Appendix A

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Court of Criminal Appeals of Alabama.

James OSGOOD

v.

STATE of Alabama

CR-13-1416

|

Oct. 21, 2016

Synopsis

Background: Defendant was convicted in the Circuit Court, Chilton County, No. CC-12-27, of capital murder and was sentenced to death. Defendant appealed.

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

defendant's statement during interview was not unequivocal invocation of right to counsel under *Miranda*;

interrogating officers did not induce confession with promises of leniency, and thus did not render confession involuntary;

prospective juror whose aunt was rape victim was not required to be removed for cause;

prospective juror who stated belief in "eye for an eye" was not required to be removed for cause;

trial court acted within its discretion in removing for cause prospective juror who expressed reservations about imposing death penalty;

jury instruction regarding consideration of nonstatutory mitigating evidence was improper;

jury instruction regarding weighing of mitigation evidence was improper; and

instructional errors constituted plain error, thus requiring reversal and new penalty-phase hearing.

Convictions affirmed; sentences reversed; remanded with instructions.

Appeal from Chilton Circuit Court (CC-12-27); Sibley G. Reynolds, Judge

Attorneys and Law Firms

Randall S. Susskind, Jennae R. Swiergula, and Alison N. Mollman, Equal Justice Initiative, Montgomery, for appellant.

Luther Strange, atty. gen., and J. Clayton Crenshaw, William D. Dill, and John A. Selden, asst. attys. gen., for appellee.

Opinion

BURKE, Judge.

***1** James Osgood was convicted of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A–5–40(a)(3), Ala. Code 1975. The jury unanimously recommended that Osgood be sentenced to death. The trial court accepted the jury's recommendation and sentenced Osgood to death. This appeal follows.

Facts

The evidence presented at trial revealed that on October 13, 2010, Tracy Brown was found dead in her home. Brown's landlord made the discovery after being contacted by Brown's employer when the employer became concerned because Brown had failed to show up for work. Officer David Moses of the Chilton County Sheriff's Department testified that he and his partner were the first to arrive on the scene. Officer Moses testified that he went into Brown's bedroom and saw Brown lying on the floor next to her bed. According to Moses, Brown was naked and had stab wounds to her back as well as a gruesome wound to her neck causing him to believe that she had been murdered. Moses stated that he then left the room, secured the scene, and called other officers for assistance.

Lieutenant Shane Lockhart, a detective with the Chilton County Sheriff's Department, testified that he was the lead investigator on the case. After eliminating one potential suspect, Lockhart learned that Brown had last been seen in the company of Osgood and Osgood's girlfriend, Tonya

Vandyke. Lockhart eventually interviewed Osgood early the next morning after Osgood voluntarily agreed to come to the sheriff's office to speak with Lockhart. During that interview, Osgood told Lockhart that he and Vandyke had been with Brown the previous day. Osgood stated that the three of them had gone to Brown's place of employment to pick up her paycheck and then ran various errands, including cashing the check, paying Brown's electric bill, and driving to a nearby town in order to look at a vehicle that Brown was considering purchasing. Further testimony from various witnesses corroborated Osgood's story regarding their activities that morning.

Lockhart testified that he then asked Osgood whether he had ever had sex with Brown. Osgood initially denied any type of sexual relationship with Brown. However, after further questioning, Osgood admitted to Lockhart that he and Vandyke had engaged in a "threesome" with Brown on the day she was murdered. (R. 760.) Osgood explained to Lockhart that Brown first performed oral sex on him. Osgood told Lockhart that Brown then got on her hands and knees on her bed and performed oral sex on Vandyke while Osgood had both vaginal and anal sex with Brown from behind. Osgood stated to Lockhart that he and Vandyke had agreed to lie about the sexual encounter because Vandyke and Brown were cousins and Vandyke was ashamed of their behavior.

Lockhart also testified that a handgun was found at the crime scene. When asked about the gun, Osgood admitted that he and Vandyke brought the gun to Brown's home. According to Osgood, they gave the gun to Brown for protection because Brown had previously told them that a man in her trailer park was harassing her. Lockhart further testified that, during the interview, he observed a cut on the small finger of Osgood's right hand. According to Lockhart, people often get that type of wound when they stab another person "because of the slickness of the knife once blood gets on it." (R. 764.) Lockhart stated that he had seen similar wounds on suspects in previous investigations in which a victim had been stabbed. Although Osgood steadfastly denied killing Brown, Lockhart placed him under arrest for Brown's murder. Lockhart testified that he then obtained search warrants for Osgood's residence and vehicle and began the process of collecting additional physical evidence.

***2** Approximately one month later, on November 16, 2010, Osgood, who was incarcerated in the Chilton County jail, asked the jail staff about the location of his vehicle and cellular telephone. Lockhart learned about his request and went to the jail along with Captain Erick Smitherman to talk with Osgood. Prior to this encounter, Lockhart had obtained a written statement from a woman named Tiffany Matthews, who was incarcerated with Vandyke. According to Matthews's statement, Vandyke admitted that she and Osgood were involved in Brown's murder and gave Matthews and another prisoner a detailed description of the killing. (C. 573-76.) Lockhart brought a copy of that statement to the jail on November 16 and read portions of it to Osgood. However, Lockhart changed the pronouns in the statement in order to make it seem like the statement was written by Vandyke. Lockhart stated that Osgood asked him to read the statement a second time, after which Osgood "put his head down, and appeared to be in deep thought." (R. 787.) After a short time, Osgood "looked up and said, you might want to get a pen and a piece of paper." (R. 788.)

According to Lockhart, Osgood then began to give him a detailed description of Brown's killing and what led up to it. A video recording of the November 16, 2010, interview was admitted into evidence as State's exhibit 36 and was played for the jury. (R. 825.) In the video, Osgood told Lockhart that he had seen an episode of the television program "CSI" in which two brothers kidnapped a person, held them in a cage, and tortured them. (R. 788-89.) Osgood told Lockhart that "for a long time he had watched stuff like that and could see himself doing something like that for pretty much as long as he could remember." (R. 789.) Osgood told Lockhart that he discussed his fantasies with Vandyke and learned that she had similar fantasies as well. Osgood and Vandyke then began to form a plan in which they would find "a bad person, like somebody who had molested a child" to be their victim or "maybe going to Wal-Mart and snatching someone at random." (R. 789.) However, they eventually decided that Brown would be their victim.

Osgood then began to give Lockhart details about Brown's murder. Osgood stated that after he, Brown, and Vandyke finished running errands, the three returned to Brown's trailer and engaged in conversation. A short time later, Brown and Vandyke went into the hallway near the bathroom, at which point Vandyke slapped Brown in the face. According to Osgood, the slap was a pre-planned signal for him and Vandyke to set their plan in motion.

Osgood stated that he approached Brown from behind and put her in a choke hold until she was almost unconscious. Osgood and Vandyke then took Brown into the bedroom where Osgood forced Brown to perform oral sex on him while

Vandyke pointed a gun at her. Osgood stated that he told Vandyke to shoot Brown if Brown bit his penis. Brown then asked if she could use the bathroom at which point Osgood followed her into the bathroom while she defecated. When the two returned to the bedroom, Vandyke undressed and sat at the head of the bed and told Brown to perform oral sex on her. Osgood explained that he was having both vaginal and anal sex with Brown while she was performing oral sex on Vandyke.

According to Osgood, Brown asked to use the bathroom again. Osgood stated that he again accompanied Brown to the bathroom and made her perform oral sex on him while she was defecating. Osgood told the detectives that, after Brown finished using the bathroom, she attempted to escape by running out of the back door of the trailer. Osgood stated that he prevented the escape by grabbing Brown's hair and dragging her back into the bedroom.

Osgood then told detectives that he then resumed having sex with Brown until he and Vandyke looked at each other and shook their heads. At that point, Osgood stated that he took his knife out of his sock and cut Brown on the side of her neck in an attempt to cut her jugular vein. Osgood told detectives that he began to get scared because Brown was not dying fast enough. Osgood admitted that he then stabbed Brown in the back and continued to cut her throat. According to Osgood, he apologized to Brown, told her that it "was nothing against her," and that she just "needed to quit fighting and just let go." (State's Exhibit 36.) Osgood stated that after Brown was dead, he went into Brown's bathroom and took a shower. Afterwards, he and Vandyke left the trailer, went to Vandyke's house, and had sex with each other.

***3** Osgood raises several issues in his brief to this Court, some of which were not raised at trial and are consequently not preserved for appellate review. However, because Osgood was sentenced to death, his failure to object at trial does not preclude this Court from reviewing those issues for plain error. Rule 45A, Ala. R. App. P., provides:

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

In Wilson v. State, 142 So.3d 732, 751 (Ala. Crim. App. 2010) (opinion on return to remand), this Court stated:

> " '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. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(quoting United States v. Frady, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). '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). Under the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial. See Ex parte Walker, 972 So.2d 737, 752 (Ala. 2007)(recognizing that the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error); Thomas v. State, 824 So.2d 1, 13 (Ala. Crim. App. 1999)(recognizing that to rise to the level of plain error, an error must have affected the outcome of the trial), overruled on other grounds, Ex parte Carter, 889 So.2d 528 (Ala. 2004). That is, the appellant must establish that an alleged error, ' " 'not only seriously affect[ed] [the appellant's] "substantial rights," but ... also ha[d] an unfair prejudicial impact on the jury's deliberations.' " ' Ex parte Brown, 11 So.3d 933, 938 (Ala. 2008)(quoting Ex parte Bryant, 951 So.2d 724, 727 (Ala. 2002), quoting in turn Hyde v. State, 778 So.2d 199, 209 (Ala. Crim. App. 1998)). Only when an error is 'so egregious ... that [it] seriously affects the fairness, integrity or public reputation of judicial proceedings,' will reversal be appropriate under the plain-error doctrine. Ex parte Price, 725 So.2d 1063, 1071–72 (Ala. 1998)(internal citations and quotations omitted). Although the 'failure to object does not preclude [appellate] review in a capital case, it does weigh against any claim of prejudice.' Ex parte Kennedy, 472 So.2d 1106, 1111 (Ala. 1985)(citing Bush v. State, 431 So.2d 563, 565 (1983))(emphasis in original). As the United States Supreme Court has noted, the appellant's burden to establish that he is entitled to reversal based on an unpreserved error 'is difficult, "as it should be." ' " Puckett v. United States, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)(quoting United States v. Dominguez Benitez, 542 U.S. 74, 83, n. 9, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004))."

***4** With these principles in mind, we address Osgood's arguments.

Guilt-Phase Issues

For clarity, this Court will address Osgood's arguments relating to the guilt phase of his trial separately from his arguments regarding the penalty phase. Thus, Osgood's issues will not be addressed in the order they are presented in his brief on appeal.

I.

Osgood argues that the statements[1] he gave police during the November 16, 2010, interview—in which he admitted to raping, sodomizing, and killing Tracy Brown—were unconstitutionally obtained in violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Osgood does not dispute that he signed a form waiving his Miranda[2] rights before speaking with police on November 16, 2010. However, Osgood asserts that he invoked his right to counsel on October 18, 2010, during an earlier interview and that he never reinitiated contact with law enforcement regarding the investigation. Therefore, Osgood says, police violated his constitutional rights under Edwards when they conducted the November 16, 2010, interview, and any statements he made during that interview were inadmissible and should have been suppressed.

A.

We first note that this issue was not properly preserved for appellate review. Prior to trial, Osgood filed a motion to suppress the above-mentioned statements because, he said, the statements did not meet the two-pronged test discussed in Waldrop v. State, 859 So.2d 1138 (Ala. Crim. App. 2000). Citing Waldrop, Osgood argued that the State had the burden of establishing that (1) he was informed of his Miranda rights and (2) that he voluntarily and knowingly waived those rights before making inculpatory statements. (C. 274-75.) Osgood raised no argument before the trial court regarding the application of Edwards to his November 16, 2010, statements.

The law regarding preservation of error is well settled and has been discussed by the Alabama Supreme Court:

> " 'review on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So.2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So.2d 210, 213 (Ala. Crim. App. 1992). " '[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.' " McKinney v. State, 654 So.2d 95, 99 (Ala. Crim. App. 1995) (citation omitted). 'the statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So.2d 880, 882 (Ala. 1987). 'the purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury.' Ex parte Works, 640 So.2d 1056, 1058 (Ala. 1994)."

***5** Ex parte Coulliette, 857 So.2d 793, 794–95 (Ala. 2003). Accordingly, Osgood's argument regarding the State's alleged violation of Edwards is not properly preserved and will be reviewed only for plain error. See Rule 45A, Ala. R. App. P.

B.

As noted, Osgood claims that he invoked his right to counsel during an interview with police on October 18, 2010, and that he did not reinitiate contact with law enforcement at any time regarding the investigation into Brown's murder. Therefore, he says, investigators violated his constitutional rights under Edwards when they conducted the November 16, 2010, interview during which Osgood made inculpatory statements.

In Edwards, the United States Supreme Court held that once a defendant has invoked his right to counsel, police are not permitted to engage in further questioning until counsel is present or until the defendant reinitiates contact with law enforcement. 451 U.S. at 484–85, 101 S.Ct. 1880 ("We further hold that an accused, such as Edwards, 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.") Osgood claims that he did not speak with his attorney at any point between October 18, 2010—the date he claims to have invoked his right to counsel—and November 16, 2010, when, without his attorney present, Osgood admitted to the charged crimes. Therefore, Osgood

argues, the trial court erred when it refused to suppress the statements he made during the latter interview.

A defendant's invocation of his right to counsel is the first inquiry under Edwards. Thus, before determining whether Osgood reinitiated contact with law enforcement before giving his confession in the interview conducted on November 16, 2010, this Court must first determine whether Osgood actually invoked his right to counsel on October 18, 2010, after waiving that right at the beginning of the interview. In Ex parte Cothren, 705 So.2d 861, 863–65 (Ala. 1997), the Alabama Supreme Court, quoting Davis v. United States, 512 U.S. 452, 458–61, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), discussed that inquiry as follows:

> " 'the right to counsel recognized in Miranda is sufficiently important to suspects in criminal investigations, we have held, that it "requir[es] the special protection of the knowing and intelligent waiver standard." Edwards v. Arizona, 451 U.S., at 483 [101 S.Ct., at 1884]. See Oregon v. Bradshaw, 462 U.S. 1039, 1046–1047 [103 S.Ct. 2830, 2835, 77 L.Ed.2d 405] (1983)(plurality opinion); id., at 1051 [103 S.Ct., at 2838] (Powell, J., concurring in judgment). If the suspect effectively waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him. North Carolina v. Butler, 441 U.S. 369, 372–376 [99 S.Ct. 1755, 1756–1759, 60 L.Ed.2d 286] (1979). But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. Edwards v. Arizona, supra, at 484–485 [101 S.Ct., at 1884–1885]. This "second layer of prophylaxis for the Miranda right to counsel," McNeil v. Wisconsin, 501 U.S. 171, 176 [111 S.Ct. 2204, 2208, 115 L.Ed.2d 158] (1991), is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Michigan v. Harvey, 494 U.S. 344, 350 [110 S.Ct. 1176, 1180, 108 L.Ed.2d 293] (1990). To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present. Minnick v. Mississippi, 498 U.S. 146 [111 S.Ct. 486, 112 L.Ed.2d 489] (1990); Arizona v. Roberson, 486 U.S. 675 [108 S.Ct. 2093, 100 L.Ed.2d 704] (1988). "It remains clear, however, that this prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." Connecticut v. Barrett, [479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987)].

***6** "The applicability of the " 'rigid' prophylactic rule" of Edwards requires courts to "determine whether the accused actually invoked his right to counsel." Smith v. Illinois, [469 U.S. 91, 95, 105 S.Ct. 490, 492, 83 L.Ed.2d 488 (1984)] (emphasis added), quoting Fare v. Michael C., 442 U.S. 707, 719 [99 S.Ct. 2560, 2569, 61 L.Ed.2d 197] (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. See Connecticut v. Barrett, supra, 479 U.S., at 529 [107 S.Ct., at 832]. Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." McNeil v. Wisconsin, 501 U.S., at 178 [111 S.Ct., at 2209]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid. ("[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards"); Edwards v. Arizona, supra, at 485 [101 S.Ct., at 1885] (impermissible for authorities "to reinterrogate an accused in custody if he has clearly asserted his right to counsel") (emphasis added).

> " 'Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Smith v. Illinois, 469 U.S., at 97–98 [105 S.Ct., at 494] (brackets and internal quotation marks omitted). Although a suspect need not "speak with the discrimination of an Oxford don," post, at 476, 114 S.Ct., at 2364 (Souter, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. See Moran v. Burbine, 475 U.S. 412, 433, n. 4 [106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410] (1986) ("[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

> " 'We decline petitioner's invitation to extend Edwards and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or

equivocal reference to an attorney. See Arizona v. Roberson, supra, at 688 [108 S.Ct., at 2101–2102] (Kennedy, J., dissenting) ("[T]he rule of Edwards is our rule, not a constitutional command; and it is our obligation to justify its expansion."). The rationale underlying Edwards is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity," Michigan v. Mosley, 423 U.S. 96, 102 [96 S.Ct. 321, 326, 46 L.Ed.2d 313] (1975), because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. Nothing in Edwards requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer. In Miranda itself, we expressly rejected the suggestion "that each police station must have a 'station house lawyer' present at all times to advise prisoners," 384 U.S., at 474 [86 S.Ct., at 1628], and held instead that a suspect must be told of his right to have an attorney present and that he may not be questioned after invoking his right to counsel. We also noted that if a suspect is "indecisive in his request for counsel," the officers need not always cease questioning. See id., at 485 [86 S.Ct., at 1633].

***7** " 'We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." Moran v. Burbine, supra, at 427 [106 S.Ct., at 1144]. A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although Edwards provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

" 'In considering how a suspect must invoke the right to counsel, we must consider the other side of the Miranda equation: the need for effective law enforcement. Although the courts ensure compliance with the Miranda requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The Edwards rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.' "

The appellant in Cothren argued, as does Osgood, that law-enforcement officers violated Edwards when they continued to question him after he claimed to have invoked his right to counsel. Testimony at Cothren's suppression hearing revealed that when police officers asked Cothren about the weapon that was used in the crime, Cothren responded: " 'I think I want to talk to an attorney before I answer that.' " 705 So.2d at 866. According to Cothren, that statement was sufficient to invoke his right to counsel, and any subsequent interrogation was impermissible under Edwards. The Alabama Supreme Court disagreed and held that Cothren's statement was not an unequivocal assertion of his desire for counsel:

> "In Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994), cert. denied, 514 U.S. 1086, 115 S.Ct. 1801, 131 L.Ed.2d 727 (1995), the Eleventh Circuit Court of Appeals, addressing a similar issue, set out the general dictionary definitions of 'equivocal,' as that word was used in Davis:
>
> > " '[Equivocal] is defined as: "Having different significations equally appropriate or plausible; capable of double interpretation; ambiguous," 5 Oxford English Dictionary 359 (2d ed., J.A. Simpson & E.S.C. Weiner, eds., 1989); and as: "Having two or more significations; capable of more than one interpretation; of doubtful meaning; ambiguous," Webster's Third International Unabridged Dictionary 769 (1986).'
>
> "30 F.3d at 1425. Based on our review of the record, we conclude that Cothren's statement to Meyers is capable of

equally plausible, differing interpretations and, therefore, that it is equivocal. The record indicates that Cothren had been fully apprised of his Miranda rights and that he was responding to Capt. Meyers's questions just before Meyers asked him when he had last possessed the .25 caliber pistol that had been used to commit the murder. In response to that particular question, Cothren stated, 'I think I want to talk to an attorney before I answer that.' It is, of course, impossible for us to glean from a cold record the intonations of Cothren's voice as he made the statement. Capt. Meyers testified that Cothren made the statement in a 'normal voice.' However, Meyers also testified that he did not understand Cothren's statement to be a blanket refusal to speak further to the police without the presence of an attorney. Without being privy to the manner in which Cothren made the statement, i.e., without knowing whether Cothren had an equivocal tone in his voice, we find two aspects of the statement that suggest to us that Capt. Meyers could reasonably have believed that Cothren was willing to talk further without the assistance of an attorney. First, Cothren stated, 'I think I want to talk to an attorney ....' Although the word 'think,' in and of itself, is of sufficiently clear import, its use here tends to diminish the forcefulness of the statement. In this respect, we agree with the conclusion reached by the Arizona Supreme Court in State v. Eastlack, 180 Ariz. 243, 883 P.2d 999 (Ariz. 1994), cert. denied, 514 U.S. 1118, 115 S.Ct. 1978, 131 L.Ed.2d 866 (1995). In that case, the court concluded that the statement 'I think I better talk to a lawyer first' was not an unequivocal request for an attorney. Cothren's use of the word 'think' could have led Capt. Meyers to conclude that Cothren was not certain as to what he should do. Second, Cothren stated, 'I think I want to talk to an attorney before I answer that.' Capt. Meyers could have reasonably concluded from Cothren's use of the word 'that' that Cothren was hesitant to respond to the specific question asked about the .25 caliber pistol, but that he might be willing to submit to other questions at a later time. The Davis Court made it very clear that it was unwilling to adopt a rule that would force police officers in 'the real world of investigation and interrogation,' 512 U.S. at 461, 114 S.Ct. at 2356, to make difficult judgment calls about whether a suspect in fact wants an attorney before speaking to the police. The Court succinctly noted that 'if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.' 512 U.S. at 459, 114 S.Ct. at 2355. (Emphasis original.) We recognize that reasonable judges and attorneys may have differing opinions as to what Cothren actually meant by his statement. However, as we read Davis, the proper standard to be used in resolving this issue is an objective one—whether a police officer in the field reasonably could have concluded from the circumstances that a suspect was not absolutely refusing to talk without the assistance of an attorney."

***8** Cothren, 705 So.2d at 866–67.

A review of the video recording of the October 18, 2010, interview does not support Osgood's contention that he unambiguously invoked his right to counsel. At the beginning of that interview, Investigator Jeff Cobb read Osgood his Miranda rights and asked whether Osgood understood those rights. Osgood answered affirmatively and then signed a form indicating that he understood his rights and that he wished to speak with law enforcement without counsel present.[3] (C. 670.) Osgood does not argue that the initial waiving of his Miranda rights was improper.

For approximately 45 minutes, Osgood answered Investigator Cobb's questions about the events surrounding Brown's murder. Osgood admitted that he had previously lied to police officers about whether he had had sex with Brown but still denied killing her. Although the interview began amicably, Osgood's demeanor began to change, and Osgood stated that he was getting "pissed" because the officers did not believe him. In response, Investigator Cobb stood up, pushed his chair under the table and said, "Look, Taz,[4] you're talking about getting pissed. That's fine." (State's Exhibit 3) Investigator Cobb then implored Osgood to tell the truth and to show some sympathy. The following exchange then occurred:

> "[Osgood:] You can't show sympathy for something you didn't do, Jeff. The girl was alive when we left. I don't know what more I can do or say to get anyone to understand or comprehend that. The girl was alive and well.
>
> "[Investigator Cobb:] You'd be willing to maybe take a polygraph test?
>
> "[Osgood:] Yeah. But what good is that? It's not admissible in court.
>
> "[Investigator Cobb:] If both attorneys agree to it, it is.
>
> "[Osgood:] I need to talk to my attorney first.

"[Investigator Cobb:] Alright. I'll be right back." (State's Exhibit 3.)

When viewed in the context of the entire interview, Osgood's statement regarding his attorney, like the defendant's statement in Cothren, is open to more than one interpretation. On October 14, 2010, Osgood waived his right to counsel and freely spoke with investigators about his interactions with Brown before she was murdered. On October 18, 2010, after a court appearance, Osgood again waived his right to counsel and spoke openly with Investigator Cobb for almost an hour before becoming somewhat agitated. At that point, Investigator Cobb asked Osgood whether he would be willing to take a polygraph examination and stated that the results would be admissible in court if both attorneys agreed to it. It was at that point that Osgood stated, "I need to talk to my attorney first." Thus, Investigator Cobb could have understood Osgood's statement to mean that Osgood wanted to talk to his attorney before submitting to a polygraph examination. The context in which the statement was made did not suggest that Osgood was absolutely refusing to continue to talk to police without counsel present. Like the appellant's statement in Cothren, Osgood's statement was ambiguous at best. Therefore, it was not an unequivocal assertion of his right to counsel.

***9** Osgood also argues that his intent to invoke his right to counsel can be gleaned from an " 'inmate request form' " he sent to correctional officer William Scarborough at the Chilton County jail, in which he asked for his attorney's name and telephone number. (Osgood's brief, at 35 n. 4.) Scarborough replied to Osgood's request as follows: "If you have hired a private lawyer, we will not know there [sic] name. If you need a court appointed attorney, you will have to fill out a hardship form." (C. 577.) That request was made on October 19, 2010, after the interview discussed above and almost a month before the November 16, 2010, interview. Additionally, there was no evidence indicating that any of the investigating officers were aware of Osgood's request. Nevertheless, asking jail staff for an attorney's name and telephone number is not an unequivocal assertion of one's right to counsel, and Osgood provides no authority to the contrary. See Rule 28(a)(10), Ala. R. App. P.

Because Osgood did not unequivocally invoke his right to counsel at any point during the investigation, Edwards is inapplicable, and we need not determine whether Osgood reinitiated contact with investigators prior to his confession on November 16, 2010. Accordingly, the trial court's decision to deny Osgood's motion to suppress his statements did not constitute error, much less plain error.

II.

Next, Osgood argues that the statement he gave on November 16, 2010, in which he confessed to raping, sodomizing, and killing Brown, was involuntary because, he says, the investigators induced it with promises of leniency. Osgood spoke to police on October 14, October 18, and November 16, 2010.[5] At the beginning of each interview, Osgood waived his Miranda rights and agreed to speak with investigators without counsel present. Osgood does not argue that any of those waivers was invalid. See Part I, supra. However, Osgood argues that his will was overborne by the investigators' promises of leniency.

A review of the above-mentioned interviews reveals the following. During the interview on October 14, 2010, Investigator Smitherman told Osgood that Osgood had two options: "One, you can say hey, me and her got in a fight, whatever, something happened I didn't want to happen, I need all the help I can get. Beg for forgiveness. Two, you can go out and lie full force, and they're not going to give you leniency." (State's Ex. 1.) Investigator Smitherman then told Osgood that the other investigator [Lockhart], "won't sit in here all day and talk to you. He'll just do what he's gotta do and then you won't have no more option to—you know, he can only help yours." Id. During the interview on October 18, 2010, Investigator Cobb told Osgood that if he were to tell the truth and show sympathy, then it was possible that Osgood "may not go to prison near as long" and that he could potentially avoid the death penalty. See (State's Hr'g Ex. 3.) Despite the investigators' assertions, Osgood maintained that he did not kill Brown.

During the interview on November 16, 2010, Investigator Lockhart read a statement to Osgood that had been written by a woman named Tiffany Matthews, who was incarcerated with Vandyke. Matthews claimed that Vandyke described her and Osgood's involvement in Brown's murder. However, Investigator Lockhart changed the wording of the statement to make it appear as if Vandyke wrote the statement herself. Investigator Lockhart then told Osgood that Vandyke intended to blame the entire crime on him and that Osgood's only hope was not to take all the blame. Investigator Lockhart further explained to Osgood that it would be in his best interest to be honest and to show remorse. Investigator

Lockhart insinuated that a jury may look more favorably on Osgood if the investigators were to testify that Osgood was remorseful and cooperative. Investigator Smitherman then told Osgood that other defendants frequently get deals and leniency when they cooperate with law enforcement. The gist of Lockhart's and Smitherman's assertions was summed up when Investigator Smitherman told Osgood that "all you can do is crawl yourself out of the hole a little bit versus digging it deeper." (State's Exhibit 36.) According to Osgood, "[t]his repeated urging by detectives that the way he could get help from the detectives and the DA's office, get the detectives to testify in his favor and get a sentence less than death, was to give a statement to the detectives about his role in the crime rendered Mr. Osgood's subsequent inculpatory statement involuntary." (Osgood's brief, at 46.)

***10** In reviewing a trial court's ruling on a motion to suppress a confession or an inculpatory statement, this Court applies the standard discussed by the Alabama Supreme Court in McLeod v. State, 718 So.2d 727 (Ala. 1998):

> "For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. Ex parte Singleton, 465 So.2d 443, 445 (Ala. 1985). The initial determination is made by the trial court. Singleton, 465 So.2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. Marschke v. State, 450 So.2d 177 (Ala. Crim. App. 1984)....
>
> "The Fifth Amendment to the Constitution of the United States provides in pertinent part: 'No person ... shall be compelled in any criminal case to be a witness against himself....' Similarly, § 6 of the Alabama Constitution of 1901 provides that 'in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself.' These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); Hubbard v. State, 283 Ala. 183, 215 So.2d 261 (1968).
>
> "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In Culombe, 367 U.S. at 602, 81 S.Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his will has been overborne' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. Id. (emphasis added).
>
> "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139–40, 22 L.Ed.2d 433 (1969); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see Beecher v. Alabama, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See Ex parte Matthews, 601 So.2d 52, 54 (Ala.)(stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); Jackson v. State, 562 So.2d 1373, 1380 (Ala. Crim. App. 1990)(stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); Eakes v. State, 387 So.2d 855, 859 (Ala. Crim. App. 1978)(stating that the true test to be employed is 'whether the defendant's will was overborne at the time he confessed')(emphasis added)."

***11** 718 So.2d at 729 (footnote omitted).

In discussing the Alabama Supreme Court's holding in McLeod, this Court has stated:

> "The Court in McLeod focused on the 'totality of the circumstances' surrounding McLeod's confession rather than merely the interrogator's statement. McLeod, 718 So.2d at 729. Under this analysis, implied and/or vague promises, absent coercive conditions and given a defendant whose personal characteristics do not make him unusually susceptible to inducement, are not sufficient to render a confession involuntary. McLeod, 718 So.2d at 724....
>
> > " 'A statement made by a law enforcement agent to an accused that the accused's cooperation would be passed on to judicial authorities and would probably be helpful to him is not a sufficient inducement so as to render a subsequent incriminating statement involuntary.'

"United States v. Davidson, 768 F.2d 1266, 1271 (11th Cir. 1985), citing United States v. Ballard, 586 F.2d 1060, 1063 (5th Cir.1978).

"Under the 'overborne' standard expressed in McLeod and used by federal courts, the statement made by [law enforcement] was not coercive. When determining the admissibility of a confession, this Court must look at the entire circumstances, not only the behavior of the interrogators in creating pressure, but also the defendant's experience with the criminal justice system and personal characteristics. McLeod, 718 So.2d at 729; Ex parte Gaddy, 698 So.2d [1150] at 1154, 1155 [(Ala.1997)]. The appellant in this case had broad experience with the criminal justice system; he had either an eighth- or ninth-grade education; and the record does not reflect that he had any mental deficiencies. These factors indicate that the appellant was even less susceptible to inducement than was McLeod, who had had little or no previous experience with the criminal justice system. Furthermore, the statement made by [law enforcement] offered no specific reward for confessing and was analogous to statements that the defendant's cooperation 'would probably be helpful' permitted in Davidson. There was no evidence that [law enforcement] used any means of intimidation or any other improper methods of interrogation. [The law enforcement officer] was merely giving his opinion to the appellant regarding the appropriateness of his confessing. Given the totality of the circumstances, the State met its burden of proving that the appellant's confession was voluntary."

Craig v. State, 719 So.2d 274, 278–79 (Ala. Crim. App. 1998).

In reviewing the testimony presented at Osgood's suppression hearing as well as the video recordings of each of the above-mentioned interviews, we cannot say that the trial court abused its discretion by denying Osgood's motion to suppress. At no point did law enforcement tell Osgood that admitting his involvement in Brown's murder would have no adverse consequences nor did they promise him any specific outcome contingent on his cooperation. Rather, the interrogating officers suggested to Osgood that he might receive a more favorable sentence if his cooperation and remorse were made known to the trial court and the jury. See Hosch v. State 155 So.3d 1048, 1093 (Ala. Crim. App. 2013)("Telling Hosch that he could not make things worse for himself by telling the truth and that, if he told admitted his role in the crime, he could tell the prosecutor that he had taken responsibility did not constitute illegal inducements."). None of the statements made by law enforcement were coercive in nature, and our review of the record does not convince the Court that Osgood's will was overborne.

***12** Osgood also argues that the officers' representations that Vandyke was cooperating with law enforcement, when combined with the other statements made to Osgood, rendered the confession involuntary. However, this Court has held:

" 'A misrepresentation which prompts inculpatory statements is only one factor to be considered in determining the voluntariness of the resulting statements.' People v. Kashney, 111 Ill.2d 454, 466, 95 Ill.Dec. 835, 840, 490 N.E.2d 688, 693 (1986). 'trickery or deception does not make a statement involuntary unless the method [is] calculated to produce an untruthful confession or was offensive to due process.' Creager v. State, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997). See also C.T. Drechsler, Admissibility of Confession as Affected by its Inducement Through Artifice, Deception, Trickery, or Fraud, 99 A.L.R.2d 772 (1965).

" ' "[C]ourts have found waivers to be voluntary even in cases where officers employed deceitful tactics." Soffar v. Cockrell, 300 F.3d 588, 596 (5th Cir. 2002) (en banc). See also [Colorado v.] Spring, 479 U.S. [564] at 575–77, 107 S.Ct. 851 [93 L.Ed.2d 954 (1987)]; United States v. Tapp, 812 F.2d 177, 179 (5th Cir. 1987). "[T]rickery or deceit is only prohibited to the extent it deprives the suspect 'of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " Soffar, 300 F.3d at 596 (quoting Moran [v. Burbine], 475 U.S. [412] at 424, 106 S.Ct. 1135 [89 L.Ed.2d 410 (1986)]). See also [United States v.] Farley, 607 F.3d [1294] at 1327 [(11th Cir. 2010)]. "Of course, trickery can sink to the level of coercion, but this is a relatively rare phenomenon." United States v. Flemmi, 225 F.3d 78, 91 n. 5 (1st Cir. 2000). "Generally, courts have held statements involuntary because of police trickery only when other aggravating circumstances were also present." Farley, 607 F.3d at 1328 (citing [United States v.] Castaneda–Castaneda, 729 F.2d [1360] at 1363 [([11th Cir.] Fla. 1984)]). For example, "statements have been held involuntary where the deception took the form of a coercive threat ... or where the deception goes directly to the nature of the suspect's rights and the consequences of waiving them." Id. at 1328–29 (citations omitted).'

"United States v. Degaule, 797 F.Supp.2d 1332, 1380 (N.D.Ga.2011)."

Walker v. State, 194 So.3d 253, 273 (Ala. Crim. App. 2015).

In the present case, police officers had a statement from one of Vandyke's cellmates, who claimed that Vandyke had admitted to the details of the crime to her. Thus, Investigator Lockhart's technique in which he led Osgood to believe that the statement was actually written by Vandyke was not calculated to produce an untruthful confession. There were no other aggravating factors in the techniques employed by law enforcement that lead this Court to believe that Osgood's will was overborne or that he was otherwise deprived of his Constitutional rights when he confessed to the crimes. Accordingly, we hold that Osgood's statements were voluntary and therefore admissible. Thus, the trial court was correct in denying Osgood's motion to suppress.

III.

Next, Osgood argues that the trial court erred when it denied his motions to remove prospective jurors A.S., S.O., and J.S. for cause. Under Alabama law, a juror may be removed for cause if, among other things, the juror "has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict." § 12–16–150(7), Ala. Code 1975. Additionally, this Court has stated:

> ***13** " ' " 'A trial judge's finding on whether or not a particular juror is biased "is based upon determination of demeanor and credibility that are peculiarly within a trial judge's province." [Wainwright v.] Witt, 469 U.S. [412] 429, 105 S.Ct. [844] 855 [83 L.Ed.2d 841 (1985)]. That finding must be accorded proper deference on appeal. Id. "A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion." Nobis v. State, 401 So.2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So.2d 204 (Ala. 1981).' " ' "

"Dallas v. State, 711 So.2d 1101, 1107 (Ala. Crim. App. 1997)(quoting Martin v. State, 548 So.2d 488, 490–91 (Ala. Crim. App. 1988)). " '[J]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court.' " Sharifi v. State, 993 So.2d 907, 926 (Ala. Crim. App. 2008)(quoting Johnson v. State, 820 So.2d 842, 855 (Ala. Crim. App. 2000)).

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

"Sneed v. State, 1 So.3d 104, 136 (Ala. Crim. App. 2007)(quoting Dunning v. State, 659 So.2d 995, 996 (Ala. Crim. App. 1994))."

Albarran v. State, 96 So.3d 131, 158–59 (Ala. Crim. App. 2011).

First, Osgood argues that the trial court should have granted his motion to remove prospective juror A.S. for cause.[6] During individual voir dire, A.S. disclosed that her aunt had been the victim of a rape. When defense counsel asked A.S. if she would be more likely to find Osgood guilty based on the fact that his case involved a rape, A.S. replied: "I don't know how to answer that because, you know, I don't know any of the facts of the case." (R. 602.) A.S. then stated that if there was "compelling evidence" she would be inclined to return a guilty verdict and to recommend a death sentence. Id.

In support of his argument that A.S. should have been removed for cause, Osgood cites Hunter v. State, 585 So.2d 220 (Ala. Crim. App. 1991), in which this Court held that a trial court committed reversible error by failing to remove for cause a prospective juror who gave an equivocal answer to a question regarding her ability to render an impartial verdict. In Hunter, a case in which the appellant was ultimately convicted of child abuse, the prospective juror in question stated that she was "an emotional person when it comes to children being abused." Id. at 221. When asked if she could "listen to the evidence and make a decision based on the evidence of the case" the prospective juror stated, "I don't know." Id. No further questions were asked of that particular juror.

In finding reversible error, this Court held that "[t]he trial court should have questioned the prospective juror further to ascertain whether she could be impartial. It did not do so,

and in the posture in which the matter was left, the trial court should have granted the appellant's challenge for cause." Id. at 222. In the present case, A.S. was questioned further about her potential biases. A.S. did not state that she had any type of absolute bias against people charged with rape nor did she indicate that she would be unable to set her opinions aside and try the case fairly and impartially. As noted, A.S. stated that she did not know any of the facts of Osgood's case and would only be inclined to find Osgood guilty and to recommend a death sentence "if there was compelling evidence." (R. 602.) Thus, A.S.'s answers did not suggest that she was prejudiced against defendants like Osgood. The trial court was in the best position to evaluate A.S.'s responses as well as her demeanor and its decision to deny Osgood's challenge for cause is due great deference on appeal. See Nobis v. State, 401 So.2d 191 (Ala. Crim. App. 1981). In reviewing A.S.'s responses during voir dire, we do not find that the trial court abused its discretion by denying Osgood's motion to remove A.S. for cause.

B.

***14** Next, Osgood claims that the trial court should have granted his motion to remove prospective juror S.O. for cause.[7] Osgood points to portions of S.O.'s examination in which she stated her belief that, "if you commit murder, the Bible says an eye for an eye and you should be punished." (R. 563.) Osgood also cites the following exchange in support of his argument:

> "[Defense counsel]: Good morning. You stated that if someone commits murder, then they deserve the death penalty?
>
> "[S.O.]: If they are found guilty of murder.
>
> "[Defense counsel]: If you find them guilty, you think that's the automatic best—
>
> "[S.O.]: Yes."

(R. 564-65.)

However, Osgood ignores the remainder of S.O.'s discussion with both defense counsel and the State. When pressed further about her statement that the death penalty should be "automatic" for people convicted of murder, S.O. stated: "Depends on what I hear. It depends on what evidence is presented and what I can—you know, I have to make my decision on what I hear. I can't just make it without the facts." (R. 565.) Finally, the State asked S.O. whether, despite her beliefs, she would be able to follow the trial court's instructions and consider the evidence in the case. S.O. replied: "Yes. I think when you are selected for jury duty you have to follow the law. I mean, the law says, you know, abortion is legal. That might not be my personal opinion but if the Judge tells me that I have to do this because that's the law, then that's what I do. I try to be a law abiding citizen, yeah." (R. 569-70.) S.O. then stated that she would give equal consideration to a sentence of death and a sentence of life imprisonment without parole. (R. 570.)

Although S.O. had certain beliefs regarding the imposition of the death penalty, she ultimately stated that she could and would consider a sentence of life imprisonment without parole. A review of the entirety of S.O.'s individual voir dire does not indicate any absolute bias or inability to be an impartial juror. S.O.'s statements regarding her beliefs about the death penalty were sufficiently rehabilitated by her ultimate assertion that she would follow the trial court's instructions despite any beliefs she may otherwise hold. Therefore, the trial court did not abuse its discretion by refusing to remove S.O. for cause. See Perryman v. State, 558 So.2d 972, 977 (Ala. Crim. App. 1989) ("Thus, even though a prospective juror admits to a potential bias, if further voir dire examination reveals that the juror in question can and will base his decision on the evidence alone, then a trial judge's refusal to grant a motion to strike for cause is not error.").

C.

Finally, Osgood argues that the trial court committed reversible error when it denied his motion to remove prospective juror J.S. for cause.[8] During voir dire, J.S. stated that he had known one of the State's witnesses, Don Davis, since the 1970s. When asked if that relationship would make J.S. more inclined to believe Davis's testimony, J.S. stated: "I have a lot of respect for him, but I mean, at the end of the day, the facts are the facts." (R. 622-23.) J.S. also stated that he knew one of the assistant district attorneys, C.J. Robinson, who was prosecuting the case against Osgood. According to J.S., Robinson bought property from J.S. approximately three months earlier. However, J.S. had previously testified that he did not "personally know [Robinson]" and only knew him "[j]ust passing at the softball field, something like that." (R. 622.)

***15** Neither of those associations are grounds supporting removal for cause under § 12–16–150, Ala. Code 1975. Additionally, J.S.'s statements regarding his relationships with Davis and Robinson do not indicate any type of bias that would call J.S.'s impartiality into question. In fact, the remainder of J.S.'s answers to questions during voir dire indicated that he would be a fair and impartial juror who had no fixed opinions regarding the death penalty and who indicated that he could base his decisions on the evidence that he heard. (R. 620-23.) Accordingly, the trial court did not abuse its discretion by denying Osgood's motion to remove J.S. for cause.

IV.

Next, Osgood argues that the trial court violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), when it granted the State's motion to strike prospective juror R.P. for cause. In Witherspoon, the United States Supreme Court held that a prospective juror could not be excluded for cause "because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id. at 522, 88 S.Ct. 1770. In Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court clarified its decision in Witherspoon regarding the standard for excluding prospective jurors who voiced objections to the death penalty by holding that the "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." See also Ex parte Trawick, 698 So.2d 162, 171–72 (Ala. 1997)("[U]nder Witherspoon, it is unconstitutional to exclude venirepersons for cause when they express general objections to the death penalty; the juror may be excluded only if his or her view on capital punishment would prevent or substantially impair the performance of his or her duties as a juror.").

During individual voir dire, the following exchange occurred:

> "[Prosecutor]: [R.P.], at the end of all the evidence if you felt—based on the Judge's instructions if you felt that it was appropriate, do you think you would be the kind of person that could raise your hand and vote to recommend a death sentence?
>
> "[R.P.]: No.
>
> "[Prosecutor]: You don't. Do you just have feelings against it or what is it about it?
>
> "[R.P.]: Well, I feel like you should be punished but I don't know if I would feel comfortable in voting on him receiving the death penalty."

(R. 585-86.) However, defense counsel then asked R.P. if she would be able to listen to the trial court's instructions and "make [her] determination of life without or death penalty based on the law that the Judge gives you?" R.P. responded in the affirmative.

According to Osgood, the trial court committed reversible error by granting the State's motion to challenge R.P. for cause because, he said, R.P. indicated that she would be able to render a sentencing recommendation based on the evidence presented in court and the instructions from the trial court. Osgood compares R.P.'s answers with the answers given by prospective juror S.O., discussed in Part III of this opinion and claims that the trial court's decision to exclude R.P. for cause was inconsistent with its decision not to exclude S.O. for cause.

However, a review of the record reveals that both the State and defense counsel conducted a relatively lengthy voir dire with S.O. in which she explained her answers and made it clear that would follow the trial court's instructions and consider a sentence of life without parole. See (R. 559-70.) In contrast, neither party engaged in extensive voir dire with R.P. After R.P. stated that she did not feel that she could vote to impose the death penalty, defense counsel asked if, despite her discomfort, she would be able to listen to the trial court's instructions and make a sentencing determination based on the law. R.P. responded, "Yes." (R. 586.)

***16** The length and depth of the voir dire of a prospective juror will not, on its on, support a finding on appeal regarding the propriety of a trial court's grant or denial of a party's challenge for cause. However, we find it relevant here in light of the fact that a trial court's decision on such a matter is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Wainwright, 469 U.S. at 428, 105 S.Ct. 844. As noted, "[t]he decision of the trial court on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion." Albarran, 96 So.3d at 159 (internal citations and quotations omitted). "A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." Hodges v. State, 926 So.2d 1060, 1072 (Ala. Crim. App. 2005)(internal citations omitted).

In the present case, the trial court, who was in the best position to observe the prospective jurors' demeanor and to assess their credibility, was able to hear more detail regarding S.O.'s feelings about the death penalty and her ability to be a fair and impartial juror. However, the trial court did not hear the same detail regarding R.P.'s beliefs and her ability to be fair and impartial. Thus, we find support in the record for the trial court's denial of Osgood's challenge to S.O. as well as the trial court's granting the State's motion to remove R.P. Accordingly, this Court finds that the trial court did not abuse its discretion by granting the State's motion to challenge R.P. for cause.[9]

V.

Osgood next argues that, during voir dire, the prosecutor improperly told the jury that the death penalty was an appropriate punishment.[10] According to Osgood, the trial court should have granted his motion for a mistrial on that ground.

A.

Osgood claims that the prosecutor made comments similar to the comments this Court disapproved of in Guthrie v. State, 616 So.2d 914 (Ala. Crim. App. 1993). In Guthrie, the prosecutor made the following comment during his penalty-phase closing argument: " 'When I first became involved in this case, from the very day, the State of Alabama, the law enforcement agencies and everybody agreed that this was a death penalty case, and we still stand on that position.' " 616 So.2d at 931–32. This Court held that those comments constituted facts not in evidence and rose to the level of plain error. Id. at 932. According to Osgood, the prosecutor made a similar comment in the present case which, he says, was ground for a mistrial.

A review of the record reveals that, during voir dire, the prosecutor explained to the jury that the State's burden of proof was beyond a reasonable doubt and not "beyond all doubt." (R. 389.) The prosecutor then stated: "This is a capital case. The death penalty is an appropriate punishment. Does anybody think that in a capital case the standard should be any higher than it is for any other criminal case?" (R. 390.) Thus, when the comment is read in the proper context, the prosecutor was not telling the jury that the death penalty was appropriate in that particular case, i.e., that it was appropriate for Osgood. Rather, the prosecutor was stating that death was an appropriate punishment for capital cases in general and inquiring whether any prospective jurors believed that the State should be held to a higher standard of proof in such cases. Thus, the prosecutor's statement during voir dire was not like the prosecutor's statement in Guthrie and was not grounds for a mistrial. See Vanpelt v. State, 74 So.3d 32, 69 (Ala. Crim. App. 2009), quoting Ex parte Thomas, 625 So.2d 1156, 1157 (Ala. 1993)(" '[A] mistrial is a drastic remedy, to be used only sparingly and only to prevent manifest injustice.' "). Because the prosecutor's comment in the present case was not improper, the trial court was correct to deny Osgood's motion for a mistrial.

B.

***17** In a footnote in his brief on appeal, Osgood also argues that the trial court should have granted a mistrial based on social-media posts allegedly made by the prosecutor and a member of his staff regarding Osgood's case and their opinions regarding the appropriate punishment. (Osgood's brief, at 68 n. 8.) The record does not indicate that any of the jurors read or heard about the alleged social-media posts. (See R. 1150-61.) Rather, the argument made to the trial court was that the State had violated a pretrial order that both parties refrain from speaking with the press. Nevertheless, Osgood provided no authority for his proposition that a trial court should declare a mistrial when a party writes posts on social media regarding its views on the appropriate punishment in a pending case, especially when there is no indication that the jury read or heard about the post.

In Egbuonu v. State, 993 So.2d 35, 38–39 (Ala. Crim. App. 2007), this Court held:

> "Rule 28(a)(10), Ala. R. App. P., requires that an argument contain 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.' 'recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed.' Hamm v. State, 913 So.2d 460, 486 (Ala. Crim. App. 2002). 'Authority supporting only "general propositions of law" does not constitute a sufficient argument for reversal.' Beachcroft Props., LLP v.

City of Alabaster, 901 So.2d 703, 708 (Ala. 2004), quoting Geisenhoff v. Geisenhoff, 693 So.2d 489, 491 (Ala. Civ. App. 1997).”

Because Osgood provided no authority supporting this argument, he is due no relief on appeal.

VI.

Osgood next asserts that “substantial and significant portions of the record are missing, adversely affecting [his] rights and requiring reversal.” (Osgood's brief, at 72.) In his brief on appeal, Osgood cites 15 instances in which discussions were held “ ‘off the record’ ” or “ ‘outside the hearing of the court reporter.’ ” (Osgood's brief, at 75, citing R. 164, 394, 678, 691, 719, 738, 747, 790, 811, 827, 893, 902, 1034, 1148, 1182.) According to Osgood, reversal is required because, he says, “it is not possible to determine” the substance of these discussions. (Osgood's brief, at 75.) Osgood also claims that the record is deficient because it does not contain the proceedings in which the trial court excused several members of the venire for undue hardship, extreme inconvenience, or public necessity. (Id., citing R. 320.)

In support of his argument, Osgood cites Hammond v. State, 665 So.2d 970, 972–73 (Ala. Crim. App. 1995), a case in which the record on appeal was missing a large portion of the voir dire proceedings relating to the State's challenges for cause of six potential jurors. This Court found that those missing portions constituted a “substantial and significant portion of the record” and that “the missing portions affect[ed] a substantial right of the appellant.” According to Osgood, the portions of the record missing in his case “are even more substantial than the omissions that required reversal in Hammond.” (Osgood's brief, at 74.) We disagree.

In Ex parte Harris, 632 So.2d 543, 545 (Ala. 1993), the Alabama Supreme Court addressed “[w]hether the absence of a full transcript of the voir dire examination of the jury and all bench conferences denied Harris a fundamentally fair trial in violation of state law and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus constituted reversible error.” The Court then held:

> “In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the trial court to ‘order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in-chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof ...’; and the court had granted the motion. After granting the motion, the court had the duty to see that the entire proceedings were transcribed; we must conclude that the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. See Ex parte Godbolt, 546 So.2d 991 (Ala. 1987). Thus, the question becomes whether that error constituted reversible error.
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> ***18** “ ' “When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal. The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is represented on appeal by counsel not involved at trial [as in this case], counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects....
>
> “ ‘ “We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the rial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the

> appellant have been adversely affected by the omissions from the transcript. When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed....' "
>
> "Ex parte Godbolt, 546 So.2d at 997. (Citations omitted; emphasis added.)(Quoting with approval United States v. Selva, 559 F.2d 1303, 1305–06 (5th Cir. 1977))."

Harris, 632 So.2d at 545–46 (footnote omitted).

However, the Alabama Supreme Court ultimately denied relief in Harris and found that the error in failing to transcribe those particular portions of the record constituted harmless error:

> "We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether 'a substantial and significant portion of the record' is missing and to determine whether we could 'conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript.' Id.
>
> "From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute 'a substantial and significant portion of the record' and we have 'conclud[ed] affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript.' Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless."

***19** 632 So.2d at 546.

In the present case, as in Harris, the trial court granted Osgood's pretrial motion to have all hearings transcribed. (C. 105.) Similarly, Osgood is represented by different counsel on appeal than he was at trial. However, this Court, like the Court in Harris, has carefully reviewed each of the 15 instances in the record in which untranscribed discussions occurred as well as the exchanges occurring before and after each untranscribed discussion. We have concluded that the untranscribed portions of the record did not constitute a substantial and significant portion of the record, and we have concluded affirmatively that Osgood's rights have not been adversely affected by the omissions from the transcript. Rather, the omitted discussions clearly related to nonsubstantive matters such as making sure that a witness had the correct exhibit, see R. 164, ensuring that a witness understood that she could not give hearsay testimony, see R. 678, and informing the trial court that a video was about to be played for the jury, see R. 811. Accordingly, under the particular facts of this case, we conclude that the failure to transcribe the above-mentioned off-the-record discussions was harmless error.

We also note that 10 of the 15 off-the-record discussions were initiated by defense counsel. Although those discussions were similarly nonsubstantive and did not affect Osgood's substantial rights, they constitute invited error. See Sharifi v. State, 993 So.2d 907, 936 (Ala. Crim. App. 2008), quoting Robitaille v. State, 971 So.2d 43, 59 (Ala. Crim. App. 2005)("Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby. The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error.")(Internal citations and quotation marks omitted.)

Osgood also argues that he is entitled to a new trial because the proceedings in which several prospective jurors were excused for hardship under § 12–16–63, Ala. Code 1975, was not transcribed. A review of the record reveals that, after swearing in the venire, the trial court questioned the venire about general qualifications such as age, county of residence, and whether the prospective jurors had any physical conditions that would prevent them from serving as jurors. (R. 316-20.) The record then indicates that "[e]xcuses were taken," after which the trial court excused several jurors. According to Osgood, the lack of transcription of those excuses prevents this Court from evaluating "whether the jurors who were excused provided reasons that met [the requirements of § 12–16–63, Ala. Code 1975], whether defense counsel had any objections to the excusals, or whether there were any other errors in the proceedings." (Osgood's brief, at 76).

First, we note that the trial court is vested with broad discretion in excusing jurors under § 12–16–63, Ala. Code 1975. See Scott v. State, 163 So.3d 389, 424 (Ala. Crim. App. 2012). Further, § 12–16–74, Ala. Code 1975,

"expressly provides that a trial court in capital cases may excuse prospective jurors outside the presence of parties and their counsel, for reasons of 'undue hardship, extreme inconvenience, or public necessity,' as provided in § 12–16–63(b)." Id. quoting Ex parte Pierce, 612 So.2d 516, 518 (Ala. 1992). Considering the trial court's broad discretion in excusing jurors under § 12–16–63 and the fact that the presence of the parties is not even required during this portion of jury selection, this Court finds that any error in failing to transcribe the individual excuses of the potential jurors was harmless.

***20** We also note that, notwithstanding the fact that Osgood's presence was not required, the record indicates that Osgood was present with counsel during this portion of the proceedings. The trial court's questions to the venire regarding their general qualifications were transcribed as well as the names of the individual jurors who were excused. Thus, it appears that defense counsel raised no objections to the trial court's questioning of the venire or to the trial court's decision to excuse any of the individual prospective jurors. Accordingly, Osgood is due no relief on this claim.

VII.

Next, Osgood argues that the trial court erred by admitting into evidence autopsy photographs of the victim and photographs of the victim's body at the crime scene. According to Osgood, these photographs were not relevant to any issue in dispute at trial because, he says, the identity of the victim, Osgood's involvement, and the cause of death were not contested. (Osgood's brief, at 78.) Essentially, Osgood argues that the gruesome nature of the photographs was more prejudicial than probative and served only to inflame the passions of the jury.

This Court has held:

> "Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence. Chunn v. State, 339 So.2d 1100, 1102 (Ala. Cr. App. 1976). To be admissible, the photographic material must be a true and accurate representation of the subject that it purports to represent. Mitchell v. State, 450 So.2d 181, 184 (Ala. Cr. App. 1984). The admission of such evidence lies within the sound discretion of the trial court. Fletcher v. State, 291 Ala. 67, 277 So.2d 882, 883 (1973); Donahoo v. State, 505 So.2d 1067, 1071 (Ala. Cr. App. 1986)(videotape evidence). Photographs illustrating crime scenes have been admitted into evidence, as have photographs of victims and their wounds. E.g., Hill v. State, 516 So.2d 876 (Ala. Cr. App. 1987). Furthermore, photographs that show the external wounds of a deceased victim are admissible even though the evidence is gruesome and cumulative and relates to undisputed matters. E.g., Burton v. State, 521 So.2d 91 (Ala. Cr. App. 1987). Finally, photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors. Hutto v. State, 465 So.2d 1211, 1212 (Ala. Cr. App. 1984)."

Ex parte Siebert, 555 So.2d 780, 783–84 (Ala. 1989).

> " 'Courts and juries cannot be squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens, or gives character to other evidence sustaining the issues in the case, should not exclude it.' "

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

In the present case, Osgood entered a plea of not guilty. Thus, the State had the burden of proving his guilt beyond a reasonable doubt. The crime scene photographs, though graphic, were relevant to illustrate and corroborate the testimony of police officers who investigated Brown's murder. Similarly, the autopsy photographs helped to illustrate the State medical examiner's testimony regarding the mechanisms of Brown's injuries and her cause of death. Accordingly, the trial court did not abuse its discretion by allowing photographs of the victim to be admitted into evidence.

VIII.

***21** Next, Osgood argues that the State violated Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), when it played the video of Osgood's November 16, 2010, confession in which Investigator Lockhart read Tiffany Matthews's statement to Osgood. According to Osgood,

the statement was testimonial in nature, constituted double hearsay, and violated Osgood's constitutional right to confront witnesses against him. Because Osgood did not raise this issue at trial, we will review it only for plain error. See Rule 45A, Ala. R. App. P.

As described above, Matthews, a jailhouse informant, provided police with a written statement in which she claimed to have heard Vandyke implicate Osgood in Brown's murder. During an interview with Osgood on November 16, 2010, Investigator Lockhart read Matthew's statement aloud. However, Lockhart read the statement as if it were written in the first person in order to make Osgood believe that Vandyke had written the statement. Immediately after Lockhart read the statement, Osgood confessed to raping, sodomizing, and murdering Brown.

In C.L.H. v. State, 121 So.3d 403, 406 (Ala. Crim. App. 2012), this Court held:

> " 'the Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, 'the Sixth Amendment [prohibits the admission of] testimonial hearsay [statements offered to prove the truth of the matter asserted], ... and interrogations by law enforcement officers fall squarely within that class.' Crawford, 541 U.S. at 53 [124 S.Ct. 1354] (2004); see also id. at 59 n. 9 [124 S.Ct. 1354] (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)(explaining that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted')). Accordingly,
>
> > " 'It is well settled that[, when offered for the truth of the matter asserted,] a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible against the accused; it does not fall within any recognized exception to the hearsay rule and ... its introduction violates the accused's confrontation rights. See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); R.L.B. v. State, 647 So.2d 803 (Ala. Crim. App. 1994); Ephraim v. State, 627 So.2d 1102 (Ala. Crim. App. 1993).'
>
> "Jackson v. State, 791 So.2d 979, 1024 (Ala. Crim. App. 2000)."

In the present case, there is no doubt that State's exhibit 36, the video recording of Osgood's confession, contained out-of-court statements by individuals who did not testify at trial. However, those statements were not offered to prove the truth of the matter asserted, i.e., they were not offered to prove that Osgood raped, sodomized, and murdered Brown. Rather, the statements were offered to show their effect on Osgood and his subsequent decision to confess. On cross examination, Investigator Lockhart agreed that it was his intention "to go in and read [Matthews's] statement as if it had been written by Tonya Vandyke to see if [he] could get Mr. Osgood to give a statement." (R. 834.) Thus, the State's purpose in offering the portion of the video recording in which Lockhart read Matthews's statement was to show its effect on Osgood, not to prove the truth of its contents.

***22** Rule 801(c), Ala. R. Evid., provides: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." " ' "[The hearsay rule] does not exclude extrajudicial utterances offered merely to prove the fact of the making or delivery thereof, or to explain subsequent conduct of a hearer.' " Ashford v. State, 472 So.2d 717, 719 (Ala. Crim. App. 1985), quoting 22A C.J.S. Criminal Law § 718 (1961)." Robitaille v. State, 971 So.2d 43, 57 (Ala. Crim. App. 2005). Similarly, the "[Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford v. Washington, 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)(citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). Because Matthews's statement was not offered to prove the truth of the matter asserted, its admission did not violate Crawford. Accordingly, there was no error in admitting the portion of State's exhibit 36 containing Matthews's statement.

IX.

Next, Osgood argues that the State violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), when it used peremptory strikes to remove two prospective jurors from the venire. The record reveals that, after prospective jurors were excused for undue hardship, 43 prospective jurors remained, 3 of whom were black. One of the prospective black jurors was removed for cause; the remaining two were struck by the State using its peremptory

challenges. Osgood asserts that the State exercised its peremptory challenges to remove S.L. and C. B., the two black jurors, solely on the basis of race causing Osgood, who is white, to be tried by an all white jury. Osgood did not raise a Batson challenge at trial. Thus, we review this issue only for plain error. See Rule 45A, Ala. R. App. P.

Plain error is

> "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So.2d 73 (Ala. 1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor."

Ex parte Trawick, 698 So.2d 162, 167 (Ala. 1997). "To find plain error in the context of a Batson or J.E.B. [v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994),] violation, the record must supply an inference that the prosecutor was 'engaged in the practice of purposeful discrimination.' Blackmon v. State, 7 So.3d 397, 425 (Ala. Crim. App. 2005), quoting Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987).

The Alabama Supreme Court has held:

> "The burden of persuasion is initially on the party alleging discriminatory use of a peremptory challenge to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the court is to consider 'all relevant circumstances' which could lead to an inference of discrimination. See Batson, 476 U.S. at 93, 106 S.Ct. at 1721, citing Washington v. Davis, 426 U.S. 229, 239–42, 96 S.Ct. 2040, 2047–48, 48 L.Ed.2d 597 (1976). The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:
>
> > "1. Evidence that the 'jurors in question share[d] only this one characteristic—their membership in the group—and that in all other respects they [were] as heterogeneous as the community as a whole.' [People v.] Wheeler, 22 Cal.3d [258,] at 280, 583 P.2d [748,] at 764, 148 Cal.Rptr. [890,] at 905 [(1978)]. For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.
>
> ***23** "2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.
>
> "3. The past conduct of the offending attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)].
>
> "4. The type and manner of the offending attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.
>
> "5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So.2d 350, 355 (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 [905] (1978)."
>
> "6. Disparate treatment of members of the jury venire with the same characteristics; or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy, 503 So.2d at 352 and 355.
>
> "7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.
>
> "8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. [229,] at 242, 96 S.Ct. [2040,] 2049 [48 L.Ed.2d 597] (1976)].
>
> "9. The offending party used peremptory challenges to dismiss all or most black jurors, but did not use all of his peremptory challenges. See Slappy, 503 So.2d at 354, Turner, supra."

Ex parte Branch, 526 So.2d 609, 622 (Ala. 1987).

According to Osgood, a prima facie case of racial discrimination can be inferred from the record for the following reasons: The State used peremptory strikes to remove both prospective black jurors; white jurors who served on Osgood's jury shared characteristics with the black jurors who were struck; and the black jurors who were struck were as heterogeneous as the community as a whole.

We have reviewed the voir dire examination in light of the factors set out in Branch and do not find any evidence that the State engaged in purposeful discrimination. Both parties engaged the venire in extensive voir dire over a two-day period, both as a group and individually. The State questioned each juror in a similar manner regarding his or her feelings about the death penalty, his or her ability to stick to their beliefs despite pressure from other members of the jury, and his or her willingness to serve on the jury. Although neither black juror revealed reservations about the death penalty or their willingness to serve, there existed race-neutral reasons for striking each person. S.L.'s juror questionnaire disclosed that she or a close family member had been sued by a credit-card company resulting in their wages being garnished. None of the seated jurors shared this characteristic.[11] Similarly, C.B.'s juror questionnaire revealed that he did not finish high school. All the seated jurors had at least a high school education.

***24** Based on our review of the voir dire as a whole, this Court concludes that the record does not support Osgood's assertion that the State engaged in purposeful discrimination. Accordingly, the trial court's failure to require the State to provide race-neutral reasons for its strikes sua sponte does not rise to the level of plain error.

X.

Next, Osgood argues that the trial court erred by allowing the State to introduce evidence about law enforcement's investigation of other suspects. Osgood points to Investigator Lockhart's testimony regarding his early investigation into another man as a suspect in Brown's murder. Lockhart stated that he had initially developed the other man as a suspect based on information that the other man had been harassing Brown. However, Lockhart testified that Richardson had an alibi and was later excluded based on DNA evidence. According to Osgood, this testimony was irrelevant and therefore violated his "right to due process, a fair trial, and to confront the witnesses against him, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Alabama law." (Osgood's brief, at 92.) Osgood did not object to this testimony at trial; thus, we review it only for plain error. See Rule 45A, Ala. R. App. P.

"Alabama courts have repeatedly held that the trial court has broad discretion in determining the admissibility of evidence, and that the trial court's determination will not be reversed unless the court has abused its discretion." Yeomans v. State, 898 So.2d 878, 894 (Ala. Crim. App. 2004). Further, in Deardorff v. State, 6 So.3d 1205, 1223 (Ala. Crim. App. 2004), this Court held that a police officer's testimony regarding "the initial stages of the investigation and the reasons the investigation focused on" the defendant as a suspect was permissible. See also Rule 401, Ala. R. Evid. (" 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") Investigator Lockhart's testimony about the elimination of other suspects helped to explain why the investigation focused on Osgood and also served to dispel the idea that someone other than Osgood may have killed Brown. Although Osgood states in his brief on appeal that "[i]dentity was not an issue" in his trial, Osgood maintained his plea of not guilty and the State had the burden to prove his guilt beyond a reasonable doubt. Accordingly, that testimony was relevant and its admission did not constitute error, much less plain error.

For the foregoing reasons, Osgood is not entitled to relief on any of his claims regarding the guilt phase of his trial.

Penalty-Phase Issues

After the jury returned a guilty verdict as to each count of capital murder, the trial court conducted a penalty-phase hearing in compliance with §§ 13A–5–45 and 13A–5–46, Ala. Code 1975. At that hearing, the State asked the jury to recommend a death sentence based on the following aggravating circumstances: That the capital offense was committed during the course of a rape, see § 13A–5–49(4), Ala. Code 1975, and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, see § 13A–5–49(8), Ala. Code 1975. The State incorporated all the evidence it presented during the guilt phase of the trial but presented no additional evidence at the penalty phase. Osgood called three witnesses in mitigation:

his sister, Ann Marie Osgood; mitigation specialist Teal Dick; and forensic psychiatrist Dr. Leonard Mulbry, Jr.

***25** Ann Marie Osgood testified that she is approximately one year older than Osgood and that she and Osgood were adopted when they were very young. According to Ann Marie, their adoptive parents, Richard and Peggy Osgood, were extremely abusive. Ann Marie testified that Peggy was an alcoholic who would frequently take both children to bars and leave them with strangers while she "went off with guys." (R. 1238.) Ann Marie stated that when she was very young—prior to entering kindergarten—Osgood witnessed her being forced to perform oral sex on a man in a bar. After that incident, Ann Marie stated that she and Osgood were put into foster care until their father ultimately regained custody. According to Ann Marie, their father was a stern disciplinarian who would often withhold water from Osgood to prevent him from wetting the bed.

Ann Marie also testified that Osgood worked as a stripper for a period of time and that he would frequently have sexual relationships with women he did not know very well. According to Ann Marie, Osgood told her that he struggled with addiction. However, Ann Marie stated that Osgood was very loyal and that he was a loving uncle to her children. Anne Marie also testified that she had never known Osgood to be violent.

Teal Dick, the director of the Alabama Family Resource Center, testified as a mitigation expert on Osgood's behalf. According to Dick, his research into Osgood's background, although "fairly sketchy," revealed that Osgood and his siblings were abandoned by their biological parents when Osgood was an infant and that Osgood suffered from severe malnutrition and rickets as a result. (R. 1275.) Dick stated that such malnutrition in a child has been linked to low IQ and anti social behavior. Dick testified that he interviewed Osgood on multiple occasions and that Osgood claimed that he was both physically and sexually abused beginning when he was five or six years old. Dick stated that Osgood, like his sister, was left alone in bars as a child and forced to perform oral sex on a strange man.

Dick provided the jury with an explanation of how a human brain develops from childhood and testified that Osgood's brain development was hindered by the circumstances in which he grew up. Specifically, Dick opined that Osgood's lack of attachment at an early age contributed to Osgood's being manipulative, lacking emotions, and being abnormally insensitive to punishment. Dick stated that Osgood is unable to have real empathy or to connect with other people. According to Dick, Osgood's early abandonment and malnutrition contributed to his present psychological state.

Dick provided documentation indicating that Osgood's parents had been investigated by state social workers after allegations that they excessively punished Osgood and his siblings. Those reports also indicated that Osgood had behavioral problems at school. Additional documentation revealed that Osgood was admitted to an adolescent psychiatric unit where he was diagnosed as having a conduct disorder, being under-socialized, and having a developmental reading disorder.

Dick further testified that, for various reasons, Osgood was in and out of foster care throughout his childhood and that he ultimately ended up in the custody of his adoptive mother with whom he had a tumultuous and sometimes violent relationship. Dick stated that Osgood was later placed in group facilities during his teenage years. Dick finally opined that Osgood's lack of early bonding with his parents, coupled with his experiences during childhood, predisposed him to the behaviors that led to the underlying conduct in the present case. (R. 1309.)

Dr. Leonard Mulbry, a forensic psychiatrist, testified that he interviewed Osgood on two occasions and performed a psychiatric evaluation of Osgood. Dr. Mulbry stated that he was asked specifically to evaluate Osgood's "unusual sexual behaviors" to determine whether Osgood exhibited "compulsive sexual behavior" or "sexual addiction." (R. 1326.) According to Dr. Mulbry, Osgood revealed that he was sexually abused at the age of three or four; that his first sexual encounters were with other children at the age of nine; and that when he was 14 years old, he became sexually involved with a 24-year-old woman who became pregnant with his child. Dr. Mulbry diagnosed Osgood with alcohol-use disorder, methamphetamine-use disorder, and anti-social personality disorder. Dr. Mulbry also diagnosed Osgood with sexual addiction but stated that the diagnosis was "not DSM regulated."[12] (R. 1339.) Dr. Mulbry stated that Osgood reported having 10 children but knew the whereabouts of only one. According to Dr. Mulbry, Osgood's background contributed to the development of his anti social personality disorder.

***26** In addition to Osgood's sexual behaviors, Dr. Mulbry testified that Osgood abused a wide range of substances,

the most significant being alcohol and methamphetamine. According to Dr. Mulbry, Osgood attempted suicide in 1997. Dr. Mulbry also testified to much of the same neglect and abuse that had been previously mentioned by Osgood's mitigation specialist, Teal Dick.

Discussion

On appeal, Osgood argues that the trial court's penalty-phase instructions were improper and, consequently, precluded the jury from properly considering and weighing all the mitigating evidence that was presented.

A review of the record reveals that, at the conclusion of the penalty phase, the trial court instructed the jury regarding the aggravating circumstances and the mitigating circumstances. (R. 1398-1408.) At the outset of the instructions, the trial court told the jury that "[i]n order to get a recommendation of death, you must find that the aggravating circumstance outweighs any mitigating circumstance." (R. 1399.) The trial court then proceeded to define aggravating circumstances and instructed the jury as to the specific aggravating circumstances the State was attempting to prove, i.e., that the capital offense was committed during the course of a rape and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses.

The trial court then defined mitigating circumstances for the jury by explaining that mitigating circumstances are "things that the defendant brings to you in order to attempt to outweigh the aggravating circumstances. The defendant is allowed to offer any evidence in mitigation that is evidence that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole." (R. 1403.) The trial court went on to list each of the statutory mitigating circumstances provided in § 13A–4–51, Ala. Code 1975. However, when the trial court defined nonstatutory mitigating circumstances as provided in § 13A–5–52, Ala. Code 1975, it stated:

> "Those mitigating circumstances would also include any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for life imprisonment. Those would be, as presented in this case, would be substance abuse by the defendant and his family life. If the factual existence of those two things are in dispute, the State had the burden of disproving those...."

(R. 1404)(Emphasis added.)

Osgood contends that this instruction improperly restricted the jury's consideration of nonstatutory mitigating circumstances to only two areas: Osgood's family life and his substance abuse. Osgood points out that he offered other mitigating evidence that would not fall into either of those categories. As noted above, Osgood offered evidence that he had been sexually abused by a man at a bar when he was a child; that he fathered a child with a 24-year-old woman when he was 14 years old; that he had sexual encounters with other children when he was 9 years old; that his brain development was potentially hindered by the malnutrition he suffered as an infant; that he was admitted to a psychiatric hospital as a teenager; that he reported a suicide attempt; and that Dr. Mulbry diagnosed him as having antisocial personality disorder. According to Osgood, the above-mentioned instruction prevented the jury from considering and weighing that evidence in mitigation.

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

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

Additionally, in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the United States Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Additionally, in Ex parte Smith, [Ms. 1010267, March 14, 2003] —— So.2d —— (Ala. 2003), the Alabama Supreme Court, discussed mitigating circumstances in the context of a capital case as follows:

> "To determine the appropriate sentence, the sentencer must engage in a 'broad inquiry into all relevant mitigating evidence to allow an individualized determination.' Buchanan v. Angelone, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation. Jacobs v. State, 361 So.2d 640, 652–

53 (Ala. 1978). See 13A–5–45(g), Ala. Code 1975 ('the defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52.'). '[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring specially)."

In the present case, the trial court's only jury instruction regarding nonstatutory mitigating circumstances specifically identified two areas the jury could consider, i.e., Osgood's family life and his substance abuse. It is well settled that " '[t]he jury is presumed to follow the instructions given by the trial court.' " Mitchell v. State, 84 So.3d 968, 983 (Ala. Crim. App. 2010), quoting Frazier v. State, 758 So.2d 577, 604 (Ala. Crim. App. 1999). The trial court's instruction that the nonstatutory mitigating circumstances were, "as presented in this case, ... substance abuse by the defendant and his family life," effectively precluded the jury from considering and weighing the other mitigating circumstances offered by Osgood, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, see Lockett, supra, as well as § 13A–5–45(g), Ala. Code 1975.

Osgood also argues that the trial court erred when it explained the process by which the jury should weigh the aggravating circumstances and the mitigating circumstances. After the above-mentioned instructions regarding mitigating circumstances, the trial court proceeded to explain the weighing process:

> ***28** "If you believe that the State's offered evidence of aggravating circumstances outweigh or is more convincing than the mitigating evidence offered by the defendant, then the mitigating evidence should not be considered by you in sentencing. On the other hand, if you believe that the State's offered evidence is of less or equal weight or is less convincing than the mitigating evidence, then that mitigating evidence shall be considered by you in sentencing."

(R. 1405)(Emphasis added.)

That instruction delineated two scenarios for the jury: one in which the mitigating circumstances were to be considered and one in which they were not. As stated above, Lockett made clear that the Eighth and Fourteenth Amendments require that a sentencer not be precluded from considering mitigating circumstances offered by a defendant in a capital case. See also § 13A–5–45(g), Ala. Code 1975. We note that, " '[w]hile Lockett and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.' " Ex parte Slaton, 680 So.2d 909, 924 (Ala. 1996), quoting Bankhead v. State, 585 So.2d 97, 108 (Ala. Crim. App. 1989)(emphasis added). However, by suggesting that there was at least one scenario in which the jury should not consider mitigating circumstances, the trial court's instructions ran afoul of the United States Constitution and Alabama law. See §§ 13A–5–45(g) and 13A–5–46(e), Ala. Code 1975.

Accordingly, this Court finds that the trial court's penalty-phase jury instructions improperly limited the jury's consideration of nonstatutory mitigating evidence and inaccurately described the process for weighing the aggravating circumstances and the mitigating circumstances. Consequently, Osgood's rights under both Alabama law and the United States Constitution were violated.

We note that Osgood did not raise any objection to the trial court's instructions during the penalty-phase. (R. 1408.) However, because Osgood was sentenced to death, his failure to raise that issue in the trial court does not prevent this Court from reviewing the issue for plain error. See Rule 45A, Ala. R. App. P.

In Ex parte Bryant, 951 So.2d 724 (Ala. 2002), the Alabama Supreme Court found plain error where the trial court improperly explained to the jury the process of weighing the aggravating and mitigating circumstances. In Bryant, the trial court's penalty-phase instructions suggested that the jury could recommend a death sentence if it found that the aggravating circumstances and the mitigating circumstances were of equal weight. 951 So.2d at 730 ("In the case now before us, the jury instructions erroneously allow the conclusion that the death penalty is appropriate even if the aggravating circumstances do not outweigh the mitigating circumstances so long as the mitigating circumstances do not outweigh the aggravating circumstances"). The Court further held:

> "No other instructions by the trial court and no other feature of the record instills us with any confidence that the jury did not, within the parameters of the erroneous instructions, base the death penalty recommendation on a finding that the mitigating circumstances did not outweigh

the aggravating circumstances even though the mitigating circumstances did equal the aggravating circumstances. Such a recommendation would be contrary to § 13A–5–46(e). Therefore, the erroneous jury instructions on the topic of weighing the aggravating circumstances and the mitigating circumstances constitute plain error."

***29** Bryant, 951 So.2d at 730.

In the present case, the trial court's instructions were faulty for two reasons. First, the instructions limited the jury's consideration to only two categories of nonstatutory mitigating circumstances, i.e., Osgood's family life and drug use, thereby precluding the jury from considering other nonstatutory mitigating circumstances offered by Osgood. Second, the instructions suggested to the jury that there was at least one scenario in which the jury should not even consider mitigating circumstances in its deliberations. Those instructions were in conflict with §§ 13A–5–45(g) and 13A–46(e), Ala. Code 1975, as well as the Constitutional mandates set forth in Lockett v. Ohio, supra.

This Court has reviewed the entirety of the trial court's jury instructions from the penalty-phase of Osgood's trial. The language that Osgood challenges on appeal regarding the jury's consideration of nonstatutory mitigating circumstances is the only portion of the instructions in which the trial court discussed nonstatutory mitigating circumstances. Similarly, the trial court's language regarding the weighing process in which it suggested that there existed a situation in which proffered mitigating evidence was not to be considered was the only portion of the instructions dealing with the weighing process. Accordingly, this Court is not convinced that the jury's recommendation was made with a proper understanding of the mitigating evidence it was to consider and the process by which it was to weigh the aggravating circumstances and the mitigating circumstances.

We also note that, in the trial court's written sentencing order, the court stated that, in reaching its decision to sentence Osgood to death, it had "given great consideration to the jury's recommendation and considers it to be a heavy factor to consider." (C. 468.) Accordingly, this Court finds it probable that the trial court's improper penalty-phase instructions adversely affected Osgood's Constitutional rights and, therefore, constituted plain error. See Rule 45A, Ala. R. App. P.

Although Osgood raises additional arguments on appeal regarding the penalty phase of his trial, our resolution of the issues discussed above pretermits discussion of those issues.

For the foregoing reasons, Osgood's convictions for capital murder are affirmed. However, Osgood's sentences of death are reversed and this case is remanded with instructions that Osgood be granted a new penalty-phase hearing pursuant to §§ 13A–5–45 and 13A–5–46, Ala. Code 1975. The trial court should then determine Osgood's sentence as provided in § 13A–5–47, Ala. Code 1975.

AFFIRMED AS TO CONVICTIONS; REVERSED AS TO SENTENCES; AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, J., concur. Joiner, J., recuses himself. Kellum, J., not sitting.

All Citations

--- So.3d ----, 2016 WL 6135446

Footnotes

1 In addition to the oral statement he gave police officers on November 16, 2010, Osgood also provided a written statement detailing his and Vandyke's involvement in Brown's murder. (C. 673-78.)

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

3 Osgood signed an identical form waiving his Miranda rights prior to speaking with police on October 14, 2010. (C. 669.)

4 Osgood had previously told investigators that he went by the nickname "Taz."

5 A video recording of each interview is contained in the record on appeal.

6 A.S. did not serve on Osgood's jury.

7 S.O. did not serve on Osgood's jury.

8 J.S. served on Osgood's jury.

9 Although this issue arose prior to the guilt phase of Osgood's trial, we note that R.P. was not questioned by either party regarding her ability to render a fair and impartial guilt-phase verdict based on her beliefs about the death penalty.

Although mentioned in dicta, the Court in Witherspoon noted that its holding did not "render invalid the conviction, as oppose to the sentence, in this or any other case." 391 U.S. at 523 n. 21, 88 S.Ct. 1770. Thus, we question whether this issue affects the guilt phase of Osgood's trial.

10 Osgood also argues that the prosecutor made similar remarks during the penalty phase of his trial. Those arguments will be addressed in the part of this opinion dealing with penalty-phase issues.

11 The defense also struck a prospective juror who indicated that her husband had been sued by a credit-card company.

12 Dr. Mulbry previously explained that "DSM" referred to the Diagnostic and Statistical Manual, a publication of the American Psychiatric Association, which lists the characteristics of certain mental illnesses. (R. 1322-23.)

Appendix B

2020 WL 2820637
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

James OSGOOD

v.

STATE of Alabama

CR-13-1416

|

May 29, 2020

Synopsis

Background: Defendant was convicted in the Circuit Court, Chilton County, No. CC-12-27, of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, No. CR-13-1416, 2016 WL 6135446, affirmed convictions, reversed sentences, and remanded. On remanded, defendant was sentenced to death. Defendant appealed.

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

trial court's reference to jury's sentencing decision as recommendation did not render invalid defendant's waiver of statutory right to have jury decide sentence;

trial court's decision to allow State to show jury venire crime-scene photograph during penalty phase did not render defendant's waiver of jury's participation involuntary;

trial court did not abuse its discretion by denying defendant's motion to continue resentencing hearing in order to allow defense counsel adequate time to prepare;

trial court's denial of defendant's motion to continue resentencing hearing did not render defendant's waiver of jury's participation involuntary;

trial court did not plainly err during penalty phase by allowing victim's sister to give victim-impact testimony characterizing crime and defendant and requesting that defendant be sentenced to death;

fact that trial court, not jury, found existence of aggravating circumstance, and found that aggravating circumstance outweighed mitigating circumstances, did not violate defendant's Sixth Amendment right to jury determination of any fact on which legislature conditioned increase in maximum punishment; and

death was proper sentence.

Affirmed.

Appeal from Chilton Circuit Court (CC-12-27)

On Return to Remand

McCOOL, Judge.

***1** James Osgood was convicted of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. The jury unanimously recommended that Osgood be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Osgood to death. On October 21, 2016, this Court affirmed Osgood's convictions for murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See Osgood v. State, [Ms. CR-13-1416, October 21, 2016) ––– So. 3d. ––––, 2016 WL 6135446 (Ala. Crim. App. 2016). This Court, however, found that the circuit court's jury instructions during the penalty-phase were erroneous and that it was "probable that the [circuit] court's improper penalty-phase instructions adversely affected Osgood's Constitutional rights and, therefore, constituted plain error." ––– So. 3d at ––––, 2016 WL 6135446. Thus, this Court reversed Osgood's sentences and remanded this case for the circuit court to hold a new penalty-phase hearing pursuant to §§ 13A-5-45 and 13A-5-46, Ala. Code 1975, and for the circuit court to subsequently "determine Osgood's sentence as provided in § 13A-5-47, Ala. Code 1975." Id.

On remand, a new penalty-phase hearing was held and the jury-selection process began. However, Osgood ultimately waived the participation of a jury in the new penalty-phase

hearing pursuant to § 13A-5-44(c), Ala. Code 1975. The circuit court subsequently imposed the sentence of death.

Standard of Review

Because Osgood was sentenced to death, this Court must review the record of the lower court proceedings for plain error. Rule 45A, Ala. R. App. P., states:

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

Additionally,

> " ' "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See Ex parte Price, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); Burgess v. State, 723 So.2d 742 (Ala. Crim. App. 1997), aff'd, 723 So.2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); Johnson v. State, 620 So.2d 679, 701 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala. 1993), on remand, 620 So. 2d 714 (Ala. Crim. App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."'

***2** Smith v. State, 795 So. 2d 788, 797–98 (Ala. Crim. App. 2000), quoting Hall v. State, 820 So. 2d 113, 121–22 (Ala. Crim. App. 1999). Further,

> "[t]his court has recognized that ' "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.' " ' Whitehead v. State, [777 So. 2d 781] , at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim.App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995)."

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

Discussion[1]

I.

Osgood claims that the circuit court erred in accepting his waiver of his right to a jury determination of his sentence because, he claims, his waiver was "unknowing, unintelligent, and involuntary." (Osgood's Supp. brief, 18.)[2] Specifically, Osgood alleges that his decision to "forego [sic] jury participation was not knowing and intelligent, because the District Attorney and trial court repeatedly and consistently provided misrepresentations about the jury's role" as a mere "recommender." (Osgood's Supp. brief, 20-21.) Osgood also argues that his decision to waive his right to jury participation was involuntary because, he says, it was made after the circuit court committed numerous errors, which made having an impartial jury impossible, such as: 1) allowing the State to show the potential jurors "an extremely prejudicial crime scene photograph of the victim;" 2) not allowing a continuance to provide counsel adequate time to prepare for trial; and 3) denying defense counsel's motion for a mistrial after the district attorney commented on Osgood's previous trial and sentencing. (Osgood's Supp. brief, 22.)

These specific claims –- that these errors affected the validity of his waiver of jury participation at his sentencing hearing -- were never presented to the trial court; therefore, we will review these claims to determine whether there is plain error. Rule 45A, Ala. R. App. P.

Osgood's new penalty-phase proceedings began on Monday, April 9, 2018. Osgood was represented by Robert Bowers, Jr., and Ali Garrett. During the individual voir dire portion of the jury-selection process for Osgood's new penalty-phase hearing, the court indicated that it had been informed that Osgood wished to forgo jury participation in his new penalty-phase hearing. The following transpired:

> "THE COURT: Mr. Osgood, would you state your name on the record to confirm that you are here.
>
> ***3** "[Osgood:] James Lee Osgood.
>
> "THE COURT: Mr. Osgood, am I correct in what I said that you want to forego [sic] the process before a new jury as

far as a sentencing hearing, meaning you want to waive that process and not have a proceedings before a new jury?

"[Osgood:] Yes, sir.

"THE COURT: Have you had an opportunity to discuss that with Mr. Bowers and/or Mrs. Garrett concerning what that means?

"[Osgood:] Yes, sir.

"THE COURT: I want to ask you some questions. It might sound like I'm asking them several times. It's just a way for me to get on the record clearly that you know where we are going with this.

"[Osgood:] Yes, sir."

(Supp. R. on RTR, 186-88.)[3] The court continued to question Osgood about his educational background, his ability to read and write, his physical health, his psychological evaluation that indicated that Osgood was competent to stand trial, and whether Osgood was on any mental-health medication. Osgood indicated to the court that he did not have any concerns about the quality of the representation of his counsel in this matter.

The court then discussed with Osgood the process of the proceedings if Osgood did not forgo jury participation, including re-presenting the testimony that had been presented in Osgood's first penalty-phase hearing, including information concerning any aggravating circumstances presented by the State and any mitigating circumstances to be presented by the defense. The court asked Osgood if he knew what the two possible recommendations from the jury could be, and Osgood responded: "Life without the possibility of parole and death." (Supp. R. on RTR, 192.) The court reminded Osgood that, if he chose to go through the process with a jury, the jury would then weigh aggravating factors against mitigating factors and make a decision that would "put forth a recommendation" to the court regarding the sentence. (Supp. R. on RTR, 192.) The court informed Osgood that, in addition to the information that had been presented during the penalty phase in the first trial, his defense counsel could also present any additional information regarding mitigating factors to the new jury.

The following then occurred:

"THE COURT: ... I will ask you now, knowing that you have the right to continue with this process, is it your decision alone, your independent decision to forgo or waive that process of having a jury make a recommendation to the Court?

"[Osgood:] Yes, sir.

***4** "THE COURT: Has anyone coerced you, influenced you to do this, to waive this process?

"[Osgood:] No, sir.

"THE COURT: Are you knowingly and voluntarily waiving a jury to make that determination or the recommendation to the Court?

"[Osgood:] Yes, sir.

"THE COURT: And you make this waiver of the jury without any coercion, threat, or promise?

"[Osgood:] Yes, sir.

"....

"THE COURT: With you waiving your right for the jury to make a recommendation to the Court, what that tells me you want to do is you want the Judge individually, me individually, to make the sentencing determination; is that correct?

"[Osgood:] Yes, sir.

"THE COURT: Do you understand that, one, because I heard the testimony in the penalty phase and I have reviewed the record in the penalty phase that I have all your mitigating factors to consider?

"[Osgood:] Yes, sir. You already have all the facts."

(Supp. R. on RTR, 193-95.)

The circuit court informed Osgood that the court would consider the following mitigating factors based on the testimony presented at the penalty phase of his first trial: that Osgood had a poor family life prior to the incident with the victim in this case; that Osgood was sexually abused by a man at a bar when he was a child; that Osgood fathered a child with a 24-year-old woman when he was 14 years old; that Osgood had sexual encounters with other children when he was 9 years old; that, according to Dr. Mulbry, Osgood's brain development might have been potentially hindered because of some malnutrition that he suffered as an infant; that he was admitted to a psychiatric hospital as a teenager; that Osgood had reported at least one suicide attempt; and that Dr. Mulbry diagnosed Osgood with having an antisocial

personality disorder. Osgood acknowledged that those were the enumerated mitigating factors to be considered by the court during its sentencing determination.

The circuit court explained the change in Alabama law regarding judicial override in death-penalty cases since Osgood's trial, i.e., that the circuit court now "has to follow the recommendation of life without parole if that is the recommendation of the jury," and "if the jury returned a recommendation of a death sentence, [the circuit court] can follow [the jury's recommendation] but [the court] also could change that to life without parole." (Supp. R. on RTR, 197.) Osgood acknowledged that he understood the change in the law.

Defense counsel and the State informed the court that it was the motion of both parties to have the circuit court "adopt the entire previous proceeding from the start of the penalty phase to the closing arguments of the penalty phase from the prior trial." (Supp. R. on RTR, 198.) Defense counsel specifically motioned the court to reintroduce and incorporate into the instant proceeding Osgood's exhibits 1-29 as previously admitted, as well as all the mitigation testimony that was received at the first sentencing hearing held on May 12, 2014. The court further informed Osgood of the statutory mitigating factors that the court would consider in addition to the nonstatutory mitigating factors listed above and confirmed that Osgood understood that the court would consider those mitigating factors. The court further confirmed that Osgood understood that the court would also consider the aggravating factors presented by the State –- i.e., that the crime occurred during a rape and that the murder was an especially heinous, atrocious, and cruel crime –- and that the court would weigh the aggravating circumstances it found to exist against the mitigating circumstances it found to exist.

***5** The circuit court confirmed with both of Osgood's defense counsel, individually, whether counsel was satisfied that Osgood had received a "thorough review" and knowledge of the consequences of "waiving a jury determination of a recommendation to the [c]ourt concerning his sentence." (Supp. R. on RTR, 200.)

Finally, the following exchange occurred:

> "[Mr. Bowers:] Your Honor, if I might at this time, part of the questions was had anybody forced or coerced him into this decision. I will bring it to the Court's attention that Mr. Osgood on his own mentioned this scenario to me first thing Monday morning. So we talked about it briefly first thing Monday morning. He brought it up, mentioned it on his own Monday morning. Then again on Tuesday, this morning, he again brought the subject up again on his own. And at that time, then we started exploring it further to make sure that it –- we knew it was a possibility. We wanted to make sure that we knew that it would be a possibility and figure out exactly how to do it to make sure that it was done right. So my point is that I did not bring it up or mention it to him myself nor did Mrs. Garrett. He brought this up and mentioned it on his own. Is that right, Mr. Osgood?
>
> "[Osgood:] Correct.
>
> "THE COURT: Mr. Osgood, is there –- help me understand.
>
> "[Osgood:] Why I'm doing this?
>
> "THE COURT: Yes, sir. And it might be that your explanation would help the rest of the room in this matter.
>
> "[Osgood:] I've always been a firm believer on an eye for an eye, tooth for a tooth, life for a life. If you can't do the time, don't do the crime. Okay. I screwed up. I deserve what I was given. When I was told by the appeal court that this was coming back for a resentence, I was worried because my worry was the jury would come back with a life without [parole], and I didn't want that. I remember when I was sentenced the things you told me, the manner in which you told me. So I took it that if I put it in your hands again, I would get the same sentence which would be death.
>
> "THE COURT: Is that what you are knowingly asking me for?
>
> "[Osgood:] Yes, sir."
>
> "....
>
> "[Prosecutor:] Judge, the only thing I would like to add is when this Court goes to consider the aggravating and mitigating circumstances, for the aggravating circumstances that you just referred to and read, that comes from Section 13A-5-49[, Ala. Code 1975]. It was aggravating circumstance number four is what the jury found by their verdict in the guilt phase. It was the aggravating circumstance number eight where the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses that you have to consider.
>
> "Judge, based off the statement of the defendant, I know that you covered with him the change in the law as to if the

jury recommended one you could and if they recommended –- the jury recommended something else, you couldn't. Could you just reiterate that based off of what he said that he understands that. I know he said that if it was up to you, I would receive the same. I know there would be a possibility that there could be a different result.

"THE COURT: If the jury came back with a recommendation of life without parole, this Court would resentence you to life without parole. If the jury came back with a recommendation of the death penalty, there is an option with the Court to either give you the death penalty or to give you life without parole. That would be this Court's option. So there is one way. Now the law has changed to where I couldn't go up on the sentence but I can reduce the sentence. You do understand that?

***6** "[Osgood:] Yes, sir.

"THE COURT: That's what the State's attorney was asking.

"[Osgood:] I understand."
(Supp. R. on RTR, 200-03.)

The court stood in recess until the following morning. At the beginning of the proceedings the following morning, Osgood confirmed with the court that, with the consultation with his counsel, he still wished to waive his right to jury participation in the new penalty-phase hearing of his capital-murder trial. The court ultimately sentenced Osgood to death at the conclusion of the new penalty-phase hearing.

Section 13A-5-44(c), Ala. Code 1975, provides:

"Notwithstanding any other provision of the law, the defendant with the consent of the state and with the approval of the court may waive the participation of a jury in the sentence hearing provided in Section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right."

This Court has stated:

" 'The United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), stated:

" ' "This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

" '428 U.S. at 252, 96 S.Ct. 2960 (footnote omitted). The right to have a jury recommend a sentence in a capital case is a right afforded by statute —- not the Alabama Constitution of 1901. See § 13A–5–45, Ala. Code 1975. A waiver of a statutory right requires a lower standard to uphold than a waiver of a constitutional right. See Ex parte Dunn, 514 So. 2d 1300 (Ala. 1987), and Watson v. State, 808 So. 2d 77 (Ala. Crim. App. 2001).'

"924 So.2d at 782."
Belisle v. State, 11 So. 3d 256, 317 (Ala. Crim. App. 2007)(quoting Turner v. State, 924 So. 2d 737 (Ala. Crim. App. 2002)). "When determining the validity of any waiver we look at the particular facts of the case and the totality of the circumstances." Turner, 924 So. 2d at 782.

In Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003), this Court addressed a similar situation and held that a defendant had freely waived his right to the participation of the jury in the sentencing phase of his capital murder trial when the court "thoroughly explained the rights that [the defendant] would be waiving," "questioned [the defendant] extensively about his decision and his understanding of the consequences thereof," and the defendant "remained adamant about his decision to waive jury participation." 897 So. 2d at 1197. We now turn to Osgood's specific arguments concerning the validity of his waiver of jury participation in the new penalty-phase hearing.

A.

***7** Osgood first alleges that his waiver of the jury's participation was involuntary because it was in response to the State's and the circuit court's repeatedly misrepresenting the jury's role in sentencing by referring to the jury's decision

as a "recommendation." In his brief on return to remand, Osgood states that the court informed him of "the change in Alabama's judicial override law since [his] last trial"; however, Osgood maintains, he was not correctly informed of the jury's role until after he indicated that he wished to forgo jury participation in his sentencing. (Osgood's Supp. brief, 21.)

In the present case, before accepting Osgood's waiver, the circuit court conducted an extensive colloquy to ensure that Osgood was knowingly and voluntarily waiving his right to jury participation in the new penalty-phase hearing. The circuit court ensured that Osgood was voluntarily making his waiver "without any coercion, threat, or promise." (Supp. R. on RTR, 194.) The court explained to Osgood that he had the right to have the jury make the determination regarding whether to sentence Osgood to life imprisonment without the possibility of parole or the death penalty. The court also explained the consequences of waiving that right and, thus, allowing the court alone to weigh the aggravating and mitigating circumstances and to make the sentencing determination. Additionally, the court reviewed the aggravating and mitigating factors that it would consider in making its determination and repeatedly sought Osgood's acknowledgment that he understood the consequences of his waiver of jury participation.

Osgood is correct that "[t]he 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." Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] —— So. 3d ——, —— n. 1, 2019 WL 1105024 n. 1 (Ala. Crim. App. 2019). However, the new law prohibiting the circuit court from overriding a jury verdict in capital cases "shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017." § 13A-5-47.1, Ala. Code 1975. (Emphasis added.) See also id.; see also White v. State, [Ms. CR-16-0741, April 12, 2019] —— So. 3d ——, 2019 WL 1592492 (Ala. Crim. App. 2019). Here, Osgood was charged and convicted of capital murder prior to April 11, 2017. Therefore, the new law regarding the court's ability to override a jury verdict in capital cases does not apply to him, and the court's reference to the jury's recommendation was not in error.

The record indicates that the circuit court and both parties presumed that the new capital-sentencing law should have been applied in Osgood's case, and Osgood was informed of the change in the law. See (Supp. R. on RTR, 197.) We note that Osgood does not argue that the circuit court's statement to Osgood regarding the application of the new capital-sentencing law was erroneous or that the court's statement affected his waiver of jury participation at the new penalty-phase hearing. However, regardless of the court's beliefs concerning the applicability of the new law or the references made concerning the jury's role in sentencing, under the facts of this particular case, any potential error in the court's discussion of the jury's role in sentencing was harmless because the record indicates that Osgood's decision to waive jury participation was done before any such reference. See Rule 45, Ala. R. App. P. ("No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). Here, not only did the record reflect that the circuit court thoroughly explained the process that Osgood would be entitled to if he chose to proceed with a jury during his new penalty-phase hearing, the record further discloses that Osgood had already informed his counsel that he wanted to forgo jury participation in the sentencing phase "first thing Monday morning" prior to the prosecutor's or the court's reference to the jury's role in sentencing. (Supp. R. on RTR, 200.) Thus, viewing the totality of the circumstances and the record as a whole, we cannot say that the reference to the jury's decision as a recommendation rendered Osgood's waiver invalid. See Turner, 924 So. 2d at 782.

B.

***8** Osgood also claims that his waiver of the jury's participation in the new penalty phase was involuntary because, he says, it was made "after the trial court committed numerous errors," including allowing the State to show the jury venire from which the sentencing-phase jury would be selected what he describes in his brief on return to remand as "an extremely prejudicial crime scene photograph of the victim." (Osgood's Supp. brief, 22.)

Before Osgood informed the court of his intention to waive jury participation in the new penalty phase hearing, the following occurred outside the presence of the jury venire during voir dire:

> "MRS. GARRETT: The objection is not to using any exhibits during voir dire. The objection is to using the crime scene photographs during voir dire of the jury which is what the State indicated to us that their plan was. They planned to use a photograph of the victim's driver's license with her photo which is fine with us. The photos of the crime scene would be extremely shocking to this jury of seventy people that we possibly have as a jury. I just don't think there is any need in order to shock all of those people with these photos when we could just show them to the jury when we get the jury seated.
>
> "[ASSISTANT DISTRICT ATTORNEY:] Judge, our response to that would be that there is no presumption of innocence here. One of the things we have to prove in our aggravating circumstances is that the death was particularly cruel, heinous, or atrocious compared to other capital crimes. For that reason, leads us to wanting to display that picture as part of the voir dire process.
>
> "MRS. GARRETT: I don't know why they can't just tell the jury that this is going to be –- these pictures are going to be shocking to you. They may be disturbing to you without showing them the photographs.
>
> "THE COURT: Thank you. [Prosecutor,] anything further?
>
> "[ASSISTANT DISTRICT ATTORNEY]: Only, Judge, if the jury cannot view pictures of that nature, that is something we need to know now.
>
> "[DISTRICT ATTORNEY]: Judge, for the record, I'm just planning on showing one photograph for about five, six seconds just to see if they can tolerate it.
>
> "THE COURT: Mrs. Garrett, anything further?
>
> "MRS. GARRETT: Nothing further.
>
> "THE COURT: Mr. Bowers, anything further?
>
> "MR. BOWERS: No, sir.
>
> "THE COURT: Motion to exclude as made by the defendant is overruled, denied."

(Supp. R. on RTR, 27-29.) Defense counsel later renewed the objection to the introduction of the crime scene photograph and also objected at the time the photograph was shown to the jury venire. See (Supp. R. on RTR, 51, 54.)

Although Osgood objected to the introduction of the photograph during voir dire, he did not argue in the circuit court that his waiver of the jury's participation in the new penalty-phase hearing was involuntary because of the court's decision to allow the State to introduce the photograph. Thus, we will review this specific claim under plain-error review. Rule 45A, Ala. R. App. P.

In his brief on return to remand, Osgood argues that "[t]he veniremembers' reactions to the prejudicial photograph made it clear that selecting an impartial jury was no longer an option for [him]" and, thus, his decision to "forego [sic] jury participation at his sentencing proceedings was not voluntary after the venire had been irreparably tainted" by the photograph. (Osgood's Supp. brief, 17.) In making this argument, Osgood points to the statements of two potential jurors, made during individual voir dire, as evidence that the jury was no longer capable of being impartial. Specifically, one potential juror, in response to a question by defense counsel regarding whether he believed he could return a recommendation of life imprisonment without parole if he felt that was warranted after hearing all the evidence, stated that he was "thinking that he don't [sic] even deserve to be breathing." (Supp. R. on RTR, 170). Another potential juror, when asked what type of punishment he believed would be warranted in this type of case, stated that "there is not a law that allows you to do what should be done legally," and that, in his opinion, the punishment was "not a legal one" and "they should cut off their private parts." (Supp. R. on RTR, 179.)

***9** Although Osgood's waiver of the jury's participation did come after these statements had been made, the statements made by the potential jurors were made during individual voir dire, outside the presence of the other veniremembers. Thus, these statements did not render the entire jury venire "irreparably tainted" as Osgood suggests, nor did the statements show that it would be impossible to select an impartial jury from the remaining veniremembers. Notably, these statements were made well after the photograph had been shown to the jury veniremembers and were not a direct response to the photograph. Additionally, according to Osgood's defense counsel, Osgood had already notified his counsel twice –- "first thing Monday morning" and again on Tuesday morning -- that he wished to forgo jury participation, which was before the photograph was shown to the veniremembers and before the statements were made

by the potential jurors. Further, as stated earlier, Osgood repeatedly asserted his right to waive his right to the jury's participation in the new penalty-phase hearing. Therefore, considering the totality of the circumstances in this case, we cannot say that the court's decision to allow the State to show the jury venire the crime-scene photograph rendered Osgood's waiver of the jury's participation involuntary. See Turner, 924 So. 2d at 782.

C.

Osgood further claims that his decision to waive jury participation in his new penalty-phase hearing was involuntary because the circuit court denied his motion to continue, which, he says, he made to allow his defense counsel adequate time to prepare for the penalty-phase hearing.

In order to determine whether the circuit court's denial of his motion to continue affected the voluntariness of Osgood's waiver of jury participation in his new penalty-phase hearing, we must first consider whether the circuit court's denial of his motion to continue was proper.

On October 21, 2016, this Court initially remanded this case to the circuit court for a new penalty-phase hearing. On June 21, 2017, the circuit court appointed Robert Bowers, Jr., as counsel to represent Osgood in his new penalty-phase hearing, and the court set the new sentencing hearing for November 13, 2017. On September 8, 2017, the circuit court ordered the new sentencing date to be continued and ordered the parties to "collectively review for re-sentencing dates after February 1, 2018." (RTR C., 98.) In its September 8, 2017, order, the circuit court also appointed additional counsel, Ali Garrett, to represent Osgood. On November 30, 2017, the circuit court entered an order setting Osgood's new penalty-phase hearing for April 9, 2018.

On March 23, 2018, Osgood's counsel filed a motion for a continuance, stating:

> "1. Appointed counsel Robert Bowers, Jr., did not receive notice of the April 9, 2018 trial date.
>
> "2. Neither of the defendant's appointed attorneys has had an opportunity to review the entire trial transcript.
>
> "3. The defendant's attorneys need more time to locate the expert previously used at trial, and have been unable to contact him at this point.
>
> "4. Robert Bowers, Jr. has back to back criminal jury weeks the weeks of March 26 and April 2, and needs more time to adequately prepare for this matter before April 9, 2018."

(RTR C., 103.)

On April 5, 2018, the circuit court entered a written order denying Osgood's motion to continue.

> " 'It is well settled that a motion for continuance is addressed to the sound discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal without proof that it was clearly abused. E.g., Arthur v. State, [711 So. 2d 1031] (Ala. Crim. App. 1996); Smith v. State, 698 So. 2d 189 (Ala. Crim. App. 1996); Long v. State, 611 So. 2d 443 (Ala. Crim. App. 1992). Review of a denial of a motion for continuance requires a review of the circumstances of the case, including the reasons the defendant gave to the trial judge in support of the motion, in order to determine whether there was a clear abuse of discretion. Arthur, supra.' "

Knox v. State, 834 So. 2d 126, 133-34 (Ala. Crim. App. 2002)(quoting R.D. v. State, 706 So. 2d 770, 783 (Ala. Crim. App. 1997)). Further, this Court has stated:

> " ' " 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964).' Glass v. State, 557 So. 2d 845, 848 (Ala. Cr. App. 1990).
>
> ***10** " 'The reversal of a conviction because of the refusal of the trial judge to grant a continuance requires "a positive demonstration of abuse of judicial discretion." Clayton v. State, 45 Ala. App. 127, 129, 226 So. 2d 671, 672 (1969).' Beauregard v. State, 372 So. 2d 37, 43 (Ala. Cr. App.), cert. denied, 372 So. 2d 44 (Ala. 1979)."

McGlown v. State, 598 So. 2d 1027, 1029 (Ala. Crim. App. 1992).

In the motion to continue filed by Osgood's counsel, counsel requested a continuance in part because: 1) Bowers had not received notice of the hearing date; 2) neither of Osgood's attorneys had had an opportunity to review the entire trial

transcript; and 3) Bowers had criminal-jury weeks in the weeks leading up to Osgood's new penalty-phase hearing. First, although Osgood claims that Bowers was not given notice of the hearing date, he fails to offer any explanation in the motion to continue or in the record that suggests why Bowers was not aware of the new penalty-phase hearing date or that Bowers's not being aware of the date was through no fault of his own. There was also no allegation that Garrett, Bowers's cocounsel, was also unaware of the new trial date, nor is there any indication regarding why Garrett had not been in contact with Bowers to discuss the new trial date or trial preparation. Additionally, we note that Bowers represented Osgood during the guilt-phase portion of his trial and the first penalty-phase hearing. Bowers was then appointed to represent Osgood in the new penalty-phase proceedings on June 21, 2017, and Garrett was appointed as cocounsel on September 8, 2017, which should have been more than sufficient time to allow both counsel to obtain and review the trial transcript. Nothing in the record or in Osgood's motion for a continuance suggests that counsel had not been able to obtain a copy of the trial transcript; instead, the motion merely stated that counsel had not yet reviewed the trial transcript. Further, Bowers suggested that he had inadequate time to prepare for Osgood's penalty-phase hearing because he had a busy schedule in the two weeks leading up to the hearing date; however, Bowers was appointed as counsel almost one year before the new penalty-phase hearing in June 2017, and the new penalty-phase hearing date was set on November 30, 2017, which was over four months before the new sentencing-hearing date and should have been sufficient time for preparations for a new sentencing hearing. Also, in its September 8, 2017 order, the court ordered both parties to "collectively review" possible dates for the new sentencing hearing. Nothing in the record suggests that the parties did not, in fact, follow the orders of the circuit court.

Osgood's counsel also argued in his motion to continue that they needed more time to locate "the expert" who testified during Osgood's first trial and that counsel had been unable to locate him. (RTR, C. 103.) Osgood identifies the expert by name in his brief on return to remand as Teal Dick, Osgood's mitigation expert from his first penalty-phase hearing. In Ex parte Saranthus, 501 So. 2d 1256, 1257 (Ala. 1986), the Alabama Supreme Court stated:

> "A motion for a continuance is addressed to the discretion of the court and the court's ruling on it will not be disturbed unless there is an abuse of discretion. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973). If the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence. Knowles v. Blue, 209 Ala. 27, 32, 95 So. 481, 485-86 (1923)."

***11** 501 So. 2d at 1257. Here, even assuming that Dick's testimony was material and competent, we cannot say that the remaining parts of the Saranthus test were met in this case. There is no indication in the motion that there was a probability of procuring Dick's testimony within a reasonable time if a continuance was granted, because counsel's statement in the motion to continue indicated that counsel had been unable to locate or contact Dick. See Reese v. State, 549 So. 2d 148, 151 (Ala. Crim. App. 1989)(upholding the denial of a motion to continue after finding that there was no probability that the evidence would be forthcoming where the record indicated that absent witnesses could not be located and that previous efforts by the State and the defense to locate the witnesses had been futile)(rev'd on other grounds by Huntley v. State, 627 So. 2d 1013 (Ala. 1992)). Additionally, the motion to continue in the present case was vague concerning counsel's efforts to contact Dick or concerning the due diligence counsel had performed in an effort to locate Dick. Thus, based on the facts before the circuit court at the time the court denied the motion, we cannot say that the circuit court abused its discretion in denying the motion to continue on the ground that a witness was absent. See McGlown, 598 So. 2d at 1029.

Moreover, after reviewing the entire record, this Court has been unable to find any indication that Osgood suffered any prejudice as a result of the circuit court's denial of his motion for a continuance. See Wimberly v. State, 934 So. 2d 411, 425 (Ala. Crim. App. 2005) (holding that the appellant had not established that the denial of his motion to continue was prejudicial). As the State noted in its brief on return to remand, the circuit court also appears to indicate that Dick may have actually been located and available for the new penalty-phase hearing because the court asked a veniremember during voir dire whether "the fact that Teal Dick might testify in this case and you are here as a jury veniremember, would that affect your ability to be a fair and impartial juror?" (Supp. R. on RTR, 15.) Considering Osgood's statements during the penalty phase and his adamancy that he wanted to waive the jury's participation in the new penalty-phase hearing, this Court "find[s] it extremely improbable that the additional time for preparation requested by [Osgood] would have changed

the result of the trial." Price v. State, 725 So. 2d 1003, 1061 (Ala. Crim. App. 1997)(citing Fortenberry v. State, 545 So. 2d 129, 139 (Ala. Crim. App. 1988)). See also Beauregard v. State, 372 So. 2d 37, 43 (Ala. Crim. App. 1979) (citing Clayton v. State, 45 Ala.App. 127, 226 So.2d 671, 672 (1969)("The reversal of a conviction because of the refusal of the trial judge to grant a continuance requires 'a positive demonstration of abuse of judicial discretion.' ")).

Therefore, turning to whether the circuit court's denial of his motion to continue affected the voluntariness of Osgood's waiver of jury participation, after considering the totality of the circumstances in this case and the record as a whole, we cannot say that the court's decision to deny his motion to continue rendered Osgood's waiver of the jury's participation involuntary. See Turner, 924 So. 2d at 782.

D.

Osgood also claims that his waiver of jury participation was involuntary because, he says, the circuit court improperly denied his motion for a mistrial after the district attorney commented on Osgood's previous trial and sentencing. During voir dire in the instant case, the district attorney stated:

> "James Osgood has already been found guilty of capital murder by a Chilton County jury composed of twelve citizens who were seated right over there in that box. We're here today to reconduct or to conduct the sentencing hearing or the sentencing phase as I told you. The options will be, your only options will be life without parole or death."

(Supp. R. on RTR, 50.) Defense counsel immediately objected and requested a mistrial based on the district attorney's reference to the new penalty-phase hearing as a "redo or resentencing," which counsel claimed prejudiced the entire jury venire. Id. The circuit court denied Osgood's motion for a mistrial.

***12** Contrary to Osgood's contention, the circuit court's denial of his motion for a mistrial was proper.

> " '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 Sneed v. State, 1 So. 3d 104 (Ala. Crim. App. 2007), this Court stated:

> "In Frazier v. State, 632 So. 2d 1002, 1007 (Ala. Crim. App. 1993), we held that it was plain error for the prosecutor to comment that Frazier had previously been convicted of the same offense, stating:
>
> > " 'In Lloyd v. State, 53 Ala. App. 730, 733, 304 So. 2d 232, cert. denied, 293 Ala. 410, 304 So. 2d 235 (1974), this court held that it is reversible error for the prosecution to comment on the result of a defendant's previous trial at a subsequent trial for the same offense. See also Wyatt v. State, 419 So. 2d 277, 282 (Ala. Crim. App. 1982). As the Fifth Circuit Court of Appeals stated in United States v. Attell, 655 F.2d 703, 705 (5th Cir. 1981), "[W]e are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged."'
>
> "Likewise, in Hammond v. State, 776 So. 2d 884, 892 (Ala. Crim. App. 1998), we held that, 'at the sentencing phase of a second or subsequent capital murder trial, it is reversible error for the prosecution to comment on the result of a defendant's previous trial for the same offense.' We noted that this is especially true when a prosecutor tells a penalty phase jury that a previous jury recommended that a defendant be sentenced to death. However, we have never held that it is error, much less plain error, for a witness to merely comment about a 'first trial' or a prior proceeding. Cf. Hood v. State, 245 Ga. App. 391, 392, 537 S.E.2d 788, 790 (2000)(footnote omitted) (noting that, '[w]here there is no mention of the result of a prior judicial proceeding, the bare reference to an earlier trial does not necessarily imply a conviction and reversal on appeal. The equally rational inference is a mistrial due to the inability to achieve a unanimous verdict'); State v. Lawrence, 123 Ariz. 301, 305, 599 P.2d 754, 758 (1979) (noting that '[w]e are aware of no authority in this jurisdiction supportive of the contention that mere mention of a previous trial mandates reversal on appeal')."

1 So. 3d at 114.

We note that in Hammond, in which this Court held that the prosecutor's comments to the jury constituted plain error, this Court explained:

> "In determining whether Hammond should receive the death penalty or life imprisonment without parole, this jury was aware of how another jury had resolved this very issue--adversely to the defendant. If a juror was uncertain as to whether aggravating circumstances existed, or, if found to exist, whether they outweighed the mitigating circumstances, the knowledge that 12 other people had determined that it did could have swayed the juror's verdict in favor of death. Further, the jury's awareness of Hammond's previous death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. People v. Hope, 116 Ill.2d 265, 274, 508 N.E.2d 202, 205, 108 Ill.Dec. 41, 45 (Ill.1986)."

***13** 776 So. 2d at 892.

The prosecutor's statement in this case, unlike the prosecutor's statements in Hammond, was merely a reference to the first sentencing hearing and did not inform the jury of the result of that proceeding. Thus, the circuit court did not abuse its discretion in denying Osgood's motion for a mistrial.

As previously discussed in this opinion, Osgood repeatedly and clearly asserted his desire to waive the jury's participation in the new penalty-phase proceeding after the court thoroughly explained to Osgood his right to have a jury determine his sentence and explained the consequences of waiving such a right. We again note that, according to Osgood's counsel, Osgood first inquired about his right to waive jury participation on Monday morning, prior to the new penalty-phase hearing, including the prosecutors statement to the jury and the court's denial of Osgood's motion for a mistrial. We have reviewed the entire record in this case and have found nothing in the record to suggest that the court's denial of Osgood's motion for a mistrial had any effect on Osgood's decision to waive jury participation at his new penalty-phase hearing. Based on the record as a whole and the totality of the circumstances presented here, we conclude that the record affirmatively establishes that Osgood was fully informed of his right to jury participation in the sentencing proceedings and that he subsequently freely waived his right to participation of the jury. See Turner, 924 So. 2d at 782.

II.

Osgood separately claims that the circuit court erred by allowing the State to present an "extremely prejudicial crime scene photograph of the victim" to the jury venire during voir dire, which he claims prevented him from selecting an impartial jury. (Osgood's Supp. brief, 11.)

To the extent that Osgood claims that the court's decision to allow the State to introduce the crime-scene photograph during voir dire rendered his waiver of jury participation in the new penalty-phase hearing involuntary, this issue was also raised as part of his claim challenging the voluntariness of his waiver of jury participation. This claim was previously addressed in Part I.B, of this opinion, and Osgood's waiver of jury participation was determined to be valid.

To the extent that Osgood maintains that he was unable to select an impartial jury because the court improperly allowed the State to present the crime-scene photograph of the victim to the jury venire during voir dire, Osgood is not entitled to relief on this claim. We note that Osgood did object to the introduction of the photograph in the circuit court. In his brief on return to remand, Osgood contends that allowing the State to show the venire a photograph of the victim taken from the crime scene was prejudicial and allowed the State to obtain a preview of the veniremembers' opinions on that evidence. Osgood maintains that that error in allowing the State to present the photograph "violated [his] rights to due process, an impartial jury, and a reliable sentencing guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Alabama Constitution, and Alabama law." (Osgood's Supp. brief, 17.)

***14** In support of his argument on return to remand, Osgood acknowledges that this specific issue –- i.e., whether parties may show evidence during voir dire –- "is an issue of first impression for Alabama courts." (Osgood's Supp. brief, 11.) Osgood cites several cases from other jurisdictions that have addressed this issue. However, in this particular case, it is unnecessary for this Court to determine whether the court's ruling on this matter was proper. Even assuming –- without deciding –- that the court improperly allowed the prosecutor to show the photographic evidence, any such error in the circuit court's decision was harmless in this particular case. See Rule 45, Ala. R. App. P. Here, even if the circuit court improperly allowed the prosecutor to show the jury the photographic evidence, Osgood's substantial rights were not

affected because he ultimately waived the jury's participation, which was previously determined in this opinion to be a valid waiver, and the sentencing determination was made by the circuit judge alone. Thus, any error in the court's decision did not affect Osgood's sentencing in any way.

III.

Osgood also argues that the circuit court improperly denied his motion to continue. Although Osgood raised this claim as part of his challenge to the voluntariness of his waiver of jury participation, he also raises this claim separately and contends that the court's denial of his motion to continue violated his "rights to counsel, due process, and a reliable sentencing as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Alabama Constitution, and Alabama law." (Osgood's Supp. brief, 29.) However, as previously determined in Part I.C of this opinion, discussing whether the court's denial of Osgood's motion to continue affected the voluntariness of his waiver of jury participation in the instant proceedings, we cannot say that the circuit court abused its discretion in denying Osgood's motion to continue. Therefore, Osgood is not entitled to relief on this claim.

IV.

Osgood also contends that the district attorney's comment on his prior sentencing proceedings prejudicially tainted the jury, necessitating a mistrial. Again, although Osgood raised this claim as part of his challenge to the voluntariness of his waiver of jury participation, he raises this claim separately and alleges that the court's ruling "violated his rights to due process, an impartial jury, and a reliable sentencing." (Osgood's Supp. brief, 32.) As previously determined in Part I.D of this opinion, we cannot say that the circuit court abused its discretion in denying Osgood's motion for a mistrial. Thus, Osgood is not entitled to relief on this claim.

V.

Next, Osgood claims that the circuit court erred in admitting and considering testimony that exceeded the scope of permissible victim-impact testimony. Specifically, Osgood alleges that the court improperly allowed the victim's sister to give testimony characterizing the crime and Osgood, and requesting that Osgood be sentenced to death. Osgood did not present this issue to the circuit court; therefore, we review this issue under the plain-error standard.

During the new penalty-phase hearing, the prosecutor informed the court that two representatives of the victim's family had asked to address the court. The victim's sister, Trish Jackson, addressed the court and stated:

> "[JACKSON:] Your Honor, I ask today that we be heard, the family of Tracy, that our voice today is replayed and everyone here today in your minds just again and again and again. Okay. This coming back here has been such a disservice to our ongoing fight for Tracy. It has been a disservice for proper closure and what we have been through to have to come back today. The focus should never, never be on minimizing the actions and the crime that that man did. He took the life of Tracy. He isn't embracing accountability. That I know. This isn't about him being accountable. He is looking to escape his punishment. That is my opinion. He's a monster and his plans for killing Tracy were horrendous and tortuous. For his actions, in my opinion, he deserves the death penalty. No mercy. I feel this is just punishment. Your Honor. And I am grateful to hear that could be his punishment."

***15** (Supp. R. on RTR, 207.)

In Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993), the Alabama Supreme Court held that a circuit court errs if it "consider[s] the portions of the victim impact statements wherein a victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment." 640 So. 2d at 1017. See also Gissendanner v. State, 949 So.2d 956, 962 (Ala. Crim. App. 2006)("[V]ictim impact evidence may be presented during the penalty phase of a capital-murder trial so long as the witness does not recommend an appropriate punishment or characterize the crime or the defendant."). Here, as Osgood suggests, the statements made by Jackson during the new penalty-phase hearing characterized the crime and the defendant, as well as recommended an appropriate sentence. However, the presentation of the statements does not automatically rise to the level of plain error. See Ex parte Land, 678 So. 2d 224 (Ala. 1996); Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013).

In Ex parte Land, letters were presented to the trial court by the victim's family and friends that Land claimed expressed the writers' opinions regarding Land, the crime,

and appropriate punishment. 678 So. 2d at 236. During the sentencing hearing, the judge stated that he had "thought very carefully" about everything that had been written in the letters. Id. The judge also stated that he was "to determine sentence based squarely on whether or not prevailing [sic] circumstances found to exist outweigh mitigating circumstances found to exist." Id. at 236-37. As this Court explained in Lockhart:

> "[I]n Ex parte Land ... the Alabama Supreme Court found that it was not plain error for the trial court when considering sentencing, to read letters from members of the victim's family and from members of the defendant's family, some of which expressed opinions as to the appropriate punishment, because those letters were read only by the trial judge and only 'out of a respect for the families and for the limited purpose of possibly establishing a mitigating factor....' "

163 So. 3d at 1138-39 (quoting Land, 678 So. 2d at 237).

In Lockhart, after the jury had returned a sentencing recommendation, the trial court held a hearing in which it allowed some of the victim's relatives to give statements, including statements asking the court to sentence Lockhart to death and stating that they opposed leniency. Id. at 1138. Before the statements were given, both parties and the trial court agreed that the court "could not consider the statements as victim-impact evidence but that the court could consider the statements for the limited purpose of determining whether the victim's family was recommending leniency," which was also reflected in the circuit court's sentencing order. Id. This Court found that, because "the statements of the victim's relatives were not presented to the jury, and the trial court explicitly stated that it considered the statements only for the purpose of determining whether the victim's family opposed leniency," Lockhart's substantial rights were not adversely affected and, thus, the trial court did not commit plain error. Id. at 1139.

***16** We recognize that there are certain situations in which the acceptance or presentation of such victim-impact statements may, in fact, rise to the level of plain error. In Gaston v. State, 265 So. 3d 387 (Ala. Crim. App. 2018), this Court held that it was plain error for the trial court to allow testimony from the victim's family members as to their desire for the jury to recommend the death penalty where the statements were presented to jury without an instruction from the circuit court on how the jury was to consider the victim-impact testimony and, thus, it was unclear that the improper testimony had no influence on the jury's recommendation. In Ex parte Washington, 106 So. 3d 441 (Ala. 2011), this Court held that it was plain error for the trial court to allow the admission of victim-impact testimony from the victim's parents characterizing the crime and recommending the appropriate punishment. In Washington, the statements were presented to the jury without a limiting instruction on how the jury could consider the information. Additionally, the trial judge stated at the hearing that he had reviewed the testimony and that he would consider the testimony as part of the presentence report.

Under the particular circumstances presented in this case, we conclude that the admission of the victim-impact testimony did not rise to the level of plain error. In this case, the victim-impact statements, unlike the statements made in Gaston and Washington, were not made to a jury and were made only to the judge at the conclusion of the new penalty-phase hearing after the State informed the court that the victim's family wanted to address the court. Also, unlike the court in Washington, the circuit court in this case made no statement indicating that it would consider the victim-impact statements when making his sentencing determination. Thus, in this particular case, although the court did not explicitly so state, it is clear that the circuit court allowed the family members to speak solely out of respect for the family. The record indicates that the court's sentencing determination was based solely on its consideration of the aggravating circumstances and the mitigating circumstances presented. Almost immediately following the victim-impact statements, the court stated:

> "THE COURT: Mr. Osgood, this Court has sworn and taken an oath to uphold the law of the State. This is a duty that is not taken lightly. I will continue to do the best of my ability to follow the law of this state and of our country. The law as it applies in this case requires the Court to weigh the aggravating factors as against the mitigating factors. I have fulfilled that duty and considered each of your mitigating factors and all the evidence presented by you at the previous sentencing phase of this trial. After taking all the factors into consideration, I cannot find that the mitigating factors outweigh the proven aggravating factors of the intentional killing of an innocent victim while in the course of a rape of that victim. I, in fact, find that the aggravating factors or aggravating factor outweighs all of the presented mitigating factors. Accordingly, this Court finds that the sentence in this case should be death."

(Supp. R. on RTR, 209-10.) The court's written sentencing order also indicates that the court's sentencing decision was based solely on the weighing of the aggravating and mitigating circumstances. There is nothing in the record or in

the circuit court's sentencing order that indicates that the court considered the testimony of the victim's family in sentencing Osgood to death. "We presume that the trial court disregarded any inadmissible or improper considerations in its sentencing determination. See Sockwell v. State, 675 So. 2d 4, 36 (Ala. Crim. App. 1993), aff'd, 675 So. 2d 38 (Ala. 1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996)." Whitehead v. State, 777 So. 2d 781, 848 (Ala. Crim. App. 1999). Accordingly, based on the record before this Court, we cannot say that Osgood's substantial rights were adversely affected and, thus, the circuit court did not commit plain error.

VI.

***17** Next, Osgood claims that the circuit court erred in sentencing Osgood to death on the basis of an "out-of-date and inadequate presentence investigation report" because it relied on the same presentence investigation report that had been completed in 2014 and used during Osgood's first penalty-phase hearing. (Osgood's Supp. brief, 35.) Specifically, Osgood claims in his brief on return to remand that certain information found in the presentence investigation report that is required by Rule 26.3(6) and (7), Ala. R. Crim. P., such as " 'statement[s] about the defendant's social history, including family relationships, marital status, interests, and activities" and " 'statement[s] of the defendant's medical and psychological history,' " would likely be different in 2018 than it was in 2014, regardless of whether he had been incarcerated during that entire time. He also claims that an updated report "could have provided information regarding [his] good behavior in prison." (Osgood's Supp. brief, 36.) Osgood did not raise this claim in the circuit court; thus, we will review this claim to determine whether there is plain error. Rule 45A, Ala. R. App. P.

In the present case, at the new penalty-phase hearing, the following occurred:

> "THE COURT: We had a presentence investigation. It is my understanding that the defendant since the last sentencing hearing, he has been in custody with the Department of Corrections or with Chilton County since then.
>
> "MR. BOWERS: He has, Your Honor.
>
> "THE COURT: Is there anything in addition to the previous presentencing order that you would like to add to that report?
>
> "MR. BOWERS: No, sir."

(Supp. R. on RTR, 208-09.)

> " 'A party cannot assume inconsistent positions at trial and on appeal, and a party cannot allege as error proceedings in the trial court that were invited by him or were a natural consequence of his own actions.' Fountain v. State, 586 So. 2d 277, 282 (Ala. Crim. App. 1991). 'The invited error rule has been applied equally in both capital cases and noncapital cases.' Rogers v. State, 630 So. 2d 78 (Ala. Crim. App. 1991), rev'd on other grounds, 630 So. 2d 88 (Ala. 1992). 'An invited error is waived, unless it rises to the level of plain error.' Ex parte Bankhead, 585 So. 2d 112, 126 (Ala. 1991)."

Williams v. State, 710 So. 2d 1276, 1316 (Ala. Crim. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998). See also Melson v. State, 775 So. 2d 857, 874 (Ala. Crim. App. 1999)(" 'It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice.' Murrell v. State, 377 So. 2d 1102, 1105, cert. denied, 377 So. 2d 1108 (Ala. 1979), quoting Aldridge v. State, 278 Ala. 470, 474, 179 So. 2d 51, 54 (1965)."). Thus, if there was any error in the circuit court's reliance on the 2014 presentence investigation report, it was clearly invited by Osgood.

Moreover, even assuming that the court's use of the previous presentence investigation was not invited error, any potential error was harmless beyond a reasonable doubt. We note that Osgood's assertions on appeal to support this claim were merely speculative, stating that certain information "would likely be different in 2018 than it was in 2014" and that an updated presentence investigation report "could have provided information regarding [his] good behavior in prison." (Osgood's Supp. brief, 36.)(Emphasis added.) Osgood has failed to provide this Court with any information that he believes should have been included in an updated presentence investigation report.

Additionally, this Court addressed a similar situation in Riley v. State, 166 So. 3d 705 (Ala. Crim. App. 2013), in which the court sentenced Riley to death using the same presentencing report that had been used in Riley's first trial. In Riley, this Court noted that the circuit court not only had considered

the previous presentence report from Riley's previous trial, which detailed the facts and circumstances of Riley's offense as well as his background and circumstances, but also had considered evidence of Riley's "difficult upbringing, his troubled childhood, the death of his sibling, his estranged relationship with his mother, his substance-abuse problems, his age at the time of the offense, any alleged mental-health issues, evidence of three separate head traumas, and the well-being of his young daughter." Id. at 718. In Riley, this Court held that where the record indicated that "the circuit court carefully considered 'the full mosaic of [Riley's] background and circumstances before determining the proper sentence,' " and "[b]ased on the vast array of mitigation evidence presented during the penalty phase coupled with the court's access to reports and other information not contained in the presentence report, any inadequacies in the presentence report did not constitute plain error." Id., citing Guthrie v. State, 689 So. 2d 935, 937 (Ala. Crim. App. 1996).

***18** Here, the circuit judge was the same judge who was present and heard all the mitigation evidence that had been presented at Osgood's first sentencing hearing. The circuit court's sentencing order indicated that it had considered Osgood's childhood, including Osgood being passed around from home to home, his parents leaving him and his siblings, sexual abuse, substance abuse, and the fact that Osgood's brain development was potentially hindered due to malnutrition Osgood suffered as an infant. See RTR C., 120. The circuit court's sentencing order indicates that it also considered the mitigation expert's testimony and evidence of Osgood's character. Much like in Riley, the record in the present case indicates that the circuit court carefully considered "the full mosaic of [Osgood's] background and circumstances before determining the proper sentence," Guthrie, 689 So. 2d at 947; thus, we conclude that any inadequacies in the presentence report did not constitute plain error. Rule 45A, Ala. R. App. P.

VII.

Osgood also argues that the circuit court and the State misled potential jurors about the importance of the jury's role in sentencing by referring to the jury's role as a recommendation before the venire. Osgood insists that the circuit court and the prosecution's references "unconstitutionally undermined potential juror's sense of responsibility." (Osgood's Supp. brief, 38.) Osgood cites Darden v. Wainwright, 477 U.S. 168, 183 n.15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Ex parte McGriff, 908 So. 2d 1024, 1038 (Ala. 2004), in support of his contention. As previously discussed Part I.A of this opinion, the court and the prosecution's reference to the jury's role as a recommendation was not error. Further, as to this particular claim, any potential error was harmless beyond a reasonable doubt in this case. As previously determined in this opinion, Osgood voluntarily waived his right to jury participation in his new penalty-phase trial, leaving the sentencing determination solely with the circuit court. Therefore, this reference had no effect on Osgood's sentencing and did not affect his substantial rights; thus, Osgood is not entitled to relief on this claim.

VIII.

Osgood alleges that his death sentence must be vacated in light of the United States Supreme Court's decisions in Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Specifically, he claims that Ring and Hurst render Alabama's death-penalty sentencing law unconstitutional. He also claims that, under Hurst, a death sentence may be imposed only after a jury has unanimously found beyond a reasonable doubt 1) the existence of all the statutory aggravating circumstances on which the death sentence is premised, and 2) that those aggravating circumstances outweigh the mitigating circumstances. Thus, he contends, in the present case, because the circuit court, not the jury, found the existence of an aggravating circumstance and found that the aggravating circumstance outweighed the mitigating circumstances, his death sentence is due to be reversed. We disagree.

The Alabama Supreme Court in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), explained:

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

their maximum punishment.' 536 U.S. at 589, 122 S.Ct. 2428. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S.Ct. 2428. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence."

***19** Bohannon, 222 So. 3d at 528. The Court in Bohannon also explained that the Alabama Supreme Court had considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), and Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), stating the following in regard to its findings:

"[The Alabama Supreme Court] concluded that 'all [that] Ring and Apprendi require' is that 'the jury ... determine[ ] the existence of the "aggravating circumstance necessary for imposition of the death penalty." ' 859 So. 2d at 1188 (quoting Ring, 536 U.S. at 609, 122 S.Ct. 2428), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.

"In Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment."

222 So. 3d 525. Additionally, the Alabama Supreme Court in Bohannon recognized the following:

"The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the 'findings necessary to impose the death penalty.' 577 U.S. ——, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible."

222 So. 3d at 531.

Finally, in Bohannon, the Alabama Supreme Court addressed the specific issue that Osgood now raises, stating:

"Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make 'the critical findings necessary to impose the death penalty.' 577 U.S. ——, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

"Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S.Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty--the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

***20** "Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances

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

"Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: 'The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. ——, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

"Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because 'two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct,' see § 13A–5–40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A–5–49(9), Ala. Code 1975, that '[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct,' which made Bohannon eligible for a sentence of death. See also § 13A–5–45(e), Ala. Code 1975 ('[A]ny 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.'). Because the jury, not the judge, unanimously found the existence of an aggravating factor —the intentional causing of the death of two or more persons by one act or pursuant to one scheme or course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated."

222 So. 3d at 532-33.

In the present case, a jury convicted Osgood of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. Thus, by its verdict finding Osgood guilty of murder made capital because it was committed during the course of a rape, the jury also found the existence of the aggravating circumstance provided in § 13A-5-49(4), Ala. Code 1975, that "the capital offense was committed while the defendant was engaged or was an accomplice in the commission of ... [a] rape," which made Osgood eligible for a sentence of death. See also § 13A–5–45(e), Ala. Code 1975 ('[A]ny 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.'). Therefore, "[b]ecause the jury, not the judge, unanimously found the existence of an aggravating factor" –- that the capital offense was committed while Osgood was engaged in the commission of a rape -- "making [Osgood] death-eligible, [Osgood]'s Sixth Amendment rights were not violated." See Bohannon, 222 So. 3d at 533.[4]

IX.

***21** To the extent that Osgood contends that the circuit court erred in "double-counting rape as an aggravating circumstance in the penalty phase" of his trial, Osgood is not entitled to relief on this claim.[5] (Osgood's brief on appeal,

97.) Specifically, Osgood claims that "the use of the charge of intentional murder during the course of a rape ... both as an aggravator in the guilt/innocense phase and as an aggravator in the penalty phase failed to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty ... and subjected [him] to two punishments as a result of being convicted of a single criminal charge." (Osgood's brief on appeal, 97-98.) These same assertions have been previously considered and rejected by this Court. See Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010); Morris v. State, 60 So. 3d 326 (Ala. Crim. App. 2010). Osgood did not object on this basis at trial, and we find no plain error. Rule 45A, Ala. R. App. P.

X.

Additionally, in a claim that Osgood incorporated from his principal brief on appeal, Osgood contends that the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment. However, contrary to Osgood's assertion, " '[t]here is an abundance of caselaw ... that holds that the death penalty is not per se cruel and unusual punishment.' " Mashburn v. State, 7 So. 3d 453, 465 (Ala. Crim. App. 2007)(quoting Stewart v. State, 730 So. 2d 1203, 1242 (Ala. Crim. App. 1997)(opinion on third return to remand), aff'd 730 So. 2d 1246 (Ala. 1999)). See also Knight v. State, 907 So. 2d 470 (Ala. Crim. App. 2004); Hocker v. State, 840 So. 2d 197 (Ala. Crim. App. 2002). Accordingly, Osgood is not entitled to relief on this claim.

XI.

Finally, we must address the propriety of the decision of the circuit court to sentence Osgood to death, as required by § 13A-5-53, Ala. Code 1975. Osgood was convicted of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. The record shows that Osgood's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

As previously discussed, the circuit court found as aggravating circumstances that Osgood intentionally killed the victim while in the course of raping her. See § 13A-5-49(4). The circuit court stated the following concerning the mitigating circumstances in its written sentencing order:

> "This Court finds, from preponderance of the evidence that one statutory mitigator and nine nonstatutory mitigator exist. Those would be under Section 13A-5-51(1), that [Osgood] had no significant history of prior criminal activity, and under Section 13A-5-52, that [Osgood's] childhood was unsettled at best, with him being passed around from home to home, parent to parent and some parents leaving him and his siblings after establishing a family together, substance abuse, sexual abuse by a man in a bar when he was a child, that [Osgood] fathered a child with a 24 year old woman when he was 14, that he had sexual encounters with other children when he was 9 years old, that his brain development was potentially hindered due to malnutrition he suffered as an infant, that he was admitted to a [psychiatric] hospital as a teenager, that he reported a suicide attempt and that Dr. Mulbry diagnosed him as having an antisocial personality disorder."

(Record on Return to Remand, 120.) The court also stated the following in discussing the nonstatutory mitigating factors:

> ***22** "[Osgood] presented evidence of [his] character and the reasons for his actions throughout his life, included in the same are factors concerning his adoptions, the family leaving he and his siblings, the several Pension and Security contracts and the facts that he moved in with a prior family member to keep them while they were sick and needed nursing.
>
> "The defense presented testimony from Teal Dick, a recognized mitigation expert who is a licensed professional counselor, who testified that he had counseled and review[ed] [Osgood's] history on five occasions and from those sessions, he determined that [Osgood] has a sexual addiction and an attachment disorder, which was confirmed by the evidence presented by Dr. Leonard William Mulbry.
>
> "In reviewing and considering the nonstatutory mitigating circumstances, this Court notes that his upbringing was non-conventional, and testimony of his parents failure to cuddle him caused certain character flaws."

(Record on Return to Remand, 121-22.)

After reviewing the record, we agree with the circuit court's findings. As required by § 13A–5–53(b)(2), Ala. Code 1975, we have independently weighed the aggravating and mitigating circumstances to determine the propriety of Osgood's sentence of death, and we are convinced that death

was the proper sentence for Osgood. Osgood's sentence was not excessive or disproportionate to the penalty imposed in similar cases. See, e.g., Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013)(rape/murder); Hammonds v. State, 777 So. 2d 750 (Ala. Crim. App. 1999) (rape/murder); Freeman v. State, 555 So. 2d 196 (Ala. Crim. App. 1988) (rape/murder).

Further, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that has or probably has adversely affected Osgood's substantial rights and have found no plain error or defect in the proceeding under review.

Conclusion

Based on the foregoing reasons, Osgood's sentence of death is affirmed.

AFFIRMED.

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

All Citations

--- So.3d ----, 2020 WL 2820637

Footnotes

1 This Court addresses Osgood's claims in a different order than the order in which the claims were presented in Osgood's supplemental brief on return to remand.

2 On return to remand, both parties were given an opportunity to file supplemental briefs. For the purposes of this opinion, Osgood's principal brief on appeal shall be referred to as "Osgood's brief on appeal, ___," and Osgood's supplemental brief on return to remand will be designated as "Osgood's Supp. brief, ___."

3 The record before this Court contains several sections of court documents, transcripts, and supplements. To avoid confusion, this Court will delineate each portion of the record as follows: 1) The court documents from the record on return to remand will be referred to as "RTR, C.___," and the transcript from the record on return to remand will be referred to as "RTR, R. ___"; 2) The supplemental record on return to remand will be referred to as "Supp. R. on RTR, ___"; and 3) The documents contained in the second supplemental record on return to remand will be referred to as "2nd Supp. C. on RTR, ___."

4 We recognize that there are situations that may arise in which a defendant voluntarily waives jury participation in the penalty-phase of his trial after a jury finds him guilty of capital murder, but where the determination of the existence of an aggravating circumstance necessary to render him eligible for the death penalty is not encompassed in the jury's guilty verdict. In such cases, Hurst, Ring, and Apprendi, would likely not apply because the judge, as the fact-finder, would be required to determine whether aggravating factors exist to make the defendant eligible for the death penalty. However, in this particular case, because the jury unanimously found the existence of the aggravating circumstance beyond a reasonable doubt when it rendered its verdict in the guilt-phase of Osgood's trial, such a determination regarding the application of Hurst, Ring, and Apprendi when the jury had yet to make such finding of the existence of aggravating factors is unnecessary.

5 Although this specific issue is not included in his supplemental brief on return to remand, Osgood raised this issue in his principal brief on appeal. In his supplemental brief on return to remand, Osgood incorporated by reference the issues raised in his principal brief before this Court pursuant to Rule 28A(a), Ala. R. App. P.

Appendix C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

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

October 9, 2020

CR-13-1416 **Death Penalty**

James Osgood v. State of Alabama (Appeal from Chilton Circuit Court: CC12-27)

NOTICE

You are hereby notified that on October 9, 2020, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Sibley G. Reynolds, Circuit Judge
Hon. Glenn D. McGriff, Circuit Clerk
Alison Nicole Mollman, Attorney
Randall S. Susskind, Attorney
James Clayton Crenshaw, Asst. Atty. Gen.
William Daniel Dill, Asst. Attorney General
John Selden, Asst. Attorney General
Morgan B. Shelton, Attorney

Appendix D

IN THE SUPREME COURT OF ALABAMA

May 21, 2021

1200021

Ex parte James Osgood. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: James Osgood v. State of Alabama) (Chilton Circuit Court: CC-12-27; Criminal Appeals : CR-13-1416).

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. Mitchell, J. - Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, 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