of a majority of the Court. First, the plurality concluded that the expert's testimony was not admitted for the truth of the matter asserted but was admitted only to provide a basis for the testifying expert's opinions. Second, the plurality concluded that the DNA-profile report was not testimonial because its primary purpose was not to accuse the defendant or to create evidence for use at trial, but 'for the purpose of finding a rapist who was on the loose.' Williams, [567] U.S. at [58], 132 S.Ct. at 2228. The Williams plurality also noted the inherent reliability of DNA-testing protocols and the difficulties in requiring the prosecution to produce the analysts who actually did the testing.

"....

"We conclude that Kokoszka's testimony in this case satisfied the purpose of the Confrontation Clause. Kokoszka signed the DNA-profile report and initialed each page of Cellmark's 'case file' that was also admitted into evidence. Kokoszka testified that he was one of the individuals taking responsibility for the work that resulted in the report and that he had reviewed each of the analyses undertaken to determine that they were done according to standard operating procedures and that the conclusions drawn were accurate and appropriate. Kokoszka's testimony at trial provided Ware with an opportunity to cross-examine Kokoszka about any potential errors or defects in the testing and analysis, including errors committed by other analysts who had worked on the case. The trial court found that Kokoszka's testimony satisfied the requirements of the Confrontation Clause. We agree."

***17** Ex parte Ware, 181 So. 3d at 413–17 (footnotes omitted)

Other states have followed the holding in Ex parte Ware. The New Jersey Supreme Court in State v. Michaels, 219 N.J. 1, 46-47, 95 A.3d 648, 676 (2014), noted the number of jurisdictions that follow Ex parte Ware:

"[A] number of states have held that there is no Confrontation Clause violation where a supervisor, who has conducted his or her own independent review of the data generated by other analysts, testifies to the conclusions he or she has drawn from that independent analysis. See, e.g., Marshall v. People, supra, 309 P.3d [943] at 947–48 [(Colo. 2013)] (finding no confrontation violation where testifying expert was lab supervisor who reviewed urinalysis test results and prepared, signed, and certified report); Jenkins v. State, supra, 102 So. 3d [1063] at 1069 [(Miss. 2012)] (finding no confrontation violation where testifying expert was lab supervisor who reviewed and co-signed report identifying tested substance as cocaine and was knowledgeable about testing procedures); Commonwealth v. Yohe, 621 Pa. 527, 79 A.3d 520, 540–41 (2013) (finding confrontation rights satisfied by ability to cross-examine supervisor who analyzed raw data from blood alcohol tests, drew conclusions about intoxication, and prepared and signed report), cert. denied, [572] U.S. [1135], 134 S.Ct. 2662, 189 L.Ed.2d 209 (2014); see also [State v. Ortiz–Zape, supra, [367 N.C. 1,] 743

S.E.2d [156] at 164–65 [(2013)] (finding no confrontation violation where testifying expert was technical reviewer who testified to independent conclusions based on review of cocaine substance analysis report as well as all raw data and calibration and maintenance documentation from testing)."

Michaels, 219 N.J. at 46-47, 95 A.3d at 676.

The same is true in this case. Payne testified that she supervised the entire process; that the tests were conducted at her direction; that she ensured that all protocols were followed; and that she prepared the report on the DNA results that were found on the items delivered to her office. Based on the Alabama Supreme Court's decision in Ex parte Ware, there was no Crawford violation. Therefore, there was no error, much less plain error, in the admission of the DNA report, and Belcher is due no relief on this claim.

VI.

Belcher next argues that the admission of prior-bad-acts evidence violated state and federal law. Specifically, Belcher argues that the State unlawfully "presented evidence that he had manufactured methamphetamine, that he had a prior arrest for methamphetamine possession and had previously been incarcerated, and that Belcher's home contained 'strange homemade weapons' and 'blood' that were unrelated to this case." (Belcher's brief at pp. 20-21.) The record shows that Belcher did not object to the admission into evidence of any of the now-challenged evidence; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

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

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

A.

Belcher first asserts that evidence indicating that he manufactured methamphetamine was not "inseparably connected" to Samantha's murder, that there was no evidence indicating that he committed the murder to obtain payment for drugs, and that, therefore, this evidence should not have been admitted. He further argues that the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice" and that the circuit court erred when it failed to give a limiting instruction on the use of this evidence.

Belcher references several pages in the record where, he says, this evidence was improperly admitted. (R. 623-24; 690-91; 984; 989, 1015-16.) In the first instance, Deputy Enoch Rose was questioned concerning the fact that he was dispatched to Talladega National Forest and discovered that a vehicle had run out of gas. He verified that the vehicle was not registered to the two individuals present but was registered to Belcher. The following occurred:

"[PROSECUTOR]: What, if anything did you think when the car came back to an individual not at the scene?

"[DEPUTY ROSE]: I thought he was in the woods. I thought we had a meth lab and they were hiding a meth lab in the woods. And I thought he might have been in the woods somewhere."

(R. 623.) Second, Belcher's father testified that he knew his son was using and supplying drugs to people. (R. 690-91.) Third, Belcher was also questioned on cross-examination about making methamphetamine. (R. 983-84.) In closing argument at the guilt phase, the prosecutor made the following argument:

"What do we know, though, there are followers and there are leaders. There are followers, and there are leaders. Let's look at our cast of characters. Chylli Bruce. Chylli Bruce. Chylli, our leader? I think in everybody's brain everybody's saying no, Chylli Bruce isn't. Needs to get a ride from her mother to Michael Belcher's. Hooked on drugs since she was 12 or 13. Hooked on the methamphetamine that Michael Belcher made her. She's no leader. She is Michael Belcher's follower.

"....

"His drugs. His methamphetamine that his own father says he manufactured, manufactured to give to the girls."

(R. 1015-16.)

The State argues that none of the above-cited instances rose to the level of plain error. It asserts that the evidence was not

admitted to show bad character but was admitted to show that Belcher was the ringleader of the group that killed Samantha and had been supplying the group with drugs. Also, if any error occurred, the State asserts, it was harmless because Belcher himself testified that the group was at the Shop and were "snorting methamphetamine." (R. 959.)

Here, testimony established that the reason Samantha was at the Shop on the evening of her murder was to get drugs. Steven testified that Samantha was at the Shop for "drugs" and that on the night of the murder Samantha had come to the Shop to "get high" on "ice methamphetamine." (R. 553-555.)

This Court in Doster v. State, 72 So. 3d 50, 87–89 (Ala. Crim. App. 2010), stated:

> ***19** "As Professor Charles Gamble explained:
>
> " 'Evidence of the accused's commission of another crime or act is admissible if such other incident is inseparably connected with the now-charged crime. Such collateral misconduct has historically been admitted as falling within the res gestae of the crime for which the accused is being prosecuted. Most modern courts avoid use of the term "res gestae" because of the difficulty in measuring its boundaries. The better descriptive expression is perhaps found in the requirement that the collateral act be contemporaneous with the charged crime. This rule is often expressed in terms of the other crime and the now-charged crime being parts of one continuous transaction or one continuous criminal occurrence. This is believed to be the ground of admission intended when the courts speak in terms of admitting other acts to show the "complete story" of the charged crime. The collateral acts must be viewed as an integral and natural part of the circumstances surrounding the commission of the charged crime.
>
> " 'Two theories have been adopted for justifying the admission of collateral misconduct under the present principle. Some courts hold that such contemporaneous acts are part of the charged crime and, therefore, do not constitute "other crimes, wrongs, or acts" as is generally excluded under Rule 404(b). Other courts hold that Rule 404(b) is applicable to these collateral acts but that they are offered for a permissible purpose under that rule -- i.e., that such acts are merely offered, rather than to prove bad character and conformity therewith, to show all the circumstances surrounding the charged crime.'

"C. Gamble, McElroy's Alabama Evidence § 69.01(3) (5th ed. 1996) (footnotes omitted).

> " '[One such] "special circumstance" where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. Commonwealth v. Murphy, 346 Pa. Super. 438, 499 A.2d 1080, 1082 (1985), quoting Commonwealth v. Williams, 307 Pa. 134, 148, 160 A. 602, 607 (1932). This special circumstance, sometimes referred to as the "res gestae" exception to the general proscription against evidence of other crimes, is also known as the complete story rationale, i.e., evidence of other criminal acts is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." '

"Commonwealth v. Lark, 518 Pa. 290, 303, 543 A.2d 491, 497 (1988). Evidence of a defendant's criminal actions during the course of a crime spree is admissible. See Phinizee v. State, 983 So. 2d 322, 330 (Miss. App. 2007) ('Evidence of prior bad acts is admissible to "[t]ell the complete story so as not to confuse the jury." '); Commonwealth v. Robinson, 581 Pa. 154, 216, 864 A.2d 460, 497 (2004) ('The initial assault on Sam–Cali took place approximately two weeks before the Fortney homicide and Sam–Cali's testimony provided the jury with a "complete story" of Appellant's criminal spree from the Burghardt homicide in August of 1992 to Appellant's capture in July of 1993.'); St. Clair v. Commonwealth, 140 S.W.3d 510, 535 (Ky. 2004) ('Here, the trial court properly permitted the Commonwealth to introduce evidence of Appellant's prior crimes and bad acts that were part of a continuous course of conduct in the form of a "crime spree" that began with Appellant's escape from an Oklahoma jail and ended with his flight from Trooper Bennett.'); People v. Sholl, 453 Mich. 730, 556 N.W.2d 851 (1996) (' "Evidence of other acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." '); State v. Charo, 156 Ariz. 561, 565, 754 P.2d 288, 292 (1988) (' "The 'complete story' exception to the rule excluding evidence of prior bad acts holds that evidence of other criminal acts is admissible when so connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime."

'); State v. Long, 195 Or. 81, 112, 244 P.2d 1033, 1047 (1952) ('It is fundamental that the state is entitled to the benefit of any evidence which is relevant to the issue, even though it concerns the commission of the collateral crimes. If evidence of a collateral crime tends to prove the commission of the crime charged in the indictment, the general rule of exclusion has no application.'); State v. Schoen, 34 Or. App. 105, 109, 578 P.2d 420, 422 (1978) ('The evidence, therefore, was relevant to complete the story of the crime charged.... The state is not required to "sanitize" its evidence by deleting background information to the point that the evidence actually presented seems improbable or incredible.')."

***20** Doster v. State, 72 So. 3d 50, 87–89 (Ala. Crim. App. 2010). See Horton v. State, 217 So. 3d 27 (Ala. Crim. App. 2016); Bohannon v. State, 222 So. 3d 457 (Ala. Crim. App. 2015); Hosch v. State, 155 So. 3d 1048 (Ala. Crim. App. 2013). See also Palmer v. State, 939 So. 2d 792, 795 (Miss. 2006) ("Evidence of other crimes or bad acts is ... admissible in order to tell the complete story so as not to confuse the jury."); State v. Johnson, 121 Ariz. 545, 546, 592 P.2d 379, 380 (1979) ("Evidence of prior bad acts, another offense or misconduct is admissible to prove the complete story of the crime, even though other prejudicial facts are revealed thereby.").

Evidence of Belcher's furnishing his four codefendants with methamphetamine was part of the complete story of the events leading to Samantha's kidnapping and murder. Like Doster, evidence of Belcher's manufacturing methamphetamine was necessary to complete the entire story concerning the events on the evening of Samantha's murder. Thus, there was no error, much less plain error, in the admission of this evidence.

Moreover, the circuit court did not err in not sua sponte giving a limiting instruction on the use of this evidence because it was not offered for impeachment but was offered as substantive evidence of Belcher's guilt. See Johnson v. State, 120 So. 3d 1119 (Ala. 2006) (holding that a circuit court has no duty to sua sponte instruct a jury on the use of prior convictions when those convictions are admitted as substantive evidence of guilt and not for impeachment purposes.) For these reasons, Belcher is due no relief on this claim.

B.

Belcher next asserts that the State improperly admitted evidence of his prior arrest for possession of methamphetamine. He asserts that during his statement to police he told police that he had previously been arrested. The videotape of Belcher's statements to police shows that, a few minutes into the first interview, Belcher told Investigator J.C. Bryant that 18 months earlier he had been arrested for "possessing meth." (State's Exhibit 18.) When the videotape was played for the jury, no objection was made to this portion of the statement. Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

Typically, references to prior convictions should be redacted from a confession when that confession is played to a jury. See Henderson v. State, 248 So. 3d 992, 1040-41 (Ala. Crim. App. 2017). However, a reference to a prior conviction may be harmless. The State argues that the reference was a mere "fleeting reference" to an arrest. "[F]leeting references to a defendant's collateral crimes are not so egregious to rise to the level of plain error." Floyd v. State, 289 So. 3d 337, 403 (Ala. Crim. App. 2017). "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998). We agree with the State's characterization of this evidence, and we find no plain error. Therefore, Belcher is due no relief on this claim.

Belcher also argues that the circuit court should not have allowed the audio recordings of his telephone calls from jail to be admitted into evidence because, he says, they implied that he had prior convictions. The record shows that when the State moved to admit "a disk of [Belcher's] jail calls" defense counsel stated that he had no objection to its admission. (R. 783.) In the first call, Belcher says: "They have visitation down here like they do in Bibb County." In the second call, Belcher says: "They feed a lot better here than in Bibb County."

***21** Again, we agree with the State that Belcher's statements did not imply that he had any prior convictions in Bibb County. "These were not prior convictions and were brief and vague references." Revis v. State, 101 So. 3d 247, 317 (Ala. Crim. App. 2011). The comments were only vague references to being in Bibb County. There was no plain error in the admission of the audio recordings of the calls; thus, Belcher is due no relief on this claim.

C.

Belcher next argues that the circuit court erred in allowing Inv. Bryant to testify that Belcher had "strange weapons" and blood in his house when law-enforcement officers searched the house pursuant to a search warrant. Specifically, he argues that the "weapons and blood are prototypical symbols of evidence that carry significantly more prejudice than (for example) a past burglary." (Belcher's brief at p. 30.) The State argues, on the other hand, that Inv. Bryant's testimony was not evidence of prior bad acts, that its admission did not constitute plain error, and that if error occurred it was harmless. Because Belcher did not object to this evidence, we review this claim for plain error. Rule 45A, Ala. R. App. P.

During the direct examination of Inv. Bryant, the following occurred when he was questioned about executing the search warrant on Belcher's house:

> "[PROSECUTOR]: And what did you find inside?
>
> "[INV. BRYANT]: Inside we found a mattress, some pillows, some things with what appeared to be blood. There was a room with a lot of drawings and some strange homemade weapons on the wall. There was a dryer with a car battery inside of it.
>
> "[PROSECUTOR]: I want to come back and cover those things in order. Now, you said blood, weapons, and battery; right?
>
> "[INV. BRYANT]: Yes.
>
> "....
>
> "[PROSECUTOR]: You're not aware of [the blood] having anything to do with this case?
>
> "[INV. BRYANT]: Yes.
>
> "[PROSECUTOR]: And then the same thing with the weapons. You described odd weapons. Is there any suggestion they had anything to do with this case?
>
> "[INV. BRYANT]: Not to my knowledge.
>
> "[PROSECUTOR] And then how about the battery. Was this a car battery?
>
> "[INV. BRYANT]: Yes.
>
> "[PROSECUTOR]: And who found that car battery?
>
> "[INV. BRYANT]: I did.
>
> "[PROSECUTOR]: And where did you find the battery?
>
> "[INV. BRYANT]: Found it in a dryer.
>
> "....
>
> "[PROSECUTOR]: At some point in time, did [the battery] come to have significance?
>
> "[INV. BRYANT]: Yes.
>
> "[PROSECUTOR]: How come?
>
> "[INV. BRYANT]: An interview with Steven George after the search warrant. During that interview, he stated that when -- after they took Samantha Payne's vehicle, that he had removed the car battery from inside of it and placed it in a dryer at Michael Belcher's house."

(R. 726-27) (emphasis added).

We agree with the State that neither the display of drawings and homemade weapons nor the mere presence of blood unconnected to any crime in a person's residence can be categorized as "bad acts." Therefore, we find no error, much less plain error, in the admission of Inv. Bryant's testimony concerning the contents of Belcher's house, and Belcher is due no relief on this claim.

VII.

Belcher next argues that the circuit court erred in allowing the hearsay statements of his codefendants to be admitted into evidence because, he says, their admission violated state and federal law. Specifically, Belcher challenges the following statements that were referenced by police in the videotape of the interview with Belcher: that Bruce and Steven had said that Belcher killed Samantha; that Belcher beat Samantha; that Belcher hog-tied Samantha; that Belcher threw Samantha in the trunk of a vehicle; and that Samantha's vehicle was stolen on Belcher's orders. Belcher asserts that the statements were inadmissible hearsay and were also inadmissible under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). When the videotape of Belcher's statement was played for the jury, there was no objection to Investigator Bryant's references to Belcher's codefendants'

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statements. Thus, we review this claim for plain error. Rule 45A, Ala. R. App. P.

***22** "Hearsay" is defined in Rule 801(c), Ala. R. Evid., as "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In Smith v. State, 246 So. 3d 1086 (Ala. Crim. App. 2017), this Court addressed a similar issue and stated:

> "[T]he testimony of [the police officer] was not hearsay because it was not offered to prove the truth of the matter asserted; rather, the testimony was offered to explain the course of the investigation. See Jackson v. State, 169 So. 3d 1, 106–07 (Ala. Crim. App. 2010); Robitaille v. State, 971 So. 2d 43, 58–59 (Ala. Crim. App. 2005); D.R.H. v. State, 615 So. 2d 1327, 1330 (Ala. Crim. App. 1993). This Court has considered statements similar to those made by [the police officer] and held:
>
> > " 'The references in Revis's interrogation to the statements of his uncle and brother were harmless error, if error at all. The investigators' allusions to a statement by Revis's uncle were a tactic used to elicit a confession from Revis and were interwoven in Revis's confession. These references were introduced to explain the circumstances of the confession and could be considered by the jury in weighing Revis's statements.'

"Revis v. State, 101 So. 3d 247, 277 (Ala. Crim. App. 2011)." 246 So. 3d at 1110. Unlike in Turner v. State, 115 So. 3d 939 (Ala. Crim. App. 2012), on which Belcher relies, in which the State offered statements made by the defendant's accomplices for the truth of the matter asserted, in this case the out-of-court statements of Bruce and Steven were not offered for the truth of the matter asserted. Therefore, they were not hearsay.

Moreover, to the extent that Belcher argues that admission of the statements violated Bruton, supra, that argument is meritless. In Bruton, the United States Supreme Court held that the admission of a nontestifying codefendant's statement to police implicating the defendant in the crime violated the defendant's right to confrontation. However, because Belcher's codefendants both testified against him at trial and were subject to vigorous and extensive cross-examination, Belcher was not denied his right to confrontation and there was no Bruton violation. See, e.g., Lipscomb v. State, 5 Md. App. 500, 506, 248 A.2d 491, 494 (1968) (holding that, because the codefendant testified at trial, the defendant's "reliance upon Bruton is ill-placed, the rationale of that decision not being applicable to the facts of this case").

Finally, even if the admission of the statements was error, it was clearly harmless because the majority of the statements were testified to by either Bruce or Steven or both and they were subject to cross-examination concerning those statements. "Testimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred." Yeomans v. State, 641 So. 2d 1269, 1272 (Ala. Crim. App. 1993). "The erroneous admission of evidence that is merely cumulative is harmless error." Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995). The only statement that Belcher challenges that was not testified to by Bruce or Steven at trial was the statement that Belcher ordered Steven to steal Samantha's car. However, on cross-examination Steven testified:

> ***23** "[DEFENSE COUNSEL]: Where was Mike Belcher when you were doing this?
>
> "[STEVEN]: Last I seen him, he was at the Shop.
>
> "[DEFENSE COUNSEL]: And that was completely your idea? Mike had nothing to do with your taking [Samantha's] car?
>
> "[STEVEN]: No.
>
> "[DEFENSE COUNSEL]: And burning up that car?
>
> "[STEVEN]: No."

(R. 593-94.)

Therefore, Belcher is due no relief on this claim.

VIII.

Belcher next argues that the circuit court erred in admitting gruesome crime-scene and autopsy photographs that depicted the post-murder mutilation of Samantha's body. In the alternative, he argues that, if the photographs were properly admitted, the circuit court erred in not first giving the jury cautionary instructions. Specifically, Belcher argues that it was error for the circuit court to admit several photographs of the scene were Samantha's body was discovered (State's Exhibits 1-4 and 33-58), a photograph of Samantha's hands (State's Exhibit 7), and autopsy photographs (State's Exhibits 147-161 and 173-175). Belcher did not object to admission

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into evidence of State's Exhibits 1-4, 7, and 33-58. He objected to the admission into evidence of State's Exhibits 147-161 and 173-75, stating:

> "[S]everal of them are repetitive, and several of them don't relate to the body. They're bindings and stuff like that which are already introduced through another witness. So I'm objecting to all of them going in and ask that the State cull out just the ones that related to the body."

(R. 914.) He did not, however, object to those photographs on the ground that they were gruesome. Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

This Court has long held that photographs of a decomposed body are admissible. In 1972, this Court stated:

> "State's Exhibits 5, 6, 7, are photographs of the decomposed body and the area where the remains were found. Exhibit 5 shows a closeup view of the skeleton of the upper part of the body. In Exhibit 6 a part of the skeleton can be seen, while the lower portion is clothed in pants and shoes. Exhibit No. 7 shows the lower part of the body, dressed in pants and shoes, the top part covered with brush. The quilt is shown in this picture.
>
> "Counsel for defendant objected to each of these photographs on the grounds that it does not show the location of the wounds, cause of death, time of death, relative position of combatants, if any, type of instrument used, if any; does not connect the defendant with the death, in no way identifies the victim. Is not properly identified and its only purpose is to prejudice and inflame the minds of the jury.
>
> "We find no error in the admission of the photographs. They were properly identified as correctly portraying the scene and the condition of the objects at the time they were made."

Dawson v. State, 48 Ala. App. 594, 598, 266 So. 2d 806, 809-10 (Ala. Crim. App. 1972). See also Smith v. State, 246 So. 3d 1086, 1111 (Ala. Crim. App. 2017)("Although unpleasant, the photographs and testimony were not unduly gruesome or unfairly prejudicial."); Gissendanner v. State, 949 So. 2d 956, 972 (Ala. Crim. App. 2006) ("[W]e cannot find that the trial court abused its substantial discretion when it admitted the [14-minute] videotape. Although parts of the videotape showing [the victim's] body were indeed gruesome, we find no abuse of discretion in the trial court's conclusion that the videotape was not unfairly prejudicial."); Loggins v. State, 771 So. 2d 1070, 1077 (Ala. Crim. App. 1999) ("[E]vidence of the mutilation and the photographs of the body were clearly material and relevant to show where and in what condition [the victim's] body was found.").

***24** Other state and federal courts have likewise found that photographs that show post-murder mutilation of a body are admissible.

> "The photographs depict Hobbs' decomposed body, apparently partially eaten by animals. Forensic Pathologist Dr. Dean Hawley testified that the body found in the soybean field was so decomposed that an ordinary autopsy to determine identity and cause of death could not be performed. Forensic DNA analyst Todd Bille described the process by which he concluded that it was indeed Hobbs' body. Thus, any prejudice from the admission of the photographs alone was outweighed by their probative value in showing why the State had to resort to extraordinary methods to identify the body, and that the body was identified as Hobbs."

Robinson v. State, 693 N.E.2d 548, 553 (Ind. 1998).

> "[W]hile the general gruesomeness of these photographs inherently presents some danger of prejudice, we do not view them as being so inflammatory as to outweigh their high probative worth, let alone substantially outweigh that probativeness. With the exception of the evidence of decomposition apparent in the images (bloating and discoloration, which the medical examiner made a point of differentiating from the effects of the injuries), the photos do not contain any particularly repulsive or otherwise noteworthy imagery to distinguish them from other similarly grisly images of deceased victims routinely admitted to prove the corpus delicti or for some other purpose. We certainly do not believe these eight photographs are so exceptionally gruesome and inflammatory that their exclusion should be required in spite of the general rule favoring inclusion, particularly in light of their substantial probative worth. These photographs are just the sort of admissible evidence to which the general rule of inclusion of graphic photos should apply. After all, as this Court has often repeated, '[w]ere the rule otherwise, the state would be precluded from proving the commission of a crime that is by nature heinous and repulsive.' Ratliff v. Commonwealth, 194 S.W.3d 258, 271 (Ky. 2006) (quoting Salisbury v. Commonwealth, 417 S.W.2d 244, 246 (Ky. 1967))."

Ragland v. Commonwealth, 476 S.W.3d 236, 249 (Ky. 2015).

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> "The exhibits at issue are necessarily unappealing and unfortunate. However, we conclude that the trial court's decision to admit them was not an abuse of discretion. ' "Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found." ' State v. Gregory, 340 N.C. 365, 387, 459 S.E.2d 638, 650–51 (1995) (quoting State v. Wynne, 329 N.C. 507, 517, 406 S.E.2d 812, 816–17 (1991)).... 'By admitting the photographs, the trial court implicitly determined that any undue prejudice resulting from the admission of the photographs was substantially outweighed by their probative value. The trial court did not abuse its discretion, and this assignment of error is rejected.' State v. Roache, 358 N.C. 243, 286, 595 S.E.2d 381, 410 (2004)."

State v. Bare, 194 N.C. App. 359, 364, 669 S.E.2d 882, 886 (2008). See also Leggett v. State, 256 Ga. 274, 275, 347 S.E.2d 580, 581 (1986).

***25** "Trial courts are vested with the discretion to determine whether images of a crime scene are admissible, and appellate courts overturn those decisions only when the trial courts abuse that substantial discretion." Gissendanner, 949 So. 2d at 969. "[E]vidence of the mutilation and the photographs of the body were clearly material and relevant to show where and in what condition [Samantha's] body was found." Loggins, 771 So. 2d at 1077. Although some of the photographs were gruesome, based on the holdings of the above-cited cases, we cannot say that the circuit court abused its substantial discretion in admitting the photographs. Therefore, we find no error, much less plain error, in the admission of the photographs, and Belcher is due no relief on this claim.

Alternatively, Belcher argues that, if there was no error in admitting the photographs, the circuit court should have given a cautionary instruction that the gruesome nature of the photographs should not influence the passions and prejudices of the jury. The record shows that Belcher filed a motion requesting that cautionary instructions be given when "certain State photographs" were admitted at trial. (C. 72-73.) The circuit court denied the motion. (C. 81.)

Alabama has never required that cautionary instructions be given to a jury when gruesome photographs are admitted into evidence.

> "Hosch also argues that the trial court erred when it declined to give a cautionary instruction before the photographs were displayed to the jury. He submitted a written proposed instruction along with his request to the court. Hosch cites no Alabama law requiring such an instruction. Moreover, a trial court has substantial discretion in formulating the jury instructions so long as they accurately reflect the law and the facts of the case. ... The trial court fully instructed the jury that its decision was to be based on evidence presented in court and on the law provided, and should not be based on factors such as speculation, suspicion, conjecture, or sympathy."

Hosch v. State, 155 So. 3d 1048, 1115 (Ala. Crim. App. 2013). In addition, the circuit court here gave the following instruction:

> "Your verdict must not be based upon any sympathy or prejudice or passion or emotion. It must be based on the law that I'm giving you. It must be based on the facts, the evidence as you determine it to be. If you were to do anything other than that, then you will have violated the oath that you took at the beginning of this trial."

(R. 1047.) For these reasons, we find no error, much less plain error, in regard to this claim, and Belcher is due no relief.

IX.

Belcher next argues that the circuit court erred in allowing the admission of hearsay statements made by Samantha's mother at trial. Specifically, Belcher argues that Suzanne Payne should not have been allowed to testify to facts outside the scope of her knowledge and to what her daughter told her about her movements. As noted previously in this opinion, "[h]earsay" is defined in Rule 801(c), Ala. R. Evid., as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

A.

First, Belcher argues that Suzanne should not have been allowed to testify to facts that were outside the scope of her personal knowledge. Specifically, he argues that it was error to allow Suzanne to testify concerning the names of the individuals with whom her daughter hung out when using drugs because, he says, that information was based on what her daughter had told her and not on Suzanne's personal knowledge.

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During her testimony, Suzanne said that her daughter had developed a problem with prescription pain medication after she had had an accident and broke her femur.[11] The following occurred:

***26** "[PROSECUTOR]: As a family, did you -- did y'all try to do anything to help her?

"[SUZANNE]: Yes, we did. We tried everything that was possible, which wasn't very much because at the time she was in denial and didn't see that she had a problem.

"[PROSECUTOR]: Do you know any of the people that Samantha was using drugs with?

"[DEFENSE COUNSEL]: Your Honor, at this time, I'm going to object and ask for the State to narrow that question. The word 'know' would tend to be from hearsay information. And if she could say 'personally know' or that something that isn't from hearsay.

"THE COURT: I'll sustain that. Based on her personal knowledge.

"[PROSECUTOR]: Ms. Payne, do you have any personal knowledge as to who your daughter was hanging around with and using drugs with?

"[SUZANNE]: Yes.

"[PROSECUTOR]: And who were those individuals?

"[DEFENSE COUNSEL]: Again, Your Honor, if she could -- if they could ask how she knows.

"THE COURT: She said personal knowledge. Overruled.

"[PROSECUTOR]: You may answer.

"[SUZANNE]: Mike Belcher was one. Mark George and Pumpkin.

"[PROSECUTOR]: Do you know Pumpkin's real name?

"[SUZANNE]: Alyssa Watson.

"[PROSECUTOR]: Anyone else?

"[SUZANNE]: Chylli Bruce and Steven George."

(R. 447-49.)

Rule 602, Ala. R. Evid., provides:

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

(Emphasis added.) Here, Suzanne testified that she had personal knowledge regarding with whom Samantha used drugs. Defense counsel did not question how Suzanne's personal knowledge was obtained. "A Rule 602 personal-knowledge determination is a judgment call for the trial court that is best made with the aid of firsthand observation of the witness." State v. Nhek, 687 A.2d 81, 82-83 (R.I. 1997). " '[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.' " State v. Poag, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669 (2003). "If a jury could find that the witness has personal knowledge of the facts testified to, the trial justice should admit the evidence, properly leaving the question of the witness's credibility to the jury." State v. Spratt, 742 A.2d 1194, 1199 (R.I. 1999). Based on the record before us, we cannot say that any error occurred.

Moreover, several witnesses testified that Samantha used drugs with Belcher. Steven testified that that was the reason Samantha came to the Shop the night that she was murdered. Thus, Suzanne's testimony was cumulative of other evidence, and the admission of her testimony was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). For the above reasons, Belcher is due no relief on this claim.

B.

Second, Belcher argues that the circuit court erred in allowing the admission of hearsay testimony concerning what Samantha told her mother the last night she saw Samantha.

***27** Belcher moved in limine to prohibit the State from eliciting testimony from Suzanne as to where Samantha told her "she was planning to go" on October 30, 2015. (C. 110.) Belcher argued that any answer would be hearsay. Before Suzanne testified, defense counsel reminded the court of the motion in limine filed before trial. The following occurred:

"[DEFENSE COUNSEL]: Prior to this, we had filed a motion in limine. In the prior trial Alyssa Watson and Marcus George, the Defendant did not -- the Defendants did not object and allowed a lot of hearsay about what

Samantha Payne had told her mother four or five days prior to this incident, this occurrence. And we would like a limiting instruction to Payne that she cannot go into what her daughter told her that far in advance of the death. And I was afraid that because she's already testified to it, she would start talking about it.

"THE COURT: Your main point in your motions in limine was the victim allegedly said she was going to go on to see Michael Belcher?

"[DEFENSE COUNSEL]: Uh-huh.

"THE COURT: Go ahead, State.

"[PROSECUTOR]: Your Honor, we will offer that as a present sense impression.

"THE COURT: Let me hear some of the testimony. You have a response to that?

"[DEFENSE COUNSEL]: Your Honor, with the prior trial, it was an open-ended question and she went right on into it. It was not an -- I think they're using it to identify Michael Belcher and not because -- and using it to assert the truth of the matter therein.

"THE COURT: Just make your objections as she goes, and let me hear what she has to say; okay?

"[DEFENSE COUNSEL]: Just, if I could, I don't want to try and unring a bell. I don't want her saying something that I may object and try to unring that bell.

"THE COURT: Make sure she knows she answers your question, she's not to launch into a particular narrative in response to your questions."

(R. 442-43.)

Although the circuit court did not allow the statement to be admitted during Suzanne's testimony, the statement was admitted as part of the videotaped statement that police conducted with Belcher. When the videotape was played to the jury, defense counsel objected at one point and asked that the tape be stopped. The following occurred:

"THE COURT: Stop it real quick. Y'all come up.

"(At the bench sotto voce.)

"THE COURT: I'm sorry. I didn't hear -- I wasn't paying attention to what was --

"[DEFENSE COUNSEL]: [Inv. Bryant] was telling [Belcher] what Samantha was -- said to her about going to [Belcher's] house.

"THE COURT: I will sustain the objection with the mother, and I don't -- this evidence coming in through him.

"....

"THE COURT: We should have known that before we started playing. I'm not going to say anything to them and ring the bell the second time, even if they heard it."

(R. 722-23.)

The State argues that, even assuming that the statement was inadmissible, any error in its admission was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

"In determining whether the admission of improper [evidence] is reversible error, this Court has stated that the reviewing court must determine whether the 'improper admission of the evidence ... might have adversely affected the defendant's right to a fair trial,' and before the reviewing court can affirm a judgment based upon the 'harmless error' rule, that court must find conclusively that the trial court's error did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

***28** Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993). The proper inquiry is whether it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." Ex parte Greathouse, 624 So. 2d 208, 210 (Ala. 1993).

Several witnesses testified that Samantha was with Belcher the last night that Suzanne spoke to Samantha. In fact, Belcher himself testified that Samantha came to the Shop that evening. There is no reversible error in the admission of Suzanne's statement as related by Inv. Bryant in the videotape of Belcher's statement. Accordingly, Belcher is due no relief on this claim.

X.

Belcher next argues that the circuit court erred in allowing his "unconstitutionally obtained statements" to law enforcement to be admitted into evidence. In none of the statements did Belcher confess; he repeatedly denied any involvement in Samantha's murder. In fact, he repeatedly said that he did

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not hang out with Samantha. Nonetheless, Belcher argues on appeal that the State used his statements against him, and he cites to pages 721, 724, 993-95, and 1019-20 of the trial transcript in support of this assertion.[12] Assuming, without deciding, that the statements were used against him, the record shows that Belcher did not move to suppress his statements or otherwise raise below the arguments he now makes on appeal. Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P. "[A]lthough the failure to object does not preclude this court's review of the appellant's claim [that his statement was involuntary], it does weigh heavily against any claim of prejudice." Gaddy v. State, 698 So. 2d 1100, 1114 (Ala. Crim. App. 1995).

The videotape of the first interview with Belcher reflects that Inv. Bryant read Belcher his Miranda[13] rights and that Belcher signed a form indicating that he understood those rights. The tape also shows that, when Inv. Bryant entered the room, he obtained general information from Belcher: name, age, date of birth, work, Social Security number, etc. At that time, Belcher easily answered all the questions posed to him and did not appear under the influence of alcohol or any type of drug. In the second statement, about 30 minutes later, Belcher mumbled throughout the entire interview, and it is difficult to understand him. In the third statement, about 10 minutes later, most of the interview consisted of Inv. Bryant's trying to obtain Belcher's permission to download the contents of Belcher's cellular telephone. After about 15 minutes, Belcher refused to give his consent to download the contents of his cellular telephone. In the fourth statement, about one and a half hours later, Belcher repeatedly denied that he had any involvement in Samantha's murder. Belcher is in the interview room for a total of a little over five hours.[14] When the investigator left the room, Belcher laid on the floor, faced away from the camera, and appeared to be sleeping. Every time Inv. Bryant entered the room, Belcher rose from the floor and sat in a chair. When Belcher first entered the room, he was in shorts and was carrying his shoes and socks. By the time the first interview commenced, Belcher was fully dressed.

> ***29** "For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. Ex parte Singleton, 465 So. 2d 443, 445 (Ala. 1985). The initial determination is made by the trial court. Singleton, 465 So. 2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. Marschke v. State, 450 So. 2d 177 (Ala. Crim. App. 1984). The trial court held, based on Officer Burch's testimony and McLeod's signed waiver-of-rights form, that McLeod's confession was voluntary. The Court of Criminal Appeals reversed the conviction, holding that the confession was involuntary.
>
> "....
>
> "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In Culombe [v. Connecticut], 367 U.S. [568] at 602, 81 S.Ct. [1860] at 1879 [6 L.Ed.2d 1037 (1961)], the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his will has been overborne' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. Id. (emphasis added).
>
> "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139–40, 22 L.Ed.2d 433 (1969); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see Beecher v. Alabama, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See Ex parte Matthews, 601 So. 2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); Jackson v. State, 562 So. 2d 1373, 1380 (Ala. Crim. App. 1990) (stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); Eakes v. State, 387 So.2d 855, 859 (Ala. Crim. App. 1978) (stating that the true test to be employed is 'whether the defendant's will was overborne at the time he confessed') (emphasis added). Thus, to determine whether McLeod's confession was improperly induced, we must determine if his will was 'overborne' by an implied promise of leniency."

McLeod v. State, 718 So. 2d 727, 729 (Ala. 1998). "The age and education of the defendant are merely factors to consider in determining voluntariness. ..." Moore v. State, 415 So. 2d 1210, 1214 (Ala. Crim. App. 1982). Also, we consider the

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"background, experience, and conduct of the accused. ..." Holmes v. State, 598 So. 2d 24, 26 (Ala. Crim. App. 1992).

A.

First, Belcher argues that he did not "adequately" and "effectively" waive his Miranda rights. Specifically, Belcher argues that when he signed the rights-waiver form he did not have a "full awareness" of the rights he was abandoning.

***30** When discussing a valid waiver of Miranda rights, the United States Supreme Court has stated:

> " 'First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.' [Moran v. Burbine,] 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)](quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979))."

Colorado v. Spring, 479 U.S. 564, 573, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987).

The record shows that Belcher was 31 years of age at the time of his statements and was no stranger to the criminal-justice system. The presentence report shows that Belcher had 49 previous charges. Although most of those charges were traffic violations, Belcher had charges related to drugs, criminal trespass, harassing communications, and menacing. "A totality-of-the-circumstances review of a claim of improper inducement must include both the circumstances surrounding the confession and the characteristics of the individual defendant." Price v. State, 725 So. 2d 1003, 1048 (Ala. Crim. App. 1997). A defendant's prior experience with law enforcement is relevant in evaluating the totality of the circumstances. Gaddy, 698 So. 2d at 1114.

> "To determine whether a suspect's waiver of his Miranda rights was intelligent, we inquire whether the defendant knew that he did not have to speak to police and understood that statements provided to police could be used against him. United States v. Yunis, 859 F.2d 953, 964–65 (D.C. Cir. 1988). A suspect need not, however, understand the tactical advantage of remaining silent in order to effectuate a valid waiver. Id. at 965."

United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).

Although it is clear from the videotape of Belcher's statement that he was tired, there is nothing that suggests that Belcher could not, or did not, adequately understand the rights he was waiving. Therefore, Belcher is due no relief.

B.

Belcher next argues that his statements should have been suppressed pursuant to Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), because, he says, he invoked his right to counsel, at which point all questioning should have ceased. Specifically, he argues that he explicitly asked for a lawyer but police returned to conduct a fourth interrogation without honoring his request for counsel.

The videotape shows that, during Belcher's third interview, Inv. Bryant asked Belcher to give his consent to download the contents of Belcher's cellular telephone. Near the end of that exchange, Belcher says: "Can I have a lawyer?" Inv. Bryant says: "It is up to you." Belcher asks if the lawyer will come to the station to talk to him. Inv. Bryant responds before leaving the room that the lawyer would come to the station to talk to Belcher. Inv. Bryant comes back to interview Belcher about one and a half hours later. The statements Belcher made in the last interview were similar to the statements that he had made previously and to Belcher's testimony at trial.

> ***31** "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Edwards, 451 U.S. at 484–85, 101 S.Ct. 1880 (footnote omitted). However, " 'the suspect must unambiguously request counsel.' " Ex parte Cothren, 705 So. 2d 861, 864 (Ala. 1997) (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)).

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> "[I]f the suspect makes an equivocal reference to an attorney after waiving his Miranda rights, the interrogating officer has no obligation to stop questioning the suspect and the officer is not required to ask questions to clarify whether the suspect actually wants an attorney. Davis v. United States, 512 U.S. 452, 459–62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). However, if a suspect makes an equivocal reference to an attorney before waiving his Miranda rights, the interrogating officer is required to ask questions to clarify the reference until the suspect either clearly invokes his right to counsel or waives it. See State v. Collins, 937 So. 2d 86, 93 (Ala. Crim. App. 2005) (holding that '[b]ecause [the defendant] did not waive her Miranda rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity')."

Thompson v. State, 97 So. 3d 800, 806 (Ala. Crim. App. 2011).

The State asserts that Belcher's mention of a lawyer was not an unequivocal request for a lawyer. It argues: "Merely asking if he had the right to an attorney, or what would happen to him before he gets an attorney, is not sufficient to invoke his right to an attorney." (State's brief at p. 77.) We agree. Regardless, Belcher's fourth statement was nothing more than a restatement of everything Belcher had stated previously. Thus, even if error did occur, that error was harmless beyond a reasonable doubt. See Chapman v. California, supra. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); Coral v. State, 628 So. 2d 954, 974 (Ala. Crim. App. 1992); Shepard v. State, 417 So. 2d 614, 615 (Ala. Crim. App. 1982). Therefore, Belcher is due no relief on this claim.

C.

Belcher also argues that his statements should not have been admitted because, he says, they were involuntary and not the product of free will. According to Belcher, he had a difficult time staying awake, he asked five times to speak with his father,[15] and "his difficulties were compounded by his mild neuro-cognitive disorder." (Belcher's brief at p. 85.)

> " 'The fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary.' Baker v. State, 557 So. 2d 851, 853 (Ala. Crim. App. 1990). See also Charles C. Marvel, Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 8 A.L.R. 4th 16 (1981)."

Thompson v. State, 153 So. 3d 84, 110 (Ala. Crim. App. 2012).

As we previously stated, Belcher was no stranger to the criminal-justice system. He did not appear to be under the influence of drugs or any other substance. Police did not coerce Belcher to make a statement, and police did not make any promises to secure his statement. Belcher's neurocognitive disorder did not, alone, render his statement involuntary. Based on the totality of the circumstances, Belcher's statements were voluntary. Accordingly, Belcher is due no relief.

XI.

***32** Belcher next argues that the prosecutor repeatedly engaged in misconduct that rendered his trial fundamentally unfair and deprived him of a reliable verdict. He lists several grounds in support of this argument. We address each in turn, bearing in mind the following.

> "This court has stated that '[i]n reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' Bankhead v. State, 585 So. 2d 97, 106 (Ala. Crim. App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993). See also Henderson v. State, 583 So. 2d 276, 304 (Ala. Crim. App. 1990), aff'd, 583 So. 2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). 'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' Bankhead, 585 So. 2d at 107, quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala.), cert. denied, 5[2]8 U.S.

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939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead, 585 So. 2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, McCullough v. State, 357 So. 2d 397, 399 (Ala. Crim. App. 1978), and that court is given broad discretion in determining what is permissible argument.' Bankhead, 585 So. 2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. Id."

Ferguson v. State, 814 So. 2d 925, 945-46 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001).

A.

First, Belcher argues that the prosecutor presented misleading testimony from Suzanne Payne. Specifically, he challenges the following exchange:

"[PROSECUTOR]: So what did you do when you were worried about your daughter?

"[SUZANNE]: The day she left, she used my phone. And I went back through my phone; and I called some numbers that she had called, asking if they had seen or heard from her in the last couple days.

"[PROSECUTOR]: Was one of those people Michael Belcher?

"[SUZANNE]: Yes.

"....

"[PROSECUTOR]: What did you and [Belcher] talk about?

"[SUZANNE]: I just asked him if he had seen Samantha in the last couple days.

"[PROSECUTOR]: And what was his response?

"[SUZANNE]: He started laughing like a maniac. And he said, 'No, I ain't seen her,' and hung up.

"[PROSECUTOR]: Do you recall when that was that you spoke to him?

"[SUZANNE]: It was Sunday."

***33** (R. 451-52.) Belcher argues that the prosecutor improperly implied that the telephone conversation that Suzanne had with Belcher took place after Samantha was killed and that it gave the jury a "false understanding" that led the jury to believe that Belcher laughed at Samantha's death. Because Belcher did not object to Suzanne's testimony in this regard, we review this claim for plain error. Rule 45A, Ala. R. App. P.

Suzanne testified that she last saw her daughter on October 30, 2015. She said that when she had not heard from Samantha she started to get concerned, so she called Belcher on November 1, 2015. On redirect, she again testified that she spoke to Belcher on November 1. The testimony showed that Samantha was last seen in the early morning hours of November 2. Based on Suzanne's testimony, there was no question that Suzanne spoke with Belcher before her daughter was killed. Nor is there any indication that the State tried to imply that she spoke to Belcher after her daughter had been murdered. Therefore, Belcher is due no relief on this claim.

B.

Belcher next argues that the prosecutor's closing arguments were "calculated to inflame" the passions and prejudices of the jurors. He makes several different claims to support this argument. Belcher did not object to any of the now-challenged instances of prosecutorial misconduct. Therefore, we review his claims for plain error. Rule 45A, Ala. R. App. P.

We note that, "[w]hile [Belcher's] failure to object will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice." Albarran v. State, 96 So. 3d 131, 147 (Ala. Crim. App. 2011). In addition, "[i]n Alabama, we follow a 'wide latitude of argument' rule: counsel is allowed wide latitude in drawing reasonable inference from the evidence in closing argument." Williams v. State, 710 So. 2d 1276, 1305 (Ala. Crim. App. 1996). "A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument. United States v. Young, 470 U.S. 1, 11-13, 105 S.Ct. 1038, 84 L.E.2d 1 (1985)." State v. Banks, 271 S.W.3d 90, 131 (Tenn. 2008). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

1.

First, Belcher argues that the prosecutor improperly referred to Samantha as a "beautiful girl with a beautiful smile" in his closing argument, thereby improperly invoking the sympathy of the jurors. (R. 1014.) We disagree.

"While the prosecutor's comments may have appealed to the jurors' emotions, we cannot say that these comments had a decisive effect on the jury's determination of guilt." State v. Manwarren, 139 S.W.3d 267, 274 (Mo. Ct. App. 2004). See also People v. Beltran, 353 Ill. Dec. 893, 912, 956 N.E.2d 1021, 1040 (Ill. App. Ct. 2011) ("[T]he prosecutors' referring to the victim as a 'heavenly angel' did not deprive the defendant of a fair trial."). After reviewing the record, we conclude that the prosecutor's description of Samantha as a beautiful person with a beautiful smile was not error, much less plain error, and did not so infect the trial with unfairness that Belcher was denied due process. See Darden v. Wainwright, supra. Therefore, Belcher is due no relief on this claim.

2.

Belcher next argues that the prosecutor improperly argued in closing: "Let's think from Samantha Payne's perspective; okay? You think when he threw her into the wall that she thought, 'Uh-oh, he's going to kill me; uh-oh, he wants me dead?' " (R. 1023.)

> ***34** "Generally, an appeal to the jury's sympathy during closing argument by inviting the jurors, individually, to stand in the shoes of the litigant is considered improper. Allison v. Acton-Etheridge Coal Co., 289 Ala. 443, 268 So. 2d 725 (1972). Case law demonstrates, however, that the courts have not been overly restrictive in their application of this rule."

Fountain v. Phillips, 439 So. 2d 59, 63 (Ala. 1983). Not all arguments that ask the jury to place themselves in the victim's place are reversible error. Cofield v. State, 41 Ala. App. 469, 136 So. 2d 897 (1961). After reviewing the record, we cannot say that the above comment so infected the trial with unfairness that Belcher was denied due process. See Darden v. Wainwright, supra. Accordingly, we find no plain error in the comments, and Belcher is not entitled to relief on this claim.

3.

Belcher next argues that the prosecutor misstated the law when he made the following argument:

> "One of the things [the judge] is going to tell you is we don't even have to prove any guilt. We don't have to prove any actual guilt, merely that Michael Belcher intended the death of Samantha Payne during a kidnapping and she died. Okay? That's what he's going to tell you. That he intended her death and she died during a kidnapping, not even that he did it."

(R. 1023.)

In Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010), this Court considered the propriety of an argument made by the prosecutor in closing that "the concept of voluntary intoxication is never a defense." In finding no reversible error, this Court stated:

> "As stated above, the circuit court charged the jury that what the attorneys stated was not evidence. Furthermore, the circuit court correctly charged the jury that '[w]hile voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent that is essential to an intentional killing and reduce it to other charges.' (Vol. XII, R. 1716.) See § 13A–3–2, Ala. Code 1975. See also Flowers v. State, 922 So. 2d 938, 953–54 (Ala. Crim. App. 2005.), cert. denied, 546 U.S. 1177, 126 S.Ct. 1347, 164 L.Ed.2d 60 (2006). Again, jurors are presumed to follow the trial court's instructions.
>
> "After reviewing the prosecutor's comment in the context of the entire trial, we are not persuaded that the comment ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' Vanpelt [v. State], 74 So. 3d [32] at 81 [(Ala. Crim. App. 2009)]. No plain error occurred, and no basis for reversal exists."

Reynolds, 114 So. 3d at 144-45.

Although the prosecutor's word choice was less than ideal, when viewed in context it is clear that the prosecutor was arguing that Belcher did not have to be the person who actually killed Samantha to be convicted of her murder. In addition, the circuit court instructed the jury that it should not consider any arguments of counsel concerning the law that conflicted with the law, stating:

"[A]t different times the lawyers may have said what they have thought about the law, the law that applies in this case. But I tell you that if what the lawyers have said about the law differs in any respect from what I've already told you or from what I will be telling you, you are to be governed by what the Court tells you about the law and not by what the lawyers have said about the law."

***35** (R. 1042.) The prosecutor's argument did not so infect the trial with unfairness that Belcher was denied due process. See Darden v. Wainwright, supra. Therefore, we find no error, much less, plain error, and Belcher is due no relief on this claim.

XII.

Belcher next argues that the State failed to present sufficient evidence to corroborate the accomplices' testimony in compliance with § 12-21-222, Ala. Code 1975 and that, therefore, the trial court erred in denying his motion for a judgment of acquittal. We disagree.

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

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003).

Section 12-21-222, Ala. Code 1975, states:

"A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

In addressing the scope of § 12-212-222, this Court has stated:

" '[I]t is not necessary that the accomplice should be corroborated with respect to every fact as to which he or she testifies, nor is it necessary that corroboration should establish all the elements of the offense.' 23 C.J.S. Criminal Law § 1369 (2006) (footnotes omitted). See also Arthur v. State, 711 So. 2d 1031, 1059 (Ala. Crim. App. 1996) (citations omitted) ('Corroborative evidence need not directly confirm any particular fact nor go to every material fact stated by the accomplice.'); Ferguson v. State, 814 So. 2d 925, 952 (Ala. Crim. App. 2000) (same). 'If the accomplice is corroborated in part, or as to some material fact or facts tending to connect the accused with the crime, or the commission thereof, this is sufficient to authorize an inference by the jury that he or she has testified truly even with respect to matters as to which he or she has not been corroborated, and thus sustain a conviction.' 23 C.J.S. Criminal Law § 1369 (2006) (footnotes omitted). See also Dykes v. State, 30 Ala. App. 129, 133, 1 So. 2d 754, 756–57 (1941) (citations omitted) (explaining that '[i]t has been repeatedly held, and advisedly so, that the corroboration of the testimony of an accomplice need not go to every material fact to which he testifies. If corroborated in some of such facts the jury may believe that he speaks the truth as to all.'). Further, circumstantial evidence may be sufficient to corroborate the testimony of an accomplice. Arthur, 711 So. 2d at 1059 (citing Jackson v. State, 451 So. 2d 435, 437 (Ala. Crim. App. 1984)). See also Steele v. State, 911 So. 2d 21, 28 (Ala. Crim. App. 2004) (explaining that accomplice testimony may be corroborated by circumstantial evidence).

***36** " 'Whether such corroborative evidence exists is a question of law to be resolved by the trial court, its probative force and sufficiency being questions for the jury.' Caldwell v. State, 418 So. 2d 168, 170 (Ala. Crim. App. 1981) (citations omitted)."

Green v. State, 61 So. 3d 386, 393 (Ala. Crim. App. 2010).

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" 'Corroborating evidence need not refer to any particular statement or fact testified to by an accomplice, but if it strengthens the probative criminating force of the accomplice's testimony and tends to connect the defendant with the commission of the offense, it is sufficient to warrant the submission of the case to the jury.' White v. State, 48 Ala. App. 111, 117, 262 So.2d 313, 319 (Ala. Crim. App. 1972) (citations omitted)."

Jackson v. State, 98 So. 3d 35, 41 (Ala. Crim. App. 2012). "While corroborating evidence need not be strong, it '... must be of substantive character, must be inconsistent with the innocence of a defendant and must do more than raise a suspicion of guilt.' " Booker v. State, 477 So. 2d 1388, 1390 (Ala. Crim. App. 1985) (quoting McCoy v. State, 397 So. 2d 577 (Ala. Crim. App. 1981)).

"The entire conduct of the accused may be surveyed for corroborative circumstances and if from them his connection with the offense may be fairly inferred the requirement of the statute is satisfied.

"And statements made by the defendant, in connection with other testimony, may afford corroboratory proof sufficient to sustain a conviction. 2 Wharton's Criminal Evidence, § 750.

"The suspicious conduct of the accused may furnish sufficient corroboration of the testimony of the accomplice."

Moore v. State, 30 Ala. App. 304, 306, 5 So. 2d 644, 645 (1941). "The requirement for corroboration of an accomplice's testimony cannot be satisfied by the testimony of still other accomplices." In re Hardley, 766 So. 2d 154, 157 (Ala. 1999).

Here, there was sufficient evidence to corroborate the accomplices' testimony. The knife that Steven testified he gave to Belcher before Samantha was taken into the woods had Belcher's DNA on it. Samantha's blood was found on a jacket discovered in Belcher's vehicle. Samantha's blood was also found on Belcher's cellular telephone. The trunk of Belcher's vehicle tested positive for blood. Witnesses testified that Belcher was near the area where Samantha's body was found the week before the body was discovered. Belcher was wandering around the areas with no shirt and covered in scratches. James Harvey testified that Belcher had scratches all over him and a red tint to his hands that Harvey thought was some type of blood that had been smeared. The area were Samantha's body was found was surrounded by briar bushes. Steven testified that he stole the battery out of Samantha's vehicle and took it to Belcher's house and put it in the dryer. There was testimony that a car battery was found in a dryer at Belcher's house.

After reviewing the record, we conclude that the State presented sufficient evidence corroborating the accomplices' testimony and, thus, complied with the requirements of § 12-21-222. Therefore, the circuit court properly denied Belcher's motion for a judgment of acquittal, and Belcher is due no relief on this claim.

XIII.

***37** Belcher next argues that his right to present a complete defense was violated when his counsel was prevented from arguing in closing that, "at best, Michael Belcher [was] guilty of murder just like Chylli Bruce and just like Steven George." (Belcher's brief at p. 76.)

The record shows that before closing argument the State made the following request:

"[PROSECUTOR]: You'd previously ordered that there be no discussion of the deals, if you will. No part of the defense should be that these Defendants got something and so Belcher is entitled to the same thing.

"That should not be part of any argument. It was no part of any evidence. It should be no part of the argument. And obviously, they -- You know, from my perspective -- from our perspective, it can be used to impeach their credibility. Right? But not comparatively as far as, they got it so he should get it also.

"[DEFENSE COUNSEL]: Judge, there is a reasonable inference. And that is evidence in front of the jury. I can't be restricted -- I can be restricted about talking about [Belcher] making an offer to settle for something. But as for those other two and what they got, I'm sorry, but I think that that's a reasonable inference from the evidence.

"THE COURT: I think you can say, this is their deal, this is what they got. The problem is when you say, and [Belcher] should get the same thing. Because this ain't about punishment; okay? You can point out their deals, their sentence and hammer their credibility all day long. But you can't say, give [Belcher] a life sentence during this phase of the trial."

(R. 1006-07.)

Defense counsel made the following argument in closing at the guilt phase:

> "And then we have Steven George's bargained-for testimony, similarly to Chylli Bruce except he stayed in jail considerably longer than a month. On the eve of trial when they were seeking the death penalty in his case, they came to him and said, Hey got a deal for you, you'll like it. You plead guilty to murder. We'll give you life, take the death penalty off the table. And you tell us about what happened."

(R. 1032.) Defense counsel further stated that Belcher was involved in the events that led to Samantha's death; however, he argued that Belcher had no intent to kill Samantha. In conclusion, counsel asked the jury to find Belcher guilty of felony murder. (R. 1034.) We also note that defense counsel had stated during opening that Belcher should be "treated the same way the DA's office" treated the other "killers in this case" and find Belcher guilty of murder and that the State did not object to this statement. (R. 414.)

"It is well recognized in Alabama that 'the trial judge in his discretion has control of arguments of counsel and this reviewing court will not interfere with that discretion except in cases of abuse.' " Ashbee v. Brock, 510 So. 2d 214, 216 (Ala. 1987) (quoting Dendy v. Eagle Motor Lines, Inc., 292 Ala. 99, 102, 289 So. 2d 603, 606 (1974)). The circuit court was correct that the sentence that Belcher should receive in comparison to his codefendants' sentences was not a proper subject of argument in the guilt phase of Belcher's trial. In addition, defense counsel was permitted to argue that Belcher should not be found guilty of capital murder and to point out the deals the accomplices had with the State. Although defense counsel was prohibited from directly asking the jury in closing to treat Belcher the same as the State had treated the accomplices, the import of that argument was nonetheless conveyed to the jury, and counsel had already made that argument in opening. Therefore, we find no error in the circuit court's restriction on Belcher's closing argument, and Belcher is not entitled to relief on this claim.

XIV.

***38** Belcher next argues that the circuit court's jury instructions were erroneous. Specifically, he argues that the circuit court erred in refusing to give instructions on intoxication and reckless manslaughter and that the court's reasonable-doubt instruction was erroneous.

> "A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So. 2d 1119, 1123 (Ala. Cr. App. 1992). When reviewing a trial court's instructions, ' "the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together." ' Self v. State, 620 So. 2d 110, 113 (Ala. Cr. App. 1992) (quoting Porter v. State, 520 So. 2d 235, 237 (Ala. Cr. App. 1987)); see also Beard v. State, 612 So. 2d 1335 (Ala. Cr. App. 1992); Alexander v. State, 601 So. 2d 1130 (Ala. Cr. App. 1992)."

Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999). "[W]e must view [the jury instructions] as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them." Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).

A.

First, Belcher argues that the circuit court erred in refusing to instruct the jury on voluntary intoxication and reckless manslaughter.

During the charge conference, Belcher argued that an instruction on manslaughter based on intoxication should be given. The court stated: "[Belcher] testified that he walked and somebody else killed her. This charge means -- says that he recklessly killed her. So I think that's inconsistent." (R. 1004.) Belcher's defense was that Steven killed Samantha.

> "A defendant is entitled to a charge on a lesser-included offense only if there is any reasonable theory from the evidence to support the charge. Ex parte Smith, 756 So. 2d 957, 963 (Ala. 2000). '[I]nstructions on intoxication and manslaughter are not required when they would be inconsistent with the defense strategy.' Maples v. State, 758 So. 2d [1] at 23 [(Ala. Crim. App. 1999)]."

Pilley v. State, 930 So. 2d 550, 562 (Ala. Crim. App. 2005). The circuit court's ruling was consistent with Pilley.

Moreover,

" ' "[v]oluntary drunkenness neither excuses nor palliates crime." ... "However, drunkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that

is essential to the crime." ' Fletcher v. State, 621 So. 2d 1010, 1019 (Ala. Crim. App. 1993) (citations and footnote omitted). 'While voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent essential to a malicious killing and reduce it to manslaughter.' McConnico v. State, 551 So. 2d 424, 426 (Ala. Crim. App. 1988). ' "[T]o negate the specific intent required for a murder conviction, the degree of the accused's intoxication must amount to insanity.' " Whitehead v. State, 777 So. 2d 781, 832 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 854 (Ala. 2000) (quoting Smith v. State, 756 So. 2d 892, 906 (Ala. Crim. App. 1998), aff'd, 756 So. 2d 957 (Ala. 2000)).

> " 'It is not merely, though, the consumption of intoxicating liquors or drugs that justifies an instruction on intoxication and the relevant lesser-included offenses. Pilley v. State, 930 So. 2d 550, 562 (Ala. Crim. App. 2005). Instead, there must be evidence of "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." § 13A–3–2(e)(1), Ala. Code 1975. " 'The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill.' " McGowan v. State, 990 So. 2d 931, 985 (Ala. Crim. App. 2003) (quoting Ex parte Bankhead, 585 So. 2d 112, 121 (Ala. 1991)). Stated differently, "the level of intoxication needed to negate intent must rise 'to the level of statutory insanity.' " Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (quoting Ware v. State, 584 So. 2d 939, 946 (Ala. Crim. App. 1991)).' "Smith v. State, 246 So. 3d 1086, 1099 (Ala. Crim. App. 2017). '[T]he court should charge on voluntary intoxication only where there is a sufficient evidentiary foundation in the record for a jury to entertain a reasonable doubt as to the element of intent.' Harris v. State, 2 So. 3d 880, 911 (Ala. Crim. App. 2007). '[E]vidence that the defendant ingested alcohol or drugs, standing alone, does not warrant a charge on intoxication.' Pilley v. State, 930 So. 2d 550, 562 (Ala. Crim. App. 2005). 'In order to determine whether the evidence is sufficient to necessitate an instruction and to allow the jury to consider the defense, we must view the testimony most favorably to the defendant.' Ex parte Pettway, 594 So. 2d 1196, 1200 (Ala. 1991). See also Ex parte McGriff, 908 So. 2d 1024, 1036 (Ala. 2004)."

***39** Floyd v. State, 289 So. 3d 337, 416-17 (Ala. Crim. App. 2017).

Although there was evidence indicating that, earlier in the evening, the group had been using methamphetamine, there was no evidence indicating that hours later Belcher was intoxicated to a degree that amounted to insanity. Nor was any evidence presented concerning the quantity of drugs or alcohol that Belcher had consumed. "[E]vidence that the defendant ingested alcohol or drugs, standing alone, does not warrant a charge on intoxication." Pilley v. State, 930 So. 2d at 562.

Therefore, the circuit court did not err in declining to instruct the jury on intoxication and manslaughter, and Belcher is due no relief on this claim.

B.

Belcher next argues that the circuit court's jury instruction on reasonable doubt was erroneous and violated the United States Supreme Court's holding in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), because, he says, it lessened the State's burden of proof. He argues:

> "[T]he trial court instructed the jury that the doubt which entitled Belcher to an acquittal 'must be an actual doubt' not a 'mere guess,' 'forced doubt,' 'capricious doubt,' or 'a fanciful, a vague, or a conjectural or a speculative doubt' and also equated proof beyond a reasonable doubt with an 'abiding conviction.' "

(Belcher's brief at pp. 96-97.) Belcher did not object to the court's instruction on reasonable doubt; therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

In Cage v. Louisiana, the United States Supreme Court held that use of the terms "grave uncertainty, actual substantial doubt, and moral certainty" when defining reasonable doubt allowed a juror to find guilt "based on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41, 111 S.Ct. 328. However, "it was not the use of any one of these terms, but rather the combination of all three, that rendered the charge unconstitutional in Cage." Haney v. State, 603 So. 2d 368, 411 (Ala. Crim. App. 1991). In discussing the evolution of the law subsequent to Cage, the Alabama Supreme Court has stated:

> "In Estelle v. McGuire, 502 U.S. 62, 72 and n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the United States Supreme Court made clear that the proper inquiry was whether there is a reasonable likelihood that the jury did apply the instruction in an unconstitutional manner, not whether

it could have applied it in an unconstitutional manner. In Victor [v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)], the United States Supreme Court emphasized that '[t]he constitutional question ... is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [In re] Winship[, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)] standard.' 511 U.S. at 6, 114 S.Ct. 1239. In discussing one of the jury instructions challenged in Victor, the United States Supreme Court recognized that it had stated that ' "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.' " Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317, 22 S.Ct. 662, 46 L.Ed. 922 (1902) (approving reasonable doubt instruction cast in terms of moral certainty).' 511 U.S. at 12, 114 S.Ct. 1239. The United States Supreme Court acknowledged that historically the phrase 'moral certainty' in a jury instruction meant 'the highest degree of certitude based on [the] evidence' but that the term may have lost its historical meaning over time. 511 U.S. at 11, 114 S.Ct. 1239. The United States Supreme Court, however, concluded that when an instruction equated moral certainty with proof beyond a reasonable doubt the instruction satisfied the requirements of the Due Process Clause and was constitutionally sufficient. The United States Supreme Court emphasized that, although it did not condone the use of the phrase 'moral certainty,' if the jury was instructed that its decision was to be based on the evidence in the case, then the jury understood that moral certainty was associated with the evidence of the case and no constitutional error occurred. Additionally, the United States Supreme Court addressed the use of the phrase 'substantial doubt' and emphasized that when that phrase was used in context to convey the existence rather than the magnitude of doubt there was no likelihood that jury applied the charge unconstitutionally."

***40** Ex parte Brown, 74 So. 3d 1039, 1052-53 (Ala. 2011).

The circuit court gave the following jury instruction on reasonable doubt:

"So let me give my best effort to give a definition of reasonable doubt. Sometimes it's not always -- sometimes it's said to be a self-explanatory phrase, but let me do my best. One can say that a doubt which would justify an acquittal -- that means a finding of not guilty -- must be an actual doubt. And it's not a mere guess. It's not a forced doubt. It's not a capricious doubt. It's not a fanciful, vague, or a conjectural or a speculative doubt. Is it an actual doubt. It is a doubt which arises from all of the evidence or from part of the evidence or from the lack of evidence or from contradictory evidence.

"And it is a doubt which remains after a careful consideration of all of the testimony in the case. A reasonable doubt is the doubt of a fair-minded juror who is honestly seeking the truth after a careful consideration, after an impartial consideration of all of the evidence in the case. So the State of Alabama is not required to convince you of [Belcher's] guilt beyond all doubt but beyond a reasonable doubt.

"Let me try to give it to you in an alternative fashion. Let me phrase it differently. Another way to say this is, after considering all of the evidence in this case if you have an abiding conviction of the truth of the charge made against [Belcher] and if you are firmly convinced from the evidence that [Belcher] is guilty of that charge, then it would be your duty to convict [Belcher] of that charge.

"On the other hand, if after comparing and considering all of the evidence in this case if your minds are left in such a condition that you cannot say that you have an abiding conviction of [Belcher's] guilt and if you cannot say that you are firmly convinced from the evidence that [Belcher] is guilty, then you are not convinced beyond a reasonable doubt. And in that event, it would be your duty to return a verdict of not guilty as to the particular charge."

(R. 1039-40.) This instruction was a proper statement of the law and did not run afoul of Cage. Therefore, the instruction was not error, much less plain error, and Belcher is due no relief on this claim.

Penalty-Phase Issues

XV.

Belcher next argues that the circuit court erred in refusing to grant a mistrial after, he says, a juror observed Belcher in "shackles" in violation of Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).[16]

***41** The record shows that, after closing statements in the penalty phase and after a break, the circuit court indicated that it had been informed about an incident that had occurred with one of the jurors. One of the deputies guarding Belcher stated that, when he was escorting Belcher out of the courtroom, one of the jurors was coming out of a service-elevator hallway.

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The deputy indicated that when he saw this juror he moved Belcher back into a stairwell. He said that Belcher was in handcuffs but that his department did not use "leg irons." The deputy did not know if this juror had observed Belcher in handcuffs. (R. 1187-88.) After this discussion, Belcher moved for a mistrial "in the penalty portion" of the trial. He argued that Belcher's presumption of innocence was destroyed by this juror's observation. (R. 1188.) The circuit court overruled the motion. (R. 1188.)

On appeal, Belcher argues that the circuit court erred in denying his motion for a mistrial without investigating whether the juror could be fair and impartial or issuing any kind of curative instruction. The State argues that it was not grounds for a mistrial when Belcher was seen in handcuffs going to and from the courtroom.

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

Peak v. State, 106 So. 3d 906, 915 (Ala. Crim. App. 2012).

In 1976, this Court held:

> "[I]t is not ground for a mistrial that an accused felon appear in the presence of the jury in handcuffs when such appearance is only a part of going to and from the courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried. Rhodes v. State, 34 Ala. App. 481, 41 So. 2d 623 [(1949)]."

Evans v. State, 338 So. 2d 1033, 1037 (Ala. Crim. App. 1976). See White v. State, 900 So. 2d 1249 (Ala. Crim. App. 2004); Johnson v. State, 542 So. 2d 341 (Ala. Crim. App. 1989); Thompson v. State, 462 So. 2d 777 (Ala. Crim. App. 1984); McMillan v. State, 432 So. 2d 508 (Ala. Crim. App. 1983); Taylor v. State, 372 So. 2d 387 (Ala. Crim. App. 1979). See also Allen v. Montgomery, 728 F.2d 1409, 1414 (11th Cir. 1984) ("The well established rule in this circuit is that 'a brief and fortuitous encounter of the defendant in handcuffs is not prejudicial and requires an affirmative showing of prejudice by the defendant.' Wright v. Texas, 533 F.2d 185, 187 (5th Cir. 1976); United States v. Bankston, 424 F.2d 714 (5th Cir. 1970); Hardin v. United States, 324 F.2d 553 (5th Cir. 1963).").

In this case, the record indicates that one juror might have seen Belcher in handcuffs as he was escorted by a deputy during trial. The encounter was brief. Based on the record in this case, we cannot say that the circuit court abused its discretion in denying Belcher's motion for a mistrial. Belcher is due no relief on this claim.

XVI.

Belcher next argues that the circuit court's jury instructions in the penalty phase were erroneous. He lists several different grounds in support of this contention.

> "When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them. Ingram v. State, 779 So. 2d 1225 (Ala. Cr. App. 1999). 'The absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the defendant's failure to object does weigh[ ] against his claim of prejudice.' Ex parte Boyd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998)."

***42** Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).

A.

First, Belcher argues that the circuit court repeatedly minimized the jury's verdict in the penalty phase by stating that its verdict was advisory. Because Belcher did not object to the court's statements in this regard, we review this claim for plain error. Rule 45A, Ala. R. App. P.

> "Neither the prosecutor's statement nor the trial court's instructions improperly described the role assigned to the jury. See Romano v. Oklahoma, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)(' "[T]o establish a Caldwell [v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985),] violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." ' (quoting Dugger v.

Adams, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989))); see also Bohannon v. State, 222 So. 3d 457, 519 (Ala. Crim. App. 2015)(citing Harich v. Wainwright, 813 F.2d 1082, 1101 (11th Cir. 1987), and Martin v. State, 548 So. 2d 488 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 496 (Ala. 1989), for the proposition that comments that accurately explain the respective functions of the judge and jury are permissible under Caldwell so long as the significance of the jury's recommendation is adequately stressed). In Phillips's case, neither the prosecutor nor the trial court misrepresented the effect of the jury's sentencing recommendation. Their remarks clearly defined the jury's role, were not misleading or confusing, and were correct statements of the law."

Ex parte Phillips, 287 So. 3d 1179, 1226-27 (Ala. 2018).

The circuit court's remarks that the jury's verdict was a recommendation were not misleading and were correct statements of the law at the time Belcher was sentenced.[17] We find no error, much less plain error, in the remarks. Therefore, Belcher is due no relief on this claim.

B.

Second, Belcher argues that the circuit court erred in refusing to instruct the jury concerning the proper consideration and use of victim-impact evidence. Specifically, Belcher argues that the jury was not instructed that victim-impact evidence could not be used to establish a nonstatutory aggravating circumstance.

Belcher filed a pretrial motion to limit the introduction of victim-impact evidence at the penalty phase and for the court to instruct the jury on the role of victim-impact testimony. (C. 74.) The circuit court deferred ruling on the motion until the penalty phase. (C. 82.) At the conclusion of the jury instructions in the penalty phase, Belcher did not object to the court's failure to instruct on the use of victim-impact evidence. Indeed, Belcher's counsel indicated that he had no objections to the instructions given by the circuit court. (C. 1205.) Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

***43** This Court has held that a circuit court does not err in failing to give a jury instruction on the use of victim-impact evidence. See Thompson v. State, 153 So. 3d 84, 169 (Ala. Crim. App. 2012).

"Decay argues on appeal that juries do not understand the role of victim-impact evidence or how it works in the sentencing scheme and that an additional instruction was needed. However, the instruction proffered by Decay did nothing more than to inform the jury that they may not consider victim-impact evidence as an aggravating circumstance. The instructions given to the jury made that clear."

Decay v. State, 2009 Ark. 566, 352 S.W.3d 319, 330 (2009).

The instructions here also made clear that the jury was limited to considering only the aggravating circumstances about which it had been instructed. There was no chance that the jury could have believed that it could consider the victim-impact evidence as a nonstatutory aggravating circumstance. For these reasons, there was no error, much less plain error, in the court's failure to give an instruction on the use of victim-impact evidence, and Belcher is due no relief on this claim.

C.

Third, Belcher argues that the circuit court erroneously failed to instruct the jury that its findings on mitigating circumstances did not have to be unanimous. Specifically, he argues that the United States Supreme Court in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), held that the jury must be given clear instructions that their findings on mitigation do not have to be unanimous. Because Belcher did not object to the court's failure to instruct the jury that its findings on mitigation did not have to be unanimous, we review this claim for plain error. Rule 45A, Ala. R. App. P.

"The appellate courts of this state have consistently held, since the United States Supreme Court's decision in Mills [v. Maryland, 486 U.S. 367 (1988)], that as long as there is no 'reasonable likelihood or probability that the jurors believed that they were required to agree unanimously on the existence of any particular mitigating circumstances,' there is no error in the trial court's instruction on mitigating circumstances. Freeman [v. State], 776 So. 2d [160] at 195 [(Ala. Crim. App. 1999)]. See also Ex parte Martin, 548 So. 2d 496 (Ala. 1989), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989); Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998); Brown v. State, 686 So. 2d 385 (Ala.

Cr. App. 1995); Rieber v. State, 663 So. 2d 985 (Ala. Cr. App. 1994), aff'd, 663 So.2d 999 (Ala.), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995); Holladay v. State, 629 So.2d 673 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 555 (1994)."

Tyson v. State, 784 So. 2d 328, 351 (Ala. Crim. App. 2000).

The circuit court instructed the jury several times that its findings on the aggravating circumstances had to be unanimous. Although it did not alternatively instruct the jury that its findings on mitigating circumstances did not have to be unanimous, the court said that if "you" believe that evidence is mitigating "you" can consider it as mitigation. In rejecting a similar argument in Kuenzel v. State, 577 So. 2d 474 (Ala. Crim. App. 1990), this Court stated:

> ***44** "We have examined the complained of portion of the trial judge's charge on mitigating circumstances and find that it is in accordance with the pattern jury instruction and in accordance with § 13A–5–45(g)[, Ala. Code 1975]. Therefore, we find no plain error. [Ex parte] Harrell, [470 So. 2d 1309 (Ala. 1985)]. The basis of the defendant's argument lies in the fact that the trial judge 'used the collective "you" throughout its instructions.' The defendant contends that '[i]t would be perfectly reasonable for a juror to conclude ... that "you" means all of you, unanimously, when determining whether a mitigating circumstance existed.' Appellant's brief at 92.
>
> "We reject this contention as did the Alabama Supreme Court in Ex parte Martin, 548 So. 2d 496, 499 (Ala.), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989):
>
> > " 'The charge to the jury in the instant case was in accordance with the pattern jury instruction and in accordance with Ala. Code 1975, § 13A–5–45(g). The jury was told that the defendant had the burden of injecting an issue of mitigating circumstances, but that once it was injected the state had the burden of disproving the factual existence of any mitigating circumstances by a preponderance of the evidence. There was no jury charge or verdict form to indicate that at least 10 jurors must agree on the existence of a mitigating circumstance.
> >
> > " 'We have considered the trial court's charge to the jury in light of the holding in Mills and are of the opinion that the jurors could not have reasonably believed that they were required to agree unanimously on the existence of any particular mitigating factor.' "

577 So. 2d at 521.

For these reasons, we find no plain error in the circuit court's jury instructions on mitigating circumstances. Therefore, Belcher is due no relief on this claim.

XVII.

Belcher next argues that his death sentence violated the United States Supreme Court's decisions in Hurst v. Florida, 577 U.S. 92, 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). Specifically, he argues that, "in a weighing state like Alabama, Hurst requires the jury to make a binding unanimous finding both as to the aggravating circumstances and whether those circumstances outweigh any mitigation." (Belcher's brief at p. 95.) This argument is meritless.

> "Bohannon ignores the fact that the finding required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama. Nothing in Apprendi [v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),] Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the 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."

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

The jury's unanimous verdict in the guilt phase that Belcher committed the murder during the course of a kidnapping rendered Belcher eligible to receive a sentence of death. Also, the jury in the penalty phase utilized special verdict forms and indicated that they unanimously found that the murder was especially heinous, atrocious, or cruel as compared to other capital murders. Those findings by the jury complied with the Hurst holding, and Belcher is due no relief on this claim.

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XVIII.

***45** Belcher next argues, in one paragraph in his brief, that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutional because, he says, it is vague. Belcher appears to argue that § 13A-5-49(8), Ala. Code 1975, is unconstitutional on its face. Because Belcher did not challenge the use of this aggravating circumstance or argue that § 13A-5-49(8) was unconstitutionally vague on its face in the circuit court, we review this claim for plain error. Rule 45A, Ala. R. App. P.

> "To the extent that Ingram is claiming that the 'especially heinous, atrocious or cruel' statutory aggravating circumstance found in § 13A–5–49(8), is unconstitutionally vague and overbroad on its face, that contention is without merit. See Freeman v. State, 776 So. 2d 160 (Ala. Crim. App. 1999); Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988), aff'd, 551 So. 2d 1125 (Ala. 1989), judgment vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991); Hallford v. State, 548 So. 2d 526 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989)."

Ingram v. State, 779 So. 2d 1225, 1277 (Ala. Crim. App. 1999).

Moreover, the circuit court gave detailed instructions on this aggravating circumstance in the penalty phase that were consistent with the Alabama Supreme Court's holding in Ex parte Kyzer, 399 So. 2d 330 (Ala. 1981). Using a special verdict form, the jury unanimously found that this aggravating circumstance applied in this case. Accordingly, Belcher's claim has no merit, and he is due no relief.

XIX.

Belcher next argues that relying on the felony of kidnapping as both an element of the capital-murder offense and as an aggravating circumstance violates state and federal law. Specifically, he argues that double counting the crime of kidnapping "failed to narrow the class of cases eligible for the death penalty." (Belcher's brief at pp. 98-99.) Belcher did not raise this issue in the circuit court. Thus, we review it for plain error. Rule 45A, Ala. R. App. P.

> "Contrary to [the appellant's] assertions, there 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). Because double counting is constitutionally permitted and statutorily required, Vanpelt is not entitled to any relief on this issue. § 13A–5–45(e), Ala. Code 1975."

***46** Vanpelt v. State, 74 So. 3d 32, 89 (Ala. Crim. App. 2009). See Muniz v. State, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). There was no error, much less plain error, in using kidnapping as both an element of the capital-murder offense and as an aggravating circumstance, and Belcher is due no relief on this claim.

XX.

Belcher next argues that his death sentence is unconstitutional because, he says, it is disproportionate to the penalties imposed on his codefendants who, he says, received significantly lesser sentences. Belcher relies on the case of Beck v. State, 396 So. 2d 645 (Ala. 1980),[18] to support his argument.

As stated at the beginning of this opinion, there were five defendants charged with Samantha's murder. Bruce pleaded guilty to felony murder in exchange for a 20-year sentence. Steven pleaded guilty to murder in exchange for a sentence of life imprisonment with the possibility of parole. (R. 584; C. 390.) In a joint trial, Alyssa and Marcus were convicted of felony murder, and each was sentenced to 30 years' imprisonment. The record also shows that immediately before jury selection the State offered Belcher a plea deal: If Belcher pleaded guilty to capital murder it would recommend a sentence of life imprisonment without the possibility of parole. Belcher rejected that deal but offered to plead to felony murder in exchange for a sentence of life imprisonment with the possibility of parole. The State rejected Belcher's counteroffer.

> " '[A] defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement ....' State v. O'Dell, 45 Ohio St. 3d 140, 147, 543 N.E.2d 1220 (1989). A state may, however, 'encourage a guilty plea by offering substantial benefits in return for the plea.' Corbitt v. New Jersey, 439 U.S. 212, 219, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). 'The standard of punishment is necessarily different for those who plead and for those who go to trial. For those who plead, that fact itself is a consideration in sentencing, a consideration that is not present when one is found guilty by a jury.' Id. at 224, 99 S.Ct. 492, fn. 14.
>
> "....
>
> "Several federal circuit courts of appeal have held that a sentencing difference between codefendants raises no presumption of a penalty for standing trial. United States v. Sanchez Solis, 882 F.2d 693, 699 (2d Cir. 1989) (rejecting defendant's argument that he was 'penalized for exercising his right to a trial' because of a 'disparity in sentences' between the defendant and his codefendants); United States v. Chase, 838 F.2d 743, 751 (5th Cir. 1988) ('However, a codefendant's sentence is immaterial to the propriety of a sentence imposed on a defendant'); United States v. Frost, 914 F.2d 756, 774 (6th Cir. 1990) ('Mere disparity in sentences is insufficient to show that the sentencing court penalized Frost and Griffin for going to trial'); United States v. Guerrero, 894 F.2d 261, 267 (7th Cir. 1990) ('A mere showing of disparity in sentences among codefendants did not, alone, demonstrate any abuse of discretion'); United States v. Granados, 962 F.2d 767, 774 (8th Cir. 1992) ('A defendant cannot rely upon his co-defendant's sentence as a yardstick for his own; a sentence is not disproportionate just because it exceeds a co-defendant's sentence'); United States v. Whitecotton, 142 F.3d 1194, 1200 (9th Cir. 1998) ('Disparity in sentences between codefendants is not sufficient ground to attack a proper guidelines sentence'); United States v. Jackson, 950 F.2d 633, 637–638 (10th Cir. 1991) (rejecting claim of disparate sentences 'based solely on the lesser sentence imposed on his codefendant').
>
> ***47** "....
>
> "Two state supreme courts have reached conclusions in accord with the federal judiciary. See State v. Gregory, 340 N.C. 365, 424, 459 S.E.2d 638 (1995) ('Disparity in the sentences imposed upon codefendants does not result in cruel and unusual punishment and is not unconstitutional'); People v. Caballero, 179 Ill. 2d 205, 217, 227 Ill. Dec. 965, 688 N.E.2d 658 (1997) ('A sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial')."

State v. Anderson, 151 Ohio St. 3d 212, 216-17, 87 N.E.3d 1203, 1208-09 (2017).

Moreover, in Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003), this Court stated:

> " 'The law does not require that each person involved in a crime receive the same sentence. Wright v. State, 494 So. 2d 726, 739 (Ala. Crim. App. 1985) (quoting Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)). Appellate courts should "examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any." Beck v. State, 396 So. 2d 645, 664 (Ala. 1980). However, the sentences received by codefendants are not controlling per se, Hamm v. State, 564 So. 2d 453, 464 (Ala. Crim. App. 1989), and this Court has not required or directed that every person implicated in a crime receive the same punishment. Williams v. State, 461 So. 2d 834, 849 (Ala. Crim. App. 1983), rev'd on other grounds, 461 So. 2d 852 (Ala. 1984). " 'There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence.' " Id. (quoting Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979)).'
>
> "Ex parte McWhorter, 781 So. 2d 330, 344 (Ala. 2000). 'Because of "the need for individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965,

57 L.Ed.2d 973, 990 (1978), the focus must be on the defendant.' Wright v. State, 494 So. 2d 726, 740 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 745 (Ala. 1986)."

891 So. 2d at 994.

In its sentencing order, the circuit court stated that it considered as a nonstatutory mitigating circumstance the sentences imposed on Belcher's "co-defendants pursuant to plea agreements." (C. 169.) The testimony at Belcher's trial shows that Belcher and Steven dragged Samantha into the woods. Steven testified that he returned without Belcher and that Samantha was still alive when he left the woods. Belcher was seen near the area where the body was discovered with scratches all over his body and a red tint to his hands that one witness said looked like some type of blood. Based on the evidence presented, Belcher's sentence was not disproportionate to the sentences received by his fellow codefendants. Therefore, Belcher is due no relief on this claim.

XXI.

In accordance with Rule 45A, Ala. R. App. P., we have examined the record for any plain error with respect to Belcher's capital-murder conviction, whether or not brought to our attention or to the attention of the circuit court, and we find no plain error or defect in the guilt phase of the proceedings. In accordance with § 13A-5-53, Ala. Code 1975, this Court must also review the propriety of Belcher's sentence of death. Section 13A-5-53(a) states:

> ***48** "In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence."

We find no error adversely affecting Belcher's rights during the penalty phase of the trial or the sentencing proceedings before the circuit court.

In its sentencing order, the circuit court, in accordance with the jury's guilt-phase and penalty-phase verdicts, found the existence of two aggravating circumstances: (1) that the murder was committed during the course of a kidnapping, § 13A-5-49(4), Ala. Code 1975; and (2) that the murder was especially heinous, atrocious, or cruel as compared to other capital murders. § 13A-5-49(8), Ala. Code 1975. In regard to this aggravating circumstance, the court stated, in part:

> "The [State] also presented evidence from Investigator Richard Wilkins, who had testified during the guilt phase. Inv. Wilkins testified that he had been an investigator in the Violent Crime's Unit since 2012. He testified that no other case in his experience and memory demonstrated the level of violence, cruelty and torture as found in this case. In doing so, the State presented evidence ... the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."

(C. 161.)

The circuit court found one statutory mitigating circumstance to exist: that Belcher had no significant history of prior criminal activity, § 13A-5-51(1), Ala. Code 1975. It found insufficient evidence that the offense was committed while Belcher was under the influence of extreme mental or emotional disturbance, § 13A-5-51(2), Ala. Code 1975, and that Belcher did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law, § 13A-5-51(6), Ala. Code 1975, explaining:

> "The Court has considered the opinion that [Belcher] suffers from mild neuro-cognitive disorder. However, the Court is not convinced from the evidence that any such disorder rises to the level of being an extreme mental or emotional disturbance such that it is a statutory mitigating circumstance.
>
> "....

"... [T]he Court has considered the opinion that [Belcher] suffers from mild neuro-cognitive disorder. However, the Court is not convinced from the evidence that any such disorder rises to the level of substantially diminishing [Belcher's] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, such that it is a statutory mitigating circumstance. The Court finds that [Belcher's] disorder is, instead, a non-statutory mitigating circumstance. Moreover, the Court has considered the evidence relating to [Belcher's] drug usage -- drug usage on and during November 1 and 2, 2015, as well as drug usage and habits prior to those dates. The Court is not, however, convinced from the evidence that any such drug usage rises to the level of substantially diminishing [Belcher's] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, such that it is a statutory mitigating circumstance. The Court finds that [Belcher's] drug usage is, instead, a non-statutory mitigating circumstance."

***49** (C. 166-67.)

The court also found the following to be nonstatutory mitigating circumstances:

"[Belcher's] desire to maintain a strong relationship with his daughter and his family, and desire of his daughter and family to maintain a strong relationship with him;

"[Belcher's] good behavior as an inmate;

"[Belcher's] ability to be a productive prisoner in teaching mechanic skills to other prisoners and in leading Bible studies;

"[Belcher's] mild neuro-cognitive disorder;

"[Belcher's] drug usage;

"The sentences of co-defendants pursuant to plea agreements, particularly the split sentence of co-defendant Bruce;

"The pleas of mercy on [Belcher's] behalf, made by his attorneys and family members. While it is impossible to quantify a plea for mercy, this Court finds that [Belcher] sufficiently raised the issue, and thus this Court has given [Belcher's] plea for mercy consideration."

(C. 168-69.)

The record shows that Belcher's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975. We have independently weighed the aggravating circumstances and the mitigating circumstances, and we are convinced that the death penalty was the appropriate sentence for Belcher. See § 13A-5-53(b)(2), Ala. Code 1975. Finally, we find that Belcher's sentence of death is neither excessive nor disproportionate to penalties imposed in similar cases. See § 13A-5-53(b)(3), Ala. Code 1975. Belcher was convicted of murdering Samantha Payne during the course of a kidnapping, a capital offense as defined in § 13A-5-40(a)(1), Ala. Code 1975, and similar crimes have been punished capitally throughout the state. See Lewis v. State, 24 So. 3d 480, 540 (Ala. Crim. App. 2006), and the cases cited therein.

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

AFFIRMED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.

All Citations

--- So.3d ----, 2020 WL 7382535

Footnotes

1 Five individuals were indicted for their roles in Samantha's murder: Michael Belcher, Chylli Bruce, Steven George, Alyssa Watson, and Marcus George. At the time of Belcher's trial, Bruce had pleaded guilty to felony murder in exchange for a 20-year sentence that would be split to require her to serve 5 years in prison. (C. 388.) The circuit court conditionally accepted Bruce's plea and delayed sentencing her until after she testified at her codefendants' trials. Steven George pleaded guilty to murder in exchange for a sentence of life imprisonment with the possibility of parole. (R. 584; C. 390.) The court also conditionally accepted Steven's plea and delayed his sentencing.
In a joint trial conducted before Belcher's trial, Alyssa Watson and Marcus George were both convicted of felony murder and kidnapping. On direct appeal, after finding a double-jeopardy violation, this Court, after consolidating the appeals, affirmed the felony-murder convictions but remanded the cases for the circuit court to set aside the kidnapping convictions.

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See Watson v. State and George v. State, [Ms. CR-18-0377 and CR-18-0435, January 10, 2020] ––– So. 3d –––– (Ala. Crim. App. 2020). Both Steven George and Bruce testified at Watson and Marcus George's joint trial.

2 Though Marcus and Steven share the same surname, Steven testified that they are not related. (R. 552.)

3 " 'Death qualification' refers to the exclusion of 'the so-called "Witherspoon [v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)]-excludable[s]" ' from a jury panel. See Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 1761, 90 L.Ed. 2d 137 (1986). 'Witherspoon-excludable,' in turn, refers to a prospective juror whose conscientious or religious scruples toward the imposition of the death penalty would ' "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' "

United States v. Salamone, 800 F. 2d 1216, 1219 n. 3 (3d Cir. 1986).

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

5 We note that the State used its third peremptory strike to remove P.G.

6 We note that Belcher used his seventh peremptory strike to remove R.L.

7 We note that the State used its second peremptory strike to remove S.B.

8 In Ex parte Phillips, 287 So. 3d 1179 (Ala. 2018), Chief Justice Stuart, writing in a special concurrence joined by two members of the Alabama Supreme Court, stated: "For the reasons set forth above, I would overrule Ex parte Bankhead[, 585 So. 2d 112 (Ala. 1991),] and its progeny in this regard and now hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for the first time on appeal." 287 So. 3d at 1243.

9 "It is the appellant's duty to provide this Court with a complete record on appeal." Knight v. State, 621 So. 2d 394, 395 (Ala. Crim. App. 1993).

10 "Information from a juror questionnaire is entitled to the same weight as information obtained during voir dire examination. ..." Largin v. State, 233 So. 3d 374, 404 (Ala. Crim. App. 2015).

11 The coroner testified that Samantha's body had a metal rod in its left femur. (R. 926.)

12 On page 721, Belcher objected to statements in the videotape about what Samantha told her mother about her movements. On page 724, the prosecutor mentioned that Belcher said in the interview that he was "trying to be cooperative." On page 993-95, the prosecutor questioned Belcher about statements he made to police concerning his conduct while at the police station. On page 1019, the prosecutor states in closing that Belcher's story about what happened was "outrageous."

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

14 "Questioning a suspect for three hours is not, in itself, coercive. See State v. Rousan, 961 S.W.2d 831, 846 (Mo. 1998) (stating, in a case where the appellant had been in police custody for six hours, that '[t]he length of appellant's interrogation was not coercive, in and of itself')."

Thompson v. State, 153 So. 3d 84, 111 (Ala. Crim. App. 2012).

15 In Alabama, only a juvenile has the right to speak to a parent at the time that he or she is interviewed by police. See Rule 11(B), Ala. R. Juv. P. As already noted, Belcher was 31 years old at the time of his statement to police.

16 "In Holbrook v. Flynn, a habeas corpus petitioner complained about the effect on the jury of the presence of a security force consisting of four uniformed state troopers, two deputy sheriffs, and six committing-squad officers. The case dealt with a jury's determination of the defendant's guilt derived from the need for such a large security squad. The Court found that it 'simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section. Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." ' 475 U.S. at 571, 106 S.Ct. 1340."

Jackson v. State, 169 So. 3d 1, 103 (Ala. Crim. App. 2010).

17 "The jury's sentencing verdict is no longer a recommendation. Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury." DeBlase v. State, 294 So. 3d 154, 173 n.1 (Ala. Crim. App. 2018). This amendment applies to any "defendant who is charged with capital murder after April 11, 2017...." § 13A-5-47.1, Ala. Code 1975. Belcher was indicted in January 2016.

18 The full requirements of Beck are now codified in § 13-5-53, Ala. Code 1975, and will be discussed at the end of this opinion.

End of Document

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APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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February 26, 2021

CR-18-0740 **Death Penalty**

Michael David Belcher v. State of Alabama (Appeal from Tuscaloosa Circuit Court: CC16-161)

NOTICE

You are hereby notified that on February 26, 2021, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. M. Bradley Almond, Circuit Judge
Hon. Magaria H. Bobo, Circuit Clerk
Alicia A. D'Addario, Attorney
Adam Bret Murphy, Attorney
Angela Setzer, Attorney
Morgan B. Shelton, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

May 21, 2021

1200374

Ex parte Michael David Belcher. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Marcus David Belcher v. State of Alabama) (Tuscaloosa Circuit Court: CC-16-161; Criminal Appeals : CR-18-0740).

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 May 21, 2021:

Writ Denied. No Opinion. Sellers, J. - Parker, C.J., and Bolin, Shaw, Wise, Bryan, 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 21st day of May, 2021.

Julia Jordan Weller

Clerk, Supreme Court of Alabama