Appendix A

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Court of Criminal Appeals of Alabama.

Sherman COLLINS

v.

STATE of Alabama

CR–14–0753

|

October 13, 2017

Synopsis

Background: Defendant was convicted following bifurcated trial in the Sumter Circuit Court, CC-12-109, of murder for pecuniary gain and conspiracy to commit murder, and was sentenced to death. He appealed.

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

trial court did not abuse its discretion in denying defendant's motions to continue trial;

defendant's waiver of *Miranda* rights prior to making confession was not rendered involuntary by circumstances of his incarceration;

evidence supported finding that defendant's confession was voluntary;

admission of non-testifying codefendant's hearsay statements implicating defendant in murder, in violation of *Bruton* rule, was harmless error; and

adequate proof of the corpus delicti was established to render defendant's confession admissible.

Affirmed as to conviction; remanded for correction of sentencing order.

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

Joiner, J., filed dissenting opinion.

Appeal from Sumter Circuit Court (CC–12–109); Eddie Hardaway, Jr., Judge

Attorneys and Law Firms

Andrew Reed Childers, Montgomery (withdrew 08/30/2017); Randall S. Susskind and James Hubbard, Montgomery, for appellant.

Luther Strange and Steve Marshall, attys. gen., and Lauren A. Simpson, asst. atty. gen., for appellee.

WELCH, Judge.

***1** The appellant, Sherman Collins, was convicted of murdering Detrick Bell[1] for pecuniary gain, an offense defined as capital by § 13A–5–40(a)(7), Ala. Code 1975, and conspiracy to commit murder, a violation of 13A–4–3, Ala. Code 1975. The jury recommended, by a vote of 10 to 2, that Collins be sentenced to death. The circuit court sentenced Collins to death for the capital-murder conviction and to 120 months for the conspiracy conviction. (C. 407.) This appeal followed.

The State's evidence tended to show the following. At around midnight on June 17, 2012, 12 people telephoned emergency 911 to report a shooting at the Morning Star Community Center ("Center") in Cuba. Law-enforcement personnel were dispatched to the Center and discovered the body of Detrick "Speedy" Bell in the parking lot near the door. Dr. Steven Dunton, a pathologist with the Alabama Department of Forensic Sciences, testified that Bell died as a result of a gunshot wound to his head. The bullet, Dr. Dunton said, was so large a caliber that, when it exited Bell's skull, it removed one-third of his brain.

Angela Jackson,[2] Collins's girlfriend at the time of the shooting, testified that in June 2012 she and Collins were living in New Orleans and that her twin sister, Keon Jackson, was dating Kelvin Wrenn and was living at Wrenn's house in Sumter County.[3] Angela testified that Keon asked Angela to come for Father's Day weekend in June 2012, that she had visited her sister at Wrenn's house about five times, that the last time she came to visit Collins was with her, and that her mother, her daughter, her son, her niece, and Collins drove to Sumter County and arrived at Wrenn's house on June 15 at around midnight the Friday before Father's Day. Wrenn

arrived home late that night and was angry with Keon and asked them to leave his house. They all went to Meridian, Mississippi, and obtained a room at the Ramada Inn motel. The next day, on Saturday afternoon, Angela said, she and Collins went to Wrenn's house for a barbecue. Wrenn got mad at Keon, she said, and told them all to go back to New Orleans and to take Keon with them. Later on Saturday night, Angela said, Collins and Wrenn went to a rap concert at the Center while she and Keon packed Keon's things. Angela testified that she heard a gunshot while Collins was at the Center and she and Keon tried to get to the Center to see what had happened. When the traffic prevented them from getting to the Center they went back to Wrenn's house and found Collins waiting for them. They returned to the motel in Mississippi and the next morning returned to New Orleans. Angela said that she had borrowed Keon's cellular telephone and that when they reached New Orleans Wrenn called and talked to Collins. Angela said that Collins was wearing a rust-colored shirt or burnt-orange shirt and blue jeans on the evening of the shooting.

***2** Martez Rodgers testified that he was at the Center at the time of the shooting and that about 40 or 50 people were present. Near the end of the concert he left the Center and walked outside toward Bell and Terrod Sturdivant and heard a gunshot. He testified that he could not see who shot Bell because it was too dark, but, he said, he did see that the gunman was wearing an orange shirt and jeans and that he walked away up a hill as everyone was running around him. He said that no one had been arguing, that there had been no altercation, and that the shooting was not provoked. (R. 461.)

Terrod Sturdivant testified that Bell was one of his closest friends and that they went to the Center together that night. Sturdivant said that his cellular telephone rang at the end of the concert, that he walked outside to answer it, and that Bell was behind him. Grant Kimbrough[4] came outside after he finished performing and Bell and Kimbrough talked about Kimbrough's performance. Sturdivant testified: "Sherman [Collins] walked out in the group where we was. Bam [Kimbrough] stopped him. Introduced us. Said this is his cousin Speedy [Bell]. Said this is his little homeboy Terrod. Speedy shook his hand. I told him 'what up.' I turned around to go answer my phone. A couple of steps, gunshot." (R. 483.) After he turned to answer his phone, he said, the shot happened "fast." (R. 487.) He did not see the shooter, he said, but he did see Collins walking away from the Center. Collins was wearing an orange shirt with a "Reese's" brand name and blue jeans. He stayed with Bell until he died and then he and several others went to find Kimbrough. He said that on the day of the shooting he had been in jail for a charge of unlawful distribution and had been released at around 4:30 p.m.

Rodriguez Brunson testified that Wrenn was his brother and that Bell was his friend and that he was at the Center at the time of the shooting. Brunson testified that he was in charge of security for the concert and that he had also rented the venue for the concert. He said that he saw Collins at Wrenn's house earlier that day at a barbecue, that he lived next door to his brother Wrenn, and that his house is about one mile or a mile and a half from the Center. He said that Collins came to the Center with Wrenn and that Collins was wearing an orange shirt with "Reese's" on it. Brunson said that he asked Collins to work security after Wrenn asked him if Collins could work security. (R. 558.) He said that he was inside the building when the shooting occurred but that he heard the shot and ran outside. When he got to the parking lot, he said, he saw Bell on the ground.

Tommy Nixon testified that he was at the Center when the shooting occurred because his nephew, James Brunson, contacted him and asked him to help with security for the concert. Nixon said that he arrived at the Center at about 8:00 p.m. and that he was carrying mace, a baton, and a .40 caliber Ruger brand handgun. Everything had been going okay, he said, until he heard the gunshot. There had been no arguments, no disagreement, and no fights. He was close to the main highway, he said, when he heard the shot, and he ran back toward the crowd. Nixon said that he saw a man wearing an orange shirt pass him walking in the opposite direction. When he got near the door of the Center, he saw a young man lying by the doorway, and he telephoned emergency 911. The crowd, he said, was chaotic, and he tried to get everyone to go inside. No one listened, he said, so he pulled his pistol and shot into the air about five or six times.

***3** Ronny Willingham, owner of Willingham Sports in Demopolis testified that on July 22, 2011, he sold a .22 caliber revolver to Kelvin Wrenn and that on August 6, 2011, he sold a .454 "Raging Bull" handgun to Wrenn. (R. 869.) The "Raging Bull" gun, he said, was rare and "was the largest handgun ever made. It's a—it's a revolver. Weighs about four pounds. It's got two latches. It's made by Taurus. The bullets are even like four dollars a piece. It's a very large handgun." (R. 869.)

Investigator Luther Davis with the Sumter County Sheriff's Office testified that he was assigned to investigate the

shooting at the Center. He said that police discovered Wrenn's vehicle in a ditch near the Center and that he interviewed Wrenn. Davis testified that, when he interviewed Wrenn on June 18, Wrenn said that he had conspired with Collins to kill Bell. Davis also testified that Collins confessed to him that Wrenn had told him that a man named "Speedy" had robbed his brother and that if he would kill "Speedy" he would give him $2,000. Collins confessed that he shot "Speedy" in the head and walked away after the shooting. Collins made the following statement to police:

> "We arrived at [Keon Jackson's] house Friday night and woke up around 8 a.m. Saturday morning. Keon's boyfriend, Kelvin Wrenn, had made it home from driving his truck. Kevin got into an argument with Angela about her son on the last visit in Alabama where a gun came up missing. Kelvin was really mad so we left and got a hotel in Meridian, Mississippi.
>
> "Angela and I came back to the house and Kelvin was having a BBQ. A couple of guys came over to the BBQ and we drank liquor but I didn't know their names.
>
> "Kelvin and I was getting ready to go to a rap concert and he was telling me about a man named Speedy that robbed his brother. Kelvin told me that he would give me $2,000 dollars to kill Speedy. Kevin gave me a small gun and he had a big Magnum pistol.
>
> "When we pulled up to the center, Kevin gave me the Magnum pistol and he kept the smaller pistol. There was a man at the door named Bam who knew we had the guns on us. Bam told the security guard that we were security guards so he didn't pat us down when we walked in the center.
>
> "We sat around and drank liquor for about an hour and a half. A few minutes later, Speedy came in the Center. Kelvin asked someone that was sitting beside him was that Speedy. The guy said yes. Kelvin then said, '[T]hat's the nigger that robbed my brother. Take care of him when we get outside.'
>
> "Speedy walked outside and we went behind him. Speedy was talking to a group of guys and Kelvin said, '[T]hat's the nigger right there, two grand.' I shot Speedy in the head and walked away. I threw the gun in the woods next to the Center.
>
> "I walked to the road and called my girlfriend to come pick me up. My girlfriend and I rode to Meridian, Mississippi. I talked to Kelvin on the phone and I told him where I threw the gun. That was the last time I talked to Kelvin. I never got paid $2,000 for the murder. I went back to New Orleans and got picked up on my birthday [June 26] by the U.S. Marshall for murder."

(C. 158–60; 704–05.)

The jury found Collins guilty of murdering Bell for pecuniary gain. A separate sentencing hearing was held. The jury recommended, by a vote of 10 to 2, that Collins be sentenced to death. The circuit court directed that a presentence investigation report be prepared. A sentencing hearing was held before the circuit court. The circuit court sentenced Collins to death on the capital-murder conviction and to 10 years' imprisonment on the conspiracy conviction. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A–5–53, Ala. Code 1975.

Standard of Review

***4** Because Collins has been sentenced to death, this Court must search the record of the trial proceedings for "plain error." See Rule 45A, Ala. R. App. P. Rule 45A, states:

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

In defining the scope of "plain error," this Court in Hall v. State, 820 So.2d 113 (Ala. Crim. App. 1999), stated:

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

820 So.2d at 121–22.

Collins was convicted of both capital murder and the noncapital offense of conspiracy to commit murder. The plain-error standard of review does not apply to our review of Collins's conspiracy conviction. In Ex parte Woodall, 730 So.2d 652 (Ala. 1998), the Alabama Supreme Court addressed this Court's review of a capital conviction and a noncapital conviction in the same appeal. The Court stated:

"Because the defendant in this case was sentenced to death, we have complied with our obligation [to conduct] a plain-error review.[5] However, with respect to his attempted murder conviction, for which he received a sentence of less than death, we do not believe the defendant is entitled to benefit from our plain error review. We have found no Alabama decision dealing with the particular situation present here: a case in which plain error necessitated a reversal on a capital conviction and death sentence but in which the defendant was also sentenced to a term of imprisonment on another conviction. However, the defendant's sentence of imprisonment for his conviction of attempted murder does not implicate the same heightened degree of concern for reliability that attended his sentence of death for the capital conviction. It is well established that where a defendant receives only a prison sentence the plain-error doctrine is not applicable and an appellate court will not consider an alleged error that the defendant failed to preserve by making a proper and timely objection in the trial court. See Biddie v. State, 516 So.2d 846 (Ala. 1987); Harris v. State, 347 So.2d 1363 (Ala. Cr. App. 1977), cert. denied, 347 So.2d 1368 (Ala. 1978 [1977]). Indeed, it has been said that the plain-error doctrine 'applies to death penalty cases, but not to other convictions.' Pugh v. State, 355 So.2d 386, 389 (Ala. Cr. App.), cert. denied, 355 So.2d 392 (Ala. 1977) (citations omitted) (emphasis added).

***5** "Had the defendant been convicted and sentenced to a term of imprisonment on the attempted murder count but either acquitted or sentenced to life imprisonment without the possibility of parole on the capital murder count, the plain-error doctrine would not have applied. Thus, we would not have even considered the error upon which we have predicated our reversal of his capital conviction and death sentence: the State's questioning of the defendant regarding his character and the subsequent introduction of evidence of specific incidents tending to indicate a propensity for violence. No objection to that questioning was raised at trial. The defendant should not be put in a more favorable position with respect to our review of his noncapital conviction simply because he was also found guilty of a capital offense and was sentenced to death."

730 So.2d at 665.[6]

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

Guilt–Phase Issues

I.

Collins argues that the circuit court violated his rights to due process and to a fair trial by denying his motions to continue his trial to a later date.

The record shows that Collins was indicted in September 2012. In the summer of 2014, both Collins and the State agreed that the case would be tried in December 2014. During a pretrial hearing on October 9, 2014, Collins moved for a continuance so that counsel could procure some records from the State of Louisiana. The circuit court noted that the defense had two years to obtain those records and that they had until December to obtain those records. Collins also argued that he had just obtained a copy of a videotaped reenactment of the murder the State intended to present at trial. The State opposed the continuance and told the court that it would not introduce the videotape reenactment at trial. (1 Supp. R. 57.) The circuit court denied the motion for a continuance.

On November 29, 2014, Collins filed a motion entitled "Motion to Reassert the Motion for a Continuance Previously Made by the Defendant." (C. 166–69.) In this motion, counsel argued that Collins had been treated at Charity Hospital in New Orleans, Louisiana, and that his attempts to obtain Collins's records from that hospital had been unsuccessful because the hospital had been destroyed by Hurricane Katrina in 2005. Counsel also argued that Collins had attended Booker T. Washington High School in New Orleans and that his attempts to procure records from the school had likewise been unsuccessful because the high school had also been destroyed by Hurricane Katrina. In support of this motion, Collins argued that the State had informed Collins that it

intended to rely on the aggravating circumstance that the murder was especially heinous, atrocious, or cruel compared to other capital offenses and that in order to counter that aggravating circumstance, Collins now intended to retain the services of a neurologist. Collins also stated that his mental-health expert had a scheduling conflict and that he needed to retain the services of a new expert. The State agreed to not assert this aggravating circumstance, and Collins said that he would not need the services of a neurologist. (R. 48.)

***6** During the voir dire of the prospective jurors, defense counsel again raised the issue of a continuance. The following occurred:

> "[Defense counsel]: We have had a great deal of difficulty. The hospital, Charity Hospital, no longer exists. The high school that Mr. Collins graduated from along with his records no longer exist. We're attempting to track those down and that is an ongoing process. To proceed without that information would violate the standard for effective assistance of counsel given the fact that the State has chosen to seek Mr. Collins's death in this matter.
>
> "Also, Your Honor, the Court has approved funds for a mental health expert in this case and the defense counsel had contacted an expert in this case to do an evaluation. A couple of weeks after the initial contact—in fact, think it was last week—no—week before last that the mental health expert advised counsel that he would be unavailable and would be unable to be at trial and to assist in the preparation of the defense.
>
> "At this point, Judge, we tried to make other contacts. There's no one available given the holiday and the short notice to conduct a necessary evaluation and aid the defense in the preparation not only for trial but for the mitigation work....
>
> "In a—further, Your Honor, we were at the motion hearing that occurred, I believe, it was the Thursday before Thanksgiving week, the prosecution disclosed possible aggravators they intend to seek. Among those aggravators was number eight under the aggravation statute which was the capital offense was especially heinous, atrocious or cruel as compared to other capital offenses under § 13A–9–49(8)[, Ala. Code 1975].
>
> "The Court: Response from the prosecution?
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> "[Prosecutor]: Your Honor, the first ground, I guess, they're raising is with respect to the records at Charity Hospital. I guess, Your Honor, what my concern is they're not even saying what type of treatment.
>
> "....
>
> "[Prosecutor]: In other words, I guess he's saying it's got something to do with mitigation. They say 'treat.' I mean, if he's treated for a broken leg, it hasn't got a thing to do with anything.
>
> "I'll also point out to the Court, Your Honor, that it's been two years and four months since they were appointed and retained in this case. So, you know, they certainly have had time to get any records that exist at Charity Hospital. The same with the school records, Your Honor. We're talking about two years and four months. I don't know what is meant by all resources haven't been exhausted, but if you hadn't done it in two years and four months, I don't know why we should believe that they're going to do anything now that they haven't done in two years and four months.
>
> "....
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> "With respect to the other grounds they raised, Your Honor, with respect to a mental health expert, they filed this motion on the 29th, Saturday, but yet they claim that this supposed expert—and, Your Honor, as you know, the State is not involved in the motions for ex parte funds, so we weren't aware of this effort that they say they've made to retain this supposed mental health expert. Despite the fact that we filed a motion for discovery asking for the names of those experts which had not been furnished to us. But they're saying they filed a motion on Saturday the 29th, despite the fact he told them on the 21st he couldn't be here. I don't know why we're waiting until the Saturday before trial to try to raise this issue. But again, your Honor, [they have] had two years and four months to retain an expert if that's what they wanted to do and I don't know why they would be waiting until the 11th hour to do that.
>
> ***7** "With respect to the last ground, Your Honor, on the cruel and heinous, if the Court was inclined to grant a continuance on that ground and that ground alone, we probably could agree to withdraw that. I'd like to know what the Court's position would be before I had to make that decision. But if that would be a ground that the Judge would be inclined to grant on the need for a neurologist on that ground or that aggravated circumstance, I'd like, Your Honor, to consider whether or not we could take that and agree that we wouldn't pursue that aggravating factor if that

would be the only basis that the Court would be inclined to grant it. Otherwise we object to it.

"[Defense counsel]: ... As to the issue of the heinous, if the State doesn't want to assert it, we don't need an expert."

(R. 43–48.)

The record reflects that in Collins's pretrial motion for the appointment of a mental-health expert Collins made no argument that he had ever suffered from any mental-health problems or that he had even been treated for any head or brain injury; he merely stated:

"Failure of this Court to order funds for a mental health expert for [Collins] will violate his Fifth, Sixth, and Fourteenth Amendment rights to confront the evidence against him and to receive the effective assistance of counsel and due process of the law.

"The undersigned believes that the services of a trained mental health expert for purposes of this case can be obtained for a fee of approximately $10,000.00. Considering the gravity of the charges which [Collins] faces, such a modest expenditure of State funds is warranted in the interest of justice."

(C. 457–58.) In an abundance of caution, the circuit court granted the motion and allowed Collins $10,000 for the services of a mental-health expert.

This Court has consistently held that matters of trial scheduling are typically within the discretion of the circuit court.

" ' "[I]n Alabama, our courts have always held it is discretionary with the trial court whether it should halt or suspend the trial to enable a party to secure or produce witness in court.... And, in the exercise of that discretion the trial court is not to be reversed save for gross abuse of discretion." Alonzo v. State ex rel. Booth, 283 Ala. 607, 610, 219 So.2d 858, 861 (1969), cert. denied, 396 U.S. 931, 90 S.Ct. 269, 24 L.Ed.2d 229 (1969). In Ex parte Saranthus, 501 So.2d 1256 (Ala. 1986), the Alabama Supreme Court addressed the issue of a pretrial continuance:

" ' "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)."

" 'Saranthus, 501 So. 2d at 1257. " '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, 11 L.Ed.2d 921 (1964)." Glass v. State, 557 So.2d 845, 848 (Ala. Cr. App. 1990).

" ' "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. 1979). A "positive demonstration of abuse of judicial discretion" is required even where the refusal to grant the continuance is "somewhat harsh" and this Court does not "condone like conduct in future similar circumstances." Hays v. State, 518 So.2d 749, 759 (Ala. Cr. App. 1985), affirmed in part, reversed on other grounds, 518 So.2d 768 (Ala. 1986).'

***8** "McGlown v. State, 598 So.2d 1027, 1028–29 (Ala. Crim. App. 1992).

" ' "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burdens counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances." '

"Price v. State, 725 So.2d 1003, 1061 (Ala. Crim. App. 1997), quoting Morris v. Slappy, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). See also Sullivan v. State, 939 So.2d 58, 66 (Ala. Crim. App. 2006) (' "As a general rule, continuances are not favored," In re R.F., 656 So.2d 1237, 1238 (Ala. Civ. App. 1995), and "[o]nly rarely will [an] appellate court find an abuse of discretion" in the denial of a motion for a continuance.')."

Gobble v. State, 104 So.3d 920, 939–40 (Ala. Crim. App. 2010).

Collins argues that he was denied the opportunity to present high-school and medical records. However, evidence of Collins's grades in high school was presented at the penalty phase. Fred Stemley, Collins's cousin, testified that he and Collins grew up together, that Collins was an honor student and a "very smart kid," that Collins played two sports in high school, and that Collins guided him and helped him. Elvin Collins, Collins's brother, testified that Collins did well in school. Dorothy Landry, Collins's mother, testified that Collins caused no problems growing up, that "he helped other people in school," that when Collins attended Booker T. Washington High School and he was an "A" student, that Collins played football and basketball in high school, that Collins excelled at sports and received many trophies, and that Collins graduated with honors and his name was in the newspaper.[7] Also, nothing in the record states why counsel was attempting to obtain the records from Charity Hospital. Indeed, nothing in the record suggests that Collins that ever been treated for any head or brain injury. In fact, the record shows that Collins was a high achiever, that Collins made excellent grades in high school, that Collins graduated with honors, and that Collins was highly intelligent. No witness at the sentencing hearing testified that Collins had any mental-health problems or had ever suffered any head injury.

We are aware of the recent decision of the United States Supreme Court in McWilliams v. Dunn, —— U.S. ——, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017), in which that Court reversed McWilliams's capital-murder conviction and death sentence after finding that the circuit court erred in denying him a mental-health expert to assist in his defense. The Supreme Court stated, in part:

> ***9** "[N]o one denies that the conditions that trigger application of Ake [v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)] are present. McWilliams is and was an 'indigent defendant,' 470 U.S., at 70, 105 S.Ct. 1087. See supra, at 1794. His 'mental condition' was 'relevant to ... the punishment he might suffer,' 470 U.S., at 80, 105 S.Ct. 1087. See supra, at 1794–1795. And, that 'mental condition,' i.e., his 'sanity at the time of the offense,' was 'seriously in question.' 470 U.S., at 70, 105 S.Ct. 1087. See supra, at 1794–1795. Consequently, the Constitution, as interpreted in Ake, required the State to provide McWilliams with 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense,' 470 U.S., at 83, 105 S.Ct. 1087."
>
> —— U.S. ——, 137 S.Ct. at 1798 (emphasis added).

Here, as stated above, absolutely nothing in the record suggests that Collins had any type of mental illness. In all of defense counsel's arguments concerning the motion for a continuance, counsel never argued that an expert was needed because there were reasons to doubt Collins's mental health.

"[O]nly rarely will [an] appellate court find an abuse of discretion" in the circuit court's failure to grant a continuance. Sullivan v. State, 939 So.2d 58, 66 (Ala. Crim. App. 2006). This is not one of those rare cases. Collins failed to establish a "positive demonstration of abuse of judicial discretion." See McGlown v. State, 598 So.2d 1027, 1029 (Ala. Crim. App. 1992). Therefore, we cannot say that the circuit court abused its considerable discretion in denying Collins's motion for a continuance. Collins is due no relief on this claim.

II.

Collins next argues that the circuit court erred in allowing his confession to be admitted into evidence because, he says, the State failed to establish that it was admissible.

The record shows that Collins moved to suppress his statement to law enforcement. In the motion, Collins also moved that the statement not be referenced in voir dire or opening statements because, he said, the confession was the result of "inducements or threats by law enforcement," and no reference to the confession should be allowed until "independent proof of the corpus delicti" of the charged offense had been established. (C. 185–86.) A hearing was held on the motion. (R. 230–80.) Collins made the same arguments at the hearing as he made in the motion to suppress.

At the suppression hearing, defense counsel argued:

> "Judge ... it's well established that a statement made on—because of an offer of a lesser time is indeed a violation of the Constitution and would be inadmissible. The defendant has indicated that the statement was made at the request of law enforcement, that they offered him a ten-year sentence, that he would be out in two or three years.
>
> "Now as to the other issue involved in our motion, motion in limine, which goes to the issue of the admissibility of the statement based upon the State's lack of proof of

an independent corpus delicti of a particular crime. Your Honor, it's long been published in the Alabama courts that the State must offer independent proof of the corpus delicti of the charged offense to authorize the admission of the defendant's confession or inculpatory statement."

(R. 274–76.) During the testimony of Investigator Luther Davis of the Sumter County Sheriff's Office the following occurred:

"[Prosecutor]: Did you have an opportunity to interview [Collins] again?

***10** "[Davis]: Yes, I did.

"[Prosecutor]: And who initiated that?

"[Davis]: Sherman Collins.

"[Prosecutor]: And do you recall when that was?

"[Davis]: It's gon[na] be on August the 4th.

"[Prosecutor]: Explain for the jury and for the Court, Investigator Davis, how that came to be.

"[Davis]: Sherman Collins was in his cell and requested to speak to—

"[Defense counsel]: Objection, Your Honor. It's hearsay because he's stating, I guess, that somebody told him that somebody wanted. Hearsay is the objection."

(R. 687–87.) Collins also objected and argued that his statement was obtained through inducement and offer of reward and that the State failed to prove the corpus delicti before introducing Collins's statement. (R. 696.) In the motion for a new trial, Collins's only argument in regard to his confession was that he was "denied a fair and impartial trial as a result of the trial court allowing the prosecution to introduce Mr. Collins's statement to law enforcement without the proof of the corpus delicti necessary to sustain a conviction of capital murder." (C. 485.)

At the suppression hearing Investigator Davis testified that he first came into contact with Collins when he was sent to Louisiana to escort Collins back to Alabama. Investigator Davis said that he and two other officers picked Collins up in New Orleans and drove him to Sumter County, where he was placed in the county jail. (Other testimony established that Collins was first placed in the Sumter County jail but moved to the Marengo County jail as a security measure. He was taken back to Sumter County jail about two weeks later. (2 S.R. 39.)) Investigator Davis said that on July 11, 2012, he and an Alabama Bureau of Investigation ("ABI") agent attempted to question Collins at the Marengo County jail and read him his Miranda[8] rights, but Collins refused to sign the Miranda form, and all questioning ceased. He said he could not recall if Collins invoked his right to counsel at the July 11 interview. He did not talk to Collins for about one month or until August 4, 2012, he said, when Chief Deputy Calvin Harkness informed him that Collin wanted to talk to him. He said that the interview started at about 11:00 p.m. the night of August 4 and it lasted about two hours. (R. 245.) The police did not have video equipment at that time, he said, so the confession was not videotaped. (R. 247.) He read Collins his Miranda rights, and Collins signed a waiver-of-rights form. (R. 233.) Investigator Davis said that after Collins signed the waiver form he interviewed Collins and handwrote what Collins said to him and that Collins signed that handwritten statement. He testified that he did not force Collins in any way to make the statement and he did not promise Collins anything in exchange for making the statement.

Sherman Collins testified for purposes of the suppression hearing. He said that he was arrested in New Orleans on June 16, 2012, and was transported to Sumter County about seven days later. He said that while he was being transported police did not attempt to interview him but that after he was taken from Sumter County to the Marengo County jail Investigator Davis and an ABI agent tried to interview him. He said that he refused to talk to them and asked for an attorney. (R. 257.) Collins testified: "I said I didn't want to talk because I didn't know the circumstances of the situation that I was in and I'd rather talk to an attorney before I even said something to them." (R. 257.) He said that he was then put in a cell in Marengo County for two weeks until his bond hearing. After the hearing, he said, he was taken to the Sumter County jail where Investigator Davis tried to interview him again. (R. 258.) Collins said that he refused to talk and again asked for an attorney. He was in a cell for about two weeks and then was brought to court for a bond hearing. He said that no police attempted to talk with him at that time. However, he said, after his court appearance police tried to talk with him but he refused. Collins denied that he requested to talk with Chief Deputy Harkness and said that Investigator Davis came to his cell and told him that he was supposed to be moved to another jail, "or something," and did he want to make a statement. He said that he was told by Investigator Davis that if he cooperated he would get a "10–year deal" and would probably serve only about three or four months. (R. 262.) Collins said that the only reason he signed the statement was that he was tired of being isolated and had been promised that

he would get 10 years. He said that the entire contents of the statement were "made up" and that he "never said anything about that." (R. 271.)

***11** At trial, Chief Deputy Calvin Harkness testified that in 2012 he was the chief deputy with the Sumter County Sheriff's Office. He said that he was working late one evening, after 10:00 p.m., when he received a telephone call from the jailer that Collins wanted to see him. At first, he said, he did not think anything of it but then he called the jailer and had Collins brought upstairs from the jail to this office. Collins told him, he said, that he wanted to "see what could be done for him" and he "wanted to talk or make a statement." (R. 806.)

The following occurred:

> "[Prosecutor]: And did I understand you at some point you had someone bring Sherman Collins up from the jail up to where your office was?
>
> "[Harkness]: Correct.
>
> "[Prosecutor]: Now that's when you had face-to-face contact with him?
>
> "[Harkness]: Correct.
>
> "[Prosecutor]: And are you telling the jury at that time that he informed you that he wanted to talk or make a statement?
>
> "[Harkness]: He wanted to see what could be done for him."
>
> "....
>
> "[Prosecutor]: If I could, Senior Officer Harkness, let me back up one second. So this interview, would I be correct, it was initiated by Sherman Collins?
>
> "[Harkness]: Yes.
>
> "[Prosecutor]: You didn't go seek him out?
>
> "[Harkness]: No.
>
> "[Prosecutor]: Investigator Davis didn't go seek him out?
>
> "[Harkness]: No.
>
> "[Prosecutor]: He initiated that he wanted to speak initially it was to you?
>
> "[Harkness]: Correct."

(R. 806–14.) He further testified that when Collins told him he wanted to make a statement he sent Collins back to the jail until he could reach Investigator Davis. When Collins asked to speak with police, Harkness said, he did not appear to be distressed or upset. Chief Deputy Harkness called Investigator Davis because Davis was leading the investigation. He said that he was present when Collins was read his Miranda rights, that Collins signed a waiver-of-rights form indicating that he wished to provide a statement, and that he heard Collins confess to killing Detrick Bell for $2,000.

In reviewing a circuit court's ruling on a motion to suppress a confession we apply the standard articulated 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).

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

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

"In order for a statement to be admissible, '[t]he trial judge need only be convinced from a preponderance of the evidence to find a confession to have been voluntarily made.' Jackson v. State, 516 So.2d 726, 741 (Ala. Crim. App. 1985), citing Harris v. State, 420 So.2d 812, 814 (Ala. Crim. App. 1982) (emphasis added). See also Ex parte Williams, 627 So.2d 999, 1003 (Ala. 1993). Moreover, in cases involving conflicting evidence on the issue of voluntariness, the trial court's determination is entitled to great weight on appeal. D.M.M. v. State, 647 So.2d 57, 60 (Ala. Crim. App. 1994). ' " 'Where the evidence of voluntariness is conflicting, and even where there is credible testimony to the contrary, the trial judge's finding of voluntariness must be upheld unless palpably contrary to the weight of the evidence.' " ' Dixon v. State, 588 So.2d 903, 908 (Ala.1991) (quoting Carr v. State, 545 So.2d 820, 824 (Ala. Crim. App. 1989)) (emphasis added). See also Ex parte Jackson, 836 So.2d 979, 982 (Ala. 2002)."

Jones v. State, 987 So.2d 1156, 1164 (Ala. Crim. App. 2006).

Alabama follows the majority view that an appellate court may examine the entire record when considering the correctness of a circuit court's ruling on a motion to suppress. "In reviewing a trial court's ruling on a motion to suppress, this Court may consider the evidence adduced both at the suppression hearing and at the trial." Smith v. State, 797 So.2d 503, 526 (Ala. Crim. App. 2000).

"[M]ost state courts addressing the issue, again in a variety of contexts, also have held that an appellate court may consider the entire record when reviewing the correctness of a trial court's ruling on a pretrial motion to suppress. State v. Randall, 94 Ariz. 417, 385 P.2d 709, 710 (Ariz. 1963) (warrantless arrest); State v. Whitaker, 215 Conn. 739, 578 A.2d 1031, 1033 (Conn. 1990) (voluntariness of confession); People v. Gilliam, 172 Ill.2d 484, 670 N.E.2d 606, 614, 218 Ill.Dec. 884 (Ill. 1996) (voluntariness of statement); Lamb v. State, 264 Ind. 563, 348 N.E.2d 1, 3 (Ind. 1976) (voluntariness of statement); State v. Jackson, 542 N.W.2d 842, 844 (Iowa 1996) (inventory search); State v. Chopin, 372 So.2d 1222, 1224, n. 2 (La. 1979) (investigatory stop); State v. Parkinson, 389 A.2d 1, 10 (Me. 1978) (warrantless arrest); State v. Sharp, 217 Mont. 40, 702 P.2d 959, 961 (Mont. 1985) (investigatory stop); State v. Huffman, 181 Neb. 356, 148 N.W.2d 321, 322 (Neb. 1967) (warrantless search); State v. Martinez, 94 N.M. 436, 612 P.2d 228, 231 (N.M.1980) (warrantless arrest and search); Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311, 318, n. 5 (Pa. 1983) (voluntariness of statement); State v. Keeling, 89 S.D. 436, 233 N.W.2d 586, 590, n. 2 (S.D. 1975) (pretrial identification); State v. Bruno, 157 Vt. 6, 595 A.2d 272, 273 (Vt. 1991) (investigatory stop); Carroll v. State, 938 P.2d 848, 850 (Wyo. 1997) (warrantless arrest); Henry v. State, 468 So.2d 896, 899 (Ala. Crim. App. 1984) (voluntariness of statement); Sayers v. State, 226 Ga.App. 645, 487 S.E.2d 437, 438 (Ga. App. 1997) (investigatory stop); State v. Kong, 77 Hawaii 264, 883 P.2d 686, 688 (Hawaii App. 1994) (voluntariness of statement); State v. Sims, 952 S.W.2d 286, 290 (Mo. App. 1997) (pretrial identification); Woodson v. Commonwealth, 25 Va.App. 621, 491 S.E.2d 743, 745 (Va. App. 1997) (warrantless search)."

***13** State v. Henning, 975 S.W.2d 290, 297–98 (Tenn. 1998).

A.

On appeal, Collins first argues that his confession was inadmissible because, he says, the State obtained Collins's statement in violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Specifically,

Collins argues that the only testimony indicating that Collins reinitiated contact with police was the hearsay testimony that a jailer told a police officer that Collins wanted to speak to Investigator Davis and that, according to this Court's holding in Robinson v. State, 698 So.2d 1160 (Ala. Crim. App. 1996), hearsay testimony alone is not sufficient to satisfy the State's burden of proving that Collins reinitiated contact with police after invoking his right to counsel. Collins argues in brief:

> "It is clear that Mr. Collins did not directly contact Harkness, but reached him only through jail staff. The sole evidence offered by the State regarding the crucial moment when Mr. Collins allegedly reinitiated contact with police was Harkness's hearsay testimony concerning comments made by an unknown jail employee and Davis's duplicative hearsay within hearsay."

(Collins's brief, at pp. 48–49.)

As noted above, Collins made no Edwards objection at trial. Accordingly, "the State's alleged violation of Edwards is not properly preserved and will be reviewed only for plain error." Osgood v. State, [Ms. CR–13–1416, October 21, 2016] ––– So.3d ––––, –––– (Ala. Crim. App. 2016).

In Edwards, the United States Supreme Court held that,

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

451 U.S. at 484–85, 101 S.Ct. 1880.

> "Subsequent to Edwards [v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981),] a plurality of the Court in Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), addressed what constituted, under Edwards, 'initiation' by the accused of conversation with law enforcement. Questions by the accused regarding 'the routine incidents of the custodial relationship,' for example, asking to use the bathroom or the telephone, are not valid initiations by the accused. 462 U.S. at 1045, 103 S.Ct. 2830. Instead, the accused must 'evince[ ] a willingness and a desire for a generalized discussion about the investigation.' 462 U.S. at 1045–46, 103 S.Ct. 2830."

Ex parte Williams, 31 So.3d 670, 676 (Ala. 2009).

> "The purpose of [the Edwards rule] is to protect an accused in police custody from ' "badger[ing]" or "overreaching"—explicit or subtle, deliberate or unintentional—[that] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.' Smith v. Illinois, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), quoting Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).
>
> ***14** " 'This "rigid" prophylactic rule, Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, supra, 451 U.S. [477], at 484–485[, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)] (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda v. Arizona, 384 U.S. [436], at 444–445[, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, supra, [451 U.S.,] at 485, 486, n. 9, 101 S.Ct. [1880].'
>
> "Smith v. Illinois, 469 U.S. at 95, 105 S.Ct. 490."

Eggers v. State, 914 So.2d 883, 899–900 (Ala. Crim. App. 2004).

The State first argues that there is no evidence indicating that Collins invoked his right to counsel except the testimony of Collins; therefore, Edwards has no application to the facts of this case. However, the testimony concerning Collins's invocation of his right to counsel is conflicting. Collins testified that he invoked his right to counsel on August 4, 2012, after he was transported from New Orleans to Alabama. Collins testified: "I said I didn't want to talk because I didn't know the circumstances of the situation that I was in and I'd rather talk to an attorney before I even said something to them." (R. 257.) At the suppression hearing Investigator Davis testified that he could not recall if Collins had invoked

his right to counsel. However, at trial Davis testified that Collins did not invoke his right to counsel at that time. (R. 683.) Thus, there is conflicting evidence about whether Collins requested counsel.

Even if Collins had invoked his right to counsel, there is sufficient evidence in the record to establish that Collins reinitiated contact with police after invoking that right. As stated above, Collins relies on Robinson v. State. In Robinson, this Court reversed Robinson's conviction after finding that Robinson's statement was taken in violation of Edwards. This Court stated: "The only testimony that supports the contention that [the defendant] initiated further contact was given by Detective Fisher, who stated that he 'didn't go and talk to [the defendant] because someone told me that [the defendant]—someone in the jail, and I'm not really sure, honestly, I'm not—that [the defendant] requested to talk to me.' " 698 So.2d at 1164.

Collins ignores cases subsequent to Robinson. In Ex parte Williams, 31 So.3d 670 (Ala. 2009), a majority of the Alabama Supreme Court relying, in large part, on the United States Court of Appeals' decision in Van Hook v. Anderson, 488 F.3d 411 (6th Cir. 2007), held that once a defendant has invoked his right to counsel a defendant may reinitiate contact with police through a third party. The Williams Court adopted the test in Van Hook.

> "[W]e agree with the majority opinion in Van Hook [v. Anderson, 488 F.3d 411 (6th Cir. 2007),] that under Edwards [v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981),] an accused can initiate further interrogation through a third party. We recognize that Edwards and the Supreme Court decisions both pre- and post-Edwards established a bright-line rule preventing police from reinitiating contact with an accused; however, those cases also recognized that an accused can later decide to reinitiate communication."

***15** Williams, 31 So.3d at 683.

In Van Hook, the United States Court of Appeals for the Sixth Circuit had stated:

> "In determining how the general rule of Edwards applies to third-party communications, we begin with our standard for determining when a suspect initiates a discussion. In [United States v.] Whaley, [13 F.3d 963 (6th Cir. 1994),] this court held, '[A]n Edwards initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case.' 13 F.3d at 967 (reconciling the plurality and dissenting opinions in Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983)). There is nothing inherent in 'show[ing] a willingness and a desire' that restricts it to direct communication only. To show something means to manifest, demonstrate, or communicate something. One way to show or demonstrate something is by person-to-person communication. Another way is by person-to-person-to-person communication. While the latter indirect communication may give rise to a question about the accuracy of the received message, any such question is alleviated when the ultimate recipient can ask the original declarant whether the received message is accurate. Thus, a suspect could, consistent with Whaley, communicate a willingness and a desire to talk with police through a third person. Whether the communication is direct or indirect is immaterial—what is important is the impetus for discussion comes from the suspect himself.
>
> "....
>
> "One might ask why third-party communications should be permitted when a suspect could just communicate directly with the police. But that is the wrong question. Rather, one should ask, why not? Initiation of a discussion through a third party does not contravene Edwards or its progeny. It is consistent with the purpose of Edwards—to protect against government coercion—as well as with our standard for determining whether a suspect has initiated a discussion. It furthers the interest in permitting suspects to talk with the police and advances the investigation for truth. It does not erode a suspect's protection against official coercion because the police must confirm whether the third-party communication is accurate before beginning any discussion or questioning. For these reasons, we conclude that a suspect can initiate a discussion with police through the communication of a third party."

488 F.3d at 418–23 (footnotes omitted).

Pursuant to the Alabama Supreme Court's decision in Ex parte Williams, before a statement is admissible after a defendant has reinitiated contact with police via a third party, the State must show that "the police received information that a suspect wants to talk," that "there is a sufficient basis for believing its validity," and that "the police confirm with the suspect the validity of that information." Van Hook, 488 F.3d at 424–25. As noted in Van Hook, hearsay concerns are alleviated because police must personally confirm the reliability of the information passed to law enforcement by the third party.[9]

This case is not governed by the holding in Robinson but by the Alabama Supreme Court's decision in Ex parte Williams.

***16** Also, contrary to Collins's argument in brief, "[w]e do not believe that the officer initiated the conversation by merely asking petitioner, in response to an earlier request, whether petitioner wanted to see him." McCree v. Housewright, 689 F.2d 797, 802 (8th Cir. 1982). "[W]hen the police receive information from a suspect or a third party that appears to show the suspect is willing to talk to them, they may inquire into whether the suspect was reinitiating communication." In re Tracy B., 391 S.C. 51, 65, 704 S.E.2d 71, 78 (2010).

> " 'The police' is not a monolith. Detectives and investigating officers do not typically act as guards roaming all day the areas directly adjacent to holding cells. If a suspect wants to initiate a discussion with an investigating officer, the suspect will frequently have to tell someone other than that officer. Of course, the suspect could just tell the nearest guard, who could then pass along the message to the investigating officer.
>
> "....
>
> "...In this type of situation, the police may 'inquire whether [the suspect] was re-initiating communication.' [United States v.] Michaud, 268 F.3d [728] at 735–36 [(9th Cir. 2001)] (citing [Oregon v.] Bradshaw, 462 U.S. [1039] at 1045–46, 103 S.Ct. 2830 [77 L.Ed.2d 405 (1983)]). Det. Davis testified that, based on what the mother told him, he believed her son might want to talk to police. This was enough to justify a limited inquiry to confirm or disaffirm that belief."

Van Hook v. Anderson, 488 F.3d at 423–28.

After reviewing the entire record, we hold that the evidence was sufficient to satisfy the standard adopted by the Alabama Supreme Court in Ex parte Williams. Chief Deputy Harkness testified that a jailer telephoned him and told him that Collins wanted to talk and that he met with Collins to confirm the truthfulness of the jailer's information. The State established the requirements for admissibility under Ex parte Williams and that testimony did not consist merely of hearsay. The circuit court committed no error in allowing Collins's statement to be admitted into evidence. Collins's confession was not due to be suppressed on this basis.

B.

Collins next argues that his confession should not have been admitted because, he says, the waiver of his Miranda warnings was not voluntary. Specifically, Collins says that he had been subjected to prolonged isolation, repeated interview attempts, and the promise of a 10–year sentence.

"Prolonged physical discomfort and isolation from friends and family can make a confession involuntary." See State v. Nelson, 886 N.W.2d 505, 510 (Minn. 2016). However, the degree of physical discomfort is the controlling factor in determining whether that isolation rendered the statement involuntary.

> "We recognize the principle that conditions of confinement can be so severe that the prisoner may be willing to give a confession merely to escape the intolerable imprisonment. In such a situation, the prisoner's will is overborne and any resulting confession is deemed involuntary. However, in judging the coercive effect of the conditions of confinement, we are dealing with a matter of degree.
>
> "The controlling Arizona case on this question is State v. Arnett, which held that the conditions must constitute more than merely 'uncomfortable surroundings.' 119 Ariz. 38, 43, 579 P.2d 542, 547 (1978). The examples of 'intolerable' conditions cited by Arnett contain a common thread of relatively outrageous conduct by the authorities (e. g.— being held incommunicado while in an injured condition; bread and water diet; extremely primitive surroundings). Id. In contrast, the facts of the instant case point much more strongly toward the idea that, while the isolation cells at Arizona State Prison would hardly be considered comfortable, neither are they intolerable enough to justify invalidating the confession on that ground. Isolated prisoners are not allowed to have televisions or radios, are deprived of dessert with their meals, and are allowed to shower and exercise only three times per week, none of which seems particularly intolerable. Indeed, the only condition of the isolation section which can reasonably be characterized as intolerable was the alleged excessive temperature in the cells and even on this point the record is in dispute."

***17** State v. McVay, 127 Ariz. 18, 21, 617 P.2d 1134, 1137 (1980).

In this case, Chief Deputy Harkness testified concerning the conditions of Collins's incarceration at the Sumter County

jail prior to his confession. He said that he periodically had contact with Collins, that he assisted Collins in contacting Collins's mother on several occasions, that Collins was placed in the booking-area cell because police had heard that people were upset with Collins about the murder, that Collins went to the "general area to eat," that Collins was not in an isolation cell, that Collins had no television in the cell, that Collins left the cell "for showering daily if he so chose," and that Collins was allowed to exercise in the yard daily. He said that he knew of no time except at the beginning of Collins's incarceration where Collins was questioned by law enforcement.

At trial, Investigator David testified concerning the conditions of Collins's incarceration in the Marengo County jail. He said that Collins was taken to Marengo County to keep him separated from his codefendant, Kelvin Wrenn. He said that Collins was housed in a cell by himself and that he had telephone and other privileges.

The degree of Collins's incarceration in this case did not rise to the level necessary to render his statement involuntary on that basis. See State v. McVay. Therefore, Collins's confession was not due to be suppressed on this basis.

C.

Last, Collins argues that the State failed to establish that Collins's statement was voluntary. In brief, Collins ignores the testimony at trial and cites to only portions of the suppression hearing.

As stated above, both Investigator Davis and Chief Deputy Harkness testified that after Collins initiated contact with police he signed a waiver-of-rights form and confessed to police. Investigator Davis testified that he did not force Collins to make a statement or offer him any promises. Collins offered conflicting testimony concerning the events leading to his confession, and the circuit court resolved the conflicts in the testimony against Collins's version of the events.

> " '[A]ny conflicts in the testimony or credibility of witnesses during a suppression hearing is a matter for resolution by the trial court. Absent a gross abuse of discretion, a trial court's resolution of [such] conflict[s] should not be reversed on appeal.' Sheely v. State, 629 So.2d 23, 29 (Ala. Crim. App. 1993) (citations omitted). '[A] trial court's ruling based upon conflicting evidence given at a suppression hearing is binding on this Court, ... and is not to be reversed absent a clear abuse of discretion.' Jackson v. State, 589 So.2d 781, 784 (Ala. Crim. App. 1991). 'When there is conflicting evidence of the circumstances surrounding an incriminating statement or a confession, it is the duty of the trial judge to determine its admissibility, and if the trial judge decides it is admissible his decision will not be disturbed on appeal "unless found to be manifestly contrary to the great weight of the evidence." ' Ex parte Matthews, 601 So.2d 52, 53 (Ala. 1992), quoting Williams v. State, 456 So.2d 852, 855 (Ala. Crim. App. 1984). ' "In reviewing the correctness of the trial court's ruling on a motion to suppress, this Court makes all the reasonable inferences and credibility choices supportive of the decision of the trial court." ' Kennedy v. State, 640 So.2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley v. State, 494 So.2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So.2d 772 (Ala. 1986)."

***18** Eggers v. State, 914 So.2d 883, 899 (Ala. Crim. App. 2004). The circuit court's ruling is not "manifestly contrary to the great weight of the evidence," and there is no reason to disturb the circuit court's ruling. Collins's confession was properly admitted into evidence; Collins is due no relief on this claim.

III.

Collins next argues that the circuit court erred in allowing the lead law-enforcement officer, Investigator Davis, to remain in the courtroom and to observe all of the witnesses's testimony before he testified and after Collins invoked "the rule."

The record shows that Collins moved that the circuit court invoke Rule 615, Ala. R. Evid., and exclude all testifying witnesses from the courtroom. (R. 280.) Collins further argued: "If the prosecution is going to have a law enforcement officer at the table with them that he should not be allowed to sit in until such time as he has testified if he is a witness in the case." (R. 280.) The circuit court denied the motion. (R. 280.) Before Investigator Davis testified, Collins renewed his objection to Davis's presence in the courtroom throughout the trial. The circuit court again denied the motion. (R. 644.)

Rule 615, Ala. R. Evid., provides:

> "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a

> natural person, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a victim who is unable to attend, when the representative has been selected by the victim, the victim's guardian, or the victim's family."[10]

Rule 9.3(a), Ala. R. Crim. P., also states: "Prior to or during any proceeding, the court, on its own motion or at the request of any party, may exclude witnesses from the courtroom and direct them not to communicate with each other, or with anyone other than the attorneys in the case, concerning any testimony until all witnesses have been released by the court."

"Alabama appellate courts have time and again refused to hold it an abuse of discretion on the part of a trial court to allow a sheriff, police chief, or similarly situated person who will later testify to remain in the courtroom during trial." Ex parte Lawhorn, 581 So.2d 1179, 1181 (Ala. 1991). See Dockery v. State, 287 Ga. 275, 276, 695 S.E.2d 599, 602 (2010) ("The trial court ... did not err by excepting the State's lead investigator ... from the rule of sequestration.").

The circuit court did not abuse its considerable discretion in allowing Investigator Davis to be excluded from the rule; therefore, Collins is due no relief on this claim.

IV.

***19** Collins next argues that he was denied a fair trial because, he says, one of his attorneys, John Stamps III, had a conflict of interest. Specifically, he argues that Stamps had previously represented one of the State's witnesses, Terrod Sturdivant, in an unrelated matter and that his subsequent representation of Collins resulted in a conflict of interest.

Sturdivant testified that he was present during the shooting and that he tried to get everyone to return to the Center after the shooting. He said that he had to draw his gun to get Grant "Bam" Kimbrough to return to the Center he had to draw his gun. He said that he had been in jail on the morning of the shooting, that he had been arrested for unlawful distribution or selling marijuana, that he pleaded guilty to that offense, that he was sentenced to five years, that in lieu of that sentence, he was placed on house arrest for one year, and that Stamps had represented him on that charge. During cross-examination, Stamps questioned Sturdivant about his possession of a gun and informed him that it was a crime to possess a gun after having been convicted of a felony and that by drawing a gun and forcing Bam to return to the Center he was guilty of kidnapping.

Here, Stamps did not simultaneously represent both a State witness and Collins. Stamps's representation of Sturdivant had ended well before Collins's trial. As this Court recently stated:

> "In Strouse v. Leonardo, 928 F.2d 548, 552 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit rejected the argument that an attorney had a conflict of interest because that attorney represented a defendant charged with murder and had represented the victim in an unrelated matter. Specifically, the Second Circuit held:
>
> > " 'It is well established that the Sixth Amendment right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)....
> >
> > " 'In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the Supreme Court articulated the standard for assessing ineffective assistance of counsel claims based on conflict of interest: "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 350, 100 S.Ct. at 1719. Thus, the mere possibility of a conflict is not enough to upset a conviction; the defendant must identify an actual conflict that impeded his lawyer's representation. Id.; United States v. Jones, 900 F.2d 512, 519 (2d Cir.), cert. denied, 498 U.S. 846, 111 S.Ct. 131, 112 L.Ed.2d 99 (1990). We believe that Strouse has not satisfied this burden thus far.
> >
> > " 'Strouse's claim that Cally's prior representation of Mrs. Strouse gave rise to a conflict of interest in his representation of Strouse is without merit. Cally's work for Mrs. Strouse, in addition to drafting her will, consisted of occasional real estate work and handling small matters relating to her divorce. We can discern no way in which this prior work for Mrs. Strouse created a conflict in Cally's representation of Strouse at his murder trial. See, e.g., Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir. 1989) (no conflict where defense counsel had friendship with and had in the past represented members of murder victim's family), cert.

denied, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990); Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir. 1984) (no conflict where defense counsel represented murder victim in unrelated criminal action and informed defendant of the prior representation), cert. denied, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985). Moreover, as one court has pointed out, such representation may, under some circumstances, be desirable. See Kirkpatrick, 870 F.2d at 284. Strouse could well have thought that the jury would look favorably upon his choosing his mother's lawyer to defend him.'

***20** "Strouse, 928 F.2d at 552–53. See also Moseley v. Scully, 908 F.Supp. 1120, 1138–39 (E.D.N.Y. 1995) (same); People v. Burnside, 132 Ill.App.3d 826, 827–28, 87 Ill.Dec. 719, 477 N.E.2d 845, 846 (1985) (same).

"Here, Townes's attorney had represented the victim, Woods, in matters unrelated to the crime for which Townes was on trial. During his representation of Woods, counsel did not learn any information that would be used for or against Townes. Under these circumstance, Townes has not shown that defense counsel suffered under a conflict of interest. Further, he has failed to show any indication that defense counsel's representation was affected by the alleged conflict."

Townes v. State, [Ms. CR–10–1892, December 18, 2015] ––– So.3d ––––, –––– (Ala. Crim. App. 2015).

"A conflict often exists when one attorney simultaneously represents two or more codefendants, Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and may arise when one attorney simultaneously represents a defendant and a witness in that defendant's trial. See Allen v. Dist. Court, 184 Colo. 202, 205, 519 P.2d 351, 353 (1974) ('It is of the utmost importance that an attorney's loyalty to his client not be diminished, fettered, or threatened in any manner by his loyalty to another client.').

"A similar conflict may arise when an attorney has previously represented a trial witness. This 'successive representation' may restrict the attorney's present representation of the defendant 'because of the [attorney's] duty to maintain the confidentiality of information' that he received in his prior representation of the trial witness. Rodriguez v. Dist. Court, 719 P.2d 699, 704 (Colo. 1986). Because this duty of confidentiality survives the termination of an attorney-client relationship, it 'creates the possibility that the attorney will be hindered in cross-examining the witness, which thus impedes the attorney's ability to zealously represent the current client.' Dunlap [v. People], 173 P.3d [1054] at 1070 [(Colo. 2007)] (citing Rodriguez, 719 P.2d at 704)."

West v. People, 341 P.3d 520, 526 (Colo. 2015) (footnotes omitted).

The record clearly shows that Stamps's previous representation of State witness Sturdivant did not hinder his representation of Collins in any way. Indeed, Stamps vigorously cross-examined Sturdivant. Collins "has failed to show any indication that defense counsel's representation was affected by the alleged conflict." See Townes, supra. Thus, Collins is due no relief on this claim.

V.

Collins argues that he was denied an impartial jury after the circuit court denied several of his challenges for cause of prospective jurors who, he argues, had "close personal and working relationships with a prosecutor." (Collins's brief, at p. 38.) Specifically, Collins challenges the circuit court's failure to remove prospective jurors T.T., Ke.S., Ka.S., T.D., and N.J.[11]

"To justify a challenge for cause, there must be a proper statutory ground or ' "some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." ' Clark v. State, 621 So.2d 309, 321 (Ala. Cr. App. 1992) (quoting Nettles v. State, 435 So.2d 146, 149 (Ala. Cr. App. 1983)). This court has held that 'once a juror indicates initially that he or she is biased or prejudiced or has deep seated impressions' about a case, the juror should be removed for cause. Knop v. McCain, 561 So.2d 229, 234 (Ala. 1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law Ex parte Taylor, 666 So.2d 73, 82 (Ala. 1995). A juror 'need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.' Kinder v. State, 515 So.2d 55, 61 (Ala. Cr. App. 1986)."

***21** Ex parte Davis, 718 So.2d 1166, 1171–72 (Ala. 1998).

"The test for determining whether a strike rises to the level of a challenge for cause is 'whether a juror can set

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

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

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

Turner v. State, 924 So.2d 737, 754 (Ala. Crim. App. 2002).

Moreover, most of challenged jurors were removed by the use of peremptory strikes. "[T]he Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike. Bethea v. Springhill Mem'l Hosp., 833 So.2d 1 (Ala. 2002)." Pace v. State, 904 So.2d 331, 341 (Ala. Crim. App. 2003). Cf. Ex parte Colby, 41 So.3d 1 (Ala. 2009) (may not be harmless when multiple challenges for cause are involved).

With these principles in mind we review the challenged prospective jurors.

A.

First, T.T. indicated that one of the assistant district attorneys was married to his second cousin and that another assistant district attorney, Nathan Watkins, had represented him and he had known this attorney for 40 years.[12] Collins moved that T.T. be challenged for cause because of his relationship to one district attorney and because, he said, T.T. indicated that he would be biased in favor of the State. The following occurred:

> "[Defense counsel]: Judge, in response [T.T.] stated that he was related by marriage to [assistant district attorney] who was married to his second cousin and we don't believe that should be sufficient to challenge him for cause. I don't have any—for some reason I didn't take down any indication that he was going to be partial to the State.
>
> "[Prosecutor]: I didn't hear it or either I missed it. I'm sorry.
>
> "The Court: Anything else anybody else wants to say on it?
>
> "[Defense counsel]: On that matter, no, sir. No, no.
>
> "The Court: The basis is because?
>
> "[Defense counsel]: The basis is he was related by marriage and he would show bias favoring the State's case over the defense.
>
> "The Court: That is your position that he said that?
>
> "[Defense counsel]: That's what I thought I heard, Your Honor.
>
> ***22** "[District Attorney]: I stipulate that he said he was married to [an assistant district attorney's] second cousin, but—and again, in all respect, I didn't hear him say he would be biased against the [Collins].
>
> "[Defense counsel]: That was the gentleman in the back?
>
> "[Prosecutor]: That's [T.D.].
>
> "[Defense counsel]: I've got the wrong person."

(R. 209–11.) It is clear that defense counsel confused T.T. with another juror. T.T. never stated that he was biased in favor of the State. Also, assistant district attorney Nathan Watkins stated that he did not currently represent this juror.

Moreover,

> "[i]t is good ground for challenge of a juror by either party:
>
> "....
>
> "(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured."

§ 12–16–150, Ala. Code 1975.

T.T. said that assistant district attorney Watkins was married to his second cousin. When calculating the degree of affinity, this Court has stated:

> " 'When existing only by affinity, the relationship does not disqualify, unless it be within the fifth degree, as computed by the civil-law rule. By that rule, as applied to collaterals, the count begins at one of the persons in question, and proceeds up to the common ancestor, and then down to

> the other person, calling it a degree for each person, both ascending and descending; and the number thus counted expresses the degree of kinship.' "

Zimmerman v. State, 51 Ala.App. 519, 521, 287 So.2d 230, 232 (1973), quoting Danzey v. State, 126 Ala. 15, 19–20, 28 So. 697, 698 (1900). T.T. was related to the assistant district attorney within the sixth degree of affinity. Therefore, no valid statutory basis existed to remove T.T. for cause.

Moreover,

> " '[the juror's] testimony revealed that he had been friends with one of the prosecutors for a long time. Nevertheless, the mere fact of acquaintance is not sufficient to disqualify a prospective juror if the panel member asserts that the acquaintance will not affect his judgment in the case.'
>
> "Carrasquillo v. State, 742 S.W.2d 104, 111 (Tex. App. 1987). See also J.H.B., Relationship to Prosecutor or Witness for Prosecution as Disqualifying Juror in Criminal Case, 18 A.L.R. 375 (1922)."

Bohannon v. State, 222 So.3d 457, 478 (Ala. Crim. App. 2015).

Last,

> "five of the veniremen had at some time in the past been represented in legal matters by the prosecuting attorney and eight others were personally acquainted with him. Johnson contends he was deprived of a complete panel of qualified jurors when he was compelled to use peremptory challenges to remove a number of the prosecutor's acquaintances from the venire.
>
> "The problem with appellant's point is that no evidence of any bias or prejudice on the part of the veniremen in question was shown. To the contrary, the voir dire examination of the panel by Johnson's attorney indicated that all of the panel members who knew the prosecutor were prepared to put that circumstance behind them and give the defendant a fair and impartial trial. The claim of disqualification was based purely and solely on speculation. In this situation, it was not error on the part of the trial court to deny the challenges. State v. Wraggs, 512 S.W.2d 257 (Mo. App. 1974). The point is without merit."

***23** State v. Johnson, 770 S.W.2d 263, 267–68 (Mo. App. 1989).

The circuit court did not err in denying Collins's motion to remove prospective juror T.T. for cause. Collins is due no relief on this claim.

B.

Second, Collins argues that prospective juror Ke.S. should have been struck for cause because, he says, he indicated that he was friends with all three assistant district attorneys and that one of those assistant district attorneys had represented him in the past. When Collins moved to strike Ke.S. for cause, the following occurred:

> "[District attorney]: [Ke.S.] was one of the few—if the Court will recall, he also said this is a small county and just because I know him doesn't mean I would lean his way. I'll be fair and base my verdict on the evidence. Even though he wasn't asked that, he made that statement voluntarily.
>
> "The Court: Anything further?
>
> "[Defense counsel]: No, sir.
>
> "The Court: And if I understand that, he didn't say that at the present time he has an ongoing business relationship?
>
> "[Defense counsel]: I don't recall that, Your Honor.
>
> "The Court: If he doesn't say that—
>
> "[Assistant district attorney]: I'm not in business with [Ke.S.] in any shape, form or fashion.
>
> "The Court: I'll leave him on for that."

(R. 221–23.) Ke.S. was removed from the jury by use of a peremptory strike.

"In the absence of a statute so providing, a venireperson is not absolutely disqualified because he has been a client of an attorney for one of the parties." State v. Douglas, 132 S.W.3d 251, 258 (Mo. App. 2004). Nothing in the record reflects any bias on the part of Ke.S. The circuit court did not err in failing to remove Ke.S. for cause. See State v. Johnson, supra. Collins is due no relief on this claim.

C.

Collins further argues that the circuit court erred in denying his challenge for cause of prospective juror Ka.S. because of

her relationship with one of the prosecutors. The following occurred:

> "[Defense counsel]: [J]uror number 179, [Ka.S.], indicated that [an assistant district attorney] had done some work for her.
>
> "[Assistant district attorney]: I'm going to be fair to the defense. She said that she keeps my grandson at Little Eagles Day Care at Sumter Academy, but there was no question to her whether that would affect her ability to be fair and impartial. And as far as any legal work, I might have done a house closing for her and her husband, but it would have been years ago. It's nothing current and I don't go to the Little Eagles Day Care. I'm not being facetious. I don't go out there, so she doesn't see me in that arena and I have nothing to do with Sumter Academy. So I'm not an employer or in a business relationship with her and she has not stated the fact that she keeps my grandson would make her unable to be fair and impartial.
>
> "The Court: I'll deny the challenge for cause."

(R. 224–26.) Ka.S. was removed from the jury by a peremptory strike.

Again, nothing in the record reflects that the assistant district attorney was currently doing any legal work for Ka.S. and there is nothing that suggests that Ka.S. was biased in favor of the State. The circuit court did not err in denying Collins's motion to remove Ka.S. for cause. See State v. Johnson, supra.

D.

***24** Collins next argues that the circuit court erred in denying his motion to strike prospective juror T.D. for cause because, he says, he had a business relationship with one of the assistant district attorneys and had been related by marriage to one of the assistant district attorneys. The following occurred:

> "[Defense counsel]: And we had a notation that juror number 53, [T.D.], also had, for lack of a better term, an attorney-client relationship with [an assistant district attorney].
>
> "[Prosecutor]: I think what he actually said was that he was a contractor and he had done some contracting work for me in the past. I actually don't remember it, but it certainly was a long time ago if it every happened. I have no current business relationship with him and he's not employed by me in any shape, form, or fashion.
>
> "The Court: Denied challenge for cause."

(R. 223–24.) The record shows that this juror had been married to prospective juror T.T.'s twin sister, who had been deceased for 14 years. T.T. had stated that one of the assistant district attorneys was married to his second cousin.

T.D. stated that he could be impartial. (R. 185.) Also, like prospective juror T.T. there was no statutory basis on which to remove T.T. for cause based on his degree of affinity with one of the assistant district attorneys. The circuit court did not err in denying Collins's motion to remove T.D. for cause.

E.

Collins last argues that the circuit court erred in denying his motion to remove prospective juror N.J. for cause. In brief, Collins's entire argument consists of the following: "Finally, the trial court denied a defense challenge for cause of potential juror N.J. on the basis that she was a cousin of the victim. This venire member never established that this kinship with the victim would not affect her ability to be fair and impartial." (Collins's brief, at p. 40.)

However, prospective juror N.J. stated during voir dire that her cousin married into the victim's family, not that she married into the victim's family. (R. 61.) There was no statutory basis to remove N.J. for cause based on her cousin's relationship to the victim, and there is nothing in the record that reflects that N.J. was biased. See State v. Johnson, supra. The circuit court did not err in failing to remove N.J. for cause.

VI.

Collins next argues that his right to confront his accusers was violated when the State introduced Collins's codefendant's hearsay statements implicating him in the murder.

The record shows that, during Investigator Davis's testimony, the State introduced statements made by Kelvin Wrenn. The State argued that the statements were not hearsay because they were statements made by a coconspirator in furtherance of a conspiracy. Defense counsel repeatedly argued that the admission of the statements was a violation of Collins's right to confront his accusers because the statements were classic

hearsay. (R. 770, 774–87.) The trial court agreed with the State and allowed Wrenn's statements to be admitted. (R. 788.) Investigator Davis testified that Wrenn first told him "that when [Wrenn] got out of the car I grabbed my .22 pistol and I gave Sherman [Collins] my .454 pistol," (R. 790); that Wrenn said "that I did not like Detrick [the victim] because he had someone to break in my mother's house years ago," (R. 790); and that Wrenn said "I talked to Sherman and asked him what did he do with my gun he used to kill Detrick." (R. 791.) A redacted version of Wrenn's statement to police was then admitted into evidence.

***25** During ABI Agent Bryan Manley's testimony, the prosecutor also asked about Wrenn's statements during his interview with Wrenn. He read from his statement the following: "[Wrenn] saw Speedy [the victim] and told Sherman that he didn't like Speedy because he sent somebody to break into his mama's house.... I gave Sherman my .454 revolver pistol. I had my .22 magnum revolver." (R. 850–51.)

On appeal, the State candidly concedes that the circuit court erred in admitting Wrenn's statements because their admittance violated Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We agree.

> "In Bruton, the Supreme Court specifically held that 'because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.' 391 U.S. at 126, 88 S.Ct. at 1622."

Holsemback v. State, 443 So.2d 1371, 1379 (Ala. Crim. App. 1983).

> "It is well settled that 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, absent a showing of reliability, 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. Cr. App. 1994); Ephraim v. State, 627 So.2d 1102 (Ala. Cr. App. 1993)."

Jackson v. State, 791 So.2d 979, 1024 (Ala. Crim. App. 2000).

"The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction." Schneble v. Florida, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). A reviewing court must also consider if the admission of the statement was harmless beyond a reasonable doubt. "The harmless error rule applies in capital cases." Musgrove v. State, 519 So.2d 565, 575 (Ala. Crim. App. 1986).

Collins relies on the case of Turner v. State, 115 So.3d 939 (Ala. Crim. App. 2012), to support his argument that the admission of his codefendant's statements was not harmless error. In Turner, the defendant admitted that he killed the victim; however, his entire defense was that it was an accident and that he had no intent to kill. Turner's codefendant told police that Turner told him before the murder that he intended to kill the victim.

However, in this case, Collins fully confessed to all elements of the charges against him. Other states have found a Bruton violation to constitute harmless error when a defendant confessed to the crime for which the codefendant's statement implicated him. As the New York Supreme Court stated in the following two cases:

> "The Confrontation Clause (U.S. Const. Amend VI) bars the admission at a joint trial of a nontestifying codefendant's confession which serves to incriminate the defendant (see, Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476). At the trial, the codefendant Mark Davis's statement was admitted into evidence. The defendant's statement, which was identical to the codefendant Davis's statement, was also introduced into evidence. We find that the court erred by permitting the codefendant's statement to be introduced into evidence. However, since the defendant's own statement may be considered on appeal in assessing whether the Confrontation Clause violation was harmless (see, Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 [(1987)]; People v. Hamlin, 71 N.Y.2d 750, 530 N.Y.S.2d 74, 525 N.E.2d 719[(1988)]; People v. Garcia, 151 A.D.2d 500, 542 N.Y.S.2d 289 [(1989)]), and since the defendant's statement was identical to that of the codefendant, we find the admission of Davis's statement to be harmless (see, People v. Hamlin, supra). There is no reasonable possibility that the jury would have acquitted the defendant had the codefendant's statement not been admitted in evidence (see, People v. Hamlin, supra)."

***26** People v. Sheppard, 562 N.Y.S.2d 802, 802–03, 168 A.D.2d 585, 585–86 (1990).

> "Although the trial court erred in admitting the incriminatory statement of the defendant's nontestifying codefendant (see, Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162) the error is unpreserved for appellate review, and, in any event, was harmless in light of the overwhelming evidence of guilt. The record reveals in this respect that the defendant's statement was even more detailed than that provided by his codefendant. In light of the foregoing, and considering the strength of the People's case, we conclude that there was no reasonable possibility that the jury would have acquitted the defendant had the co-defendant's statement not been admitted into evidence (see, People v. Hamlin, 71 N.Y.2d 750, 530 N.Y.S.2d 74, 525 N.E.2d 719; Cruz v. New York, supra; People v. Sheppard, 168 A.D.2d 585, 562 N.Y.S.2d 802; People v. Brown, 163 A.D.2d 405, 558 N.Y.S.2d 129 [(1990)])."

People v. Cyrus, 565 N.Y.S.2d 858, 860, 170 A.D.2d 526, 527–28 (1991).

As the Florida Supreme Court stated in Franqui v. State, 699 So.2d 1312 (Fla. 1997):

> "[W]hile that portion of [codefendant's] confession which implicated [the defendant] should not have been introduced into evidence, the fact that it mirrors [the defendant's] confession in so many respects strongly indicates that the error was harmless. Of course, [the defendant's] confession is powerful evidence of his guilt. Further, [the defendant's] confession is corroborated by other evidence in the case, including the manner in which the crime was committed. Further, as noted previously, the evidence relating to the police having recovered the guns at [the codefendant's] direction was properly admitted. The State's forensic expert testified that the bullet that killed Lopez was fired from a revolver. One of the guns the police recovered was a revolver, and [the defendant] confessed that he was the only one of the codefendants armed with that kind of gun. The other two guns recovered by the police and all of the guns carried by the victims were inconsistent with the fatal bullet. Because the revolver was rusty, the expert could not say with certainty that the fatal bullet came from that revolver. However, he did say that the bullet which killed [the victim] came from the same gun as another bullet which was lodged in the passenger mirror of the grey Suburban, and the trajectory of a hole in the passenger window lined up with that bullet, thereby indicating that it was fired from within the vehicle. [The defendant] was the only occupant of the grey Suburban, and he admitted firing a .357 revolver toward Lopez's vehicle."

699 So.2d at 1321–22.

The Superior Court of Pennsylvania in Commonwealth v. McGlone, 716 A.2d 1280 (Pa. Super. 1998), stated:

> "[E]ven if a redacted confession could be deemed a Bruton violation, its admission may be harmless if other evidence, particularly a confession by the defendant himself, overwhelmingly establishes the defendant's guilt. See Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (admission of redacted confession that used term 'other guy,' even if Bruton violation, was harmless error since defendant's own interlocking confession properly admitted). See also [Commonwealth v.] Miles, [545 Pa. 500, 681 A.2d 1295 (1996)] (assuming Bruton violation, overwhelming evidence of guilt, including confession by defendant, made error harmless)."

***27** 716 A.2d at 1284. See also Battle v. State, 804 S.E.2d 46, 52 (Ga. 2017) ("A Bruton violation may not be prejudicial when the complained-of-statements are substantially similar to evidence properly admitted at trial."); State v. McDonald, 412 S.C. 133, 143–44, 771 S.E.2d 840, 845 (2015) ("Given the extensive evidence of guilt, we conclude that the Bruton violation was harmless beyond a reasonable doubt. See Schneble [v. Florida], 405 U.S. [427] at 431, 92 S.Ct. 1056[, 31 L.Ed.2d 340 (1972)] (finding a Bruton violation to be harmless error when the 'details of petitioner's [confession] were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case' "); Goins v. State, 259 Ga.App. 739, 740–41, 578 S.E.2d 308, 311 (2003) ("This error, however, was harmless. 'To be harmless, a Bruton error must be harmless beyond a reasonable doubt. Schneble v. Florida[, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972)]. Where overwhelming evidence of a defendant's guilt exists apart from the statement of the co-defendant, then any violation of Bruton is harmless beyond a reasonable doubt.' ").

In this case, Collins's confession was properly admitted into evidence. It contained more detail than the statements that were attributed to Wrenn, and it was corroborated by other testimony. Based on the record we find that any Bruton violation was harmless beyond a reasonable doubt. Collins is due no relief on this claim.

VII.

Collins next argues that the circuit court erroneously allowed improper expert testimony from a nonexpert. Specifically, he argues that Investigator Davis was erroneously allowed to testify that the Alabama Department of Forensic Sciences had matched shell casings recovered from the shooting to a .40 caliber Glock brand handgun that had been taken from Tommy Nixon and that those casings did not match the .40 caliber handgun Terrod Sturdivant was carrying on the night of the shooting.

The record shows that State's exhibit number 40 was identified as a bag of shell casings that Investigator Davis had recovered from the Center parking lot. (R. 661.) The following occurred:

"[Prosecutor]: Was it sent to forensics to be tested?

"[Investigator Davis]: Yes.

"[Prosecutor]: And was a comparison done to your knowledge between those two firearms and those shell casings that were found out there at the scene?

"[Investigator Davis]: Correct, yes.

"[Prosecutor]: Do you recall if Forensic Sciences indicated a result of that comparison?

"[Investigator Davis]: Yes, they did.

"[Prosecutor]: What did the comparison yield? What were the results?

"[Investigator Davis]: The results were they determined that the shell casings that I collected at the scene belonged to Tommy Nixon's gun which was a .40 caliber Glock.

"[Prosecutor]: It was fired through that gun?

"[Investigator Davis]: Correct.

"[Prosecutor]: Not Terrod Sturdivant's?

"[Investigator Davis]: No.

"[Prosecutor]: Why did you collect Terrod Sturdivant's gun?

"[Investigator Davis]: Because he had it at the scene. I wanted to see did the shell casings compare to the gun that he was shooting at the crime scene.

"[Prosecutor]: Do you have any reason, Investigator Davis, to think that Terrod Sturdivant had a gun out there that night?

"[Investigator Davis]: No.

"[Prosecutor]: But there's certainly no shell casings or anything that belong to his gun?

"[Investigator Davis]: No.

"[Prosecutor]: The only shell casings that you collected at the scene came back to have been fired through the gun that Tommy Charles Nixon turned into you?

"[Investigator Davis]: Correct."

(R. 668–70.) Collins did not object to this testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Rule 45, Ala. R. App. P., provides:

***28** "No judgment may be reversed or set aside ... on the ground of ... 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 examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

See also Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Here, if any error did occur in the admission of Investigator's Davis's testimony, that error was harmless beyond a reasonable doubt. No testimony was admitted that any shell casings collected at the scene had been fired from the gun that Collins confessed he was in possession of at the time of the shooting. Therefore, there was no harm to Collins and he is due no relief on this claim.

VIII.

Collins next argues that the circuit court erred in admitting what he argues were inflammatory and prejudicial autopsy photographs.

The record shows that Collins moved in limine that use of autopsy photographs be restricted because, he said,

the "prejudicial effect of the photographs far outweighs any probative value." (C. 204.) The State introduced several autopsy photographs into evidence during Dr. Steven Dunton's testimony. Dr. Dunton testified that State's exhibit numbers 15 through 20 were photographs of the victim's body and that they reflected the condition of Bell's body at the time the body was received at the morgue. (R. 880–81.) The following occurred:

> "[Dr. Dunkins]: Yes, I did take these photographs and these do reflect the condition of his body when we received him.
>
> "[Prosecutor]: Your Honor, we would offer State's 15 through 20.
>
> "[Defense counsel]: We have no objection. We've looked at them already.
>
> "The Court: State's 15 through 20 will be admitted."

(R. 880–81.) Not only did defense counsel not object to the admission of the autopsy photographs, but counsel stated that he had looked at the photographs and had no objection. Therefore, if any error did occur in the admission of the photographs it was invited by counsel's actions. "Invited error applies to death-penalty cases and operates to waive the error unless 'it rises to the level of plain error.' Ex parte Bankhead, 585 So.2d 112, 126 (Ala. 1991)." Gobble v. State, 104 So.3d 920, 945 (Ala. Crim. App. 2010).

Moreover, autopsy photographs are admissible.

> "[A]utopsy photographs depicting the internal views of wounds are likewise admissible. In Dabbs v. State, 518 So.2d 825, 829 (Ala. Cr. App. 1987), we stated that even though autopsy photographs of a victim's head injuries, as viewed internally, may be gruesome, admission of such photos is sometimes necessary to demonstrate the extent of the victim's injuries. See Dabbs, supra."

Broadnax v. State, 825 So.2d 134, 159 (Ala. Crim. App. 2000).

The circuit court committed no error in admitting the autopsy photographs into evidence, and Collins is due no relief on this claim.

IX.

Collins argues that the State failed to offer any independent proof, absent Collins's confession, that the murder was committed for pecuniary gain. Specifically, Collins argues that his confession was not admissible because the State failed to present independent proof of the corpus delicti of the murder for pecuniary gain.

> "A majority of jurisdictions follow the traditional corpus delicti rule. The rule arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge. 'This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual.' The corpus delicti rule protects defendants from unjust convictions based upon confessions alone which may be of questionable reliability."

***29** State v. Aten, 130 Wash.2d 640, 656–57, 927 P.2d 210, 219 (1996).

In discussing the evidence necessary to satisfy the independent proof of the corpus delicti rule, this Court has stated:

> "It has been the rule in Alabama that the State must offer independent proof of the corpus delicti of the charged offense to authorize the admission of a defendant's confession or inculpatory statement. Robinson v. State, 560 So.2d 1130, 1135–36 (Ala. Cr. App. 1989); see C. Gamble, McElroy's Alabama Evidence, 200.13 (5th ed. 1996). ' "The corpus delicti consists of two elements: '(1) That a certain result has been produced, ... and (2) that some person is criminally responsible for the act.' " Johnson [v. State, 473 So.2d 607, 608 (Ala. Cr. App. 1985),] (quoting C. Gamble, McElroy's Alabama Evidence § 304.01 (3d ed. 1977)).' Spear v. State, 508 So.2d 306, 308 (Ala. Cr. App. 1987). ' "Positive, direct evidence of the corpus delicti is not indispensable to the admissions of confessions." ' Bracewell v. State, 506 So.2d 354, 360 (Ala. Cr. App. 1986), quoting Ryan v. State, 100 Ala. 94, 14 So. 868 (1894). 'The corpus delicti may be established by circumstantial evidence.' Sockwell v. State, 675 So.2d 4, 21 (Ala. Cr. 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)).
>
> " ' "Independent evidence of the corpus delicti need not be of such probative strength as that such evidence, standing alone, in the opinion of the trial or appellate

> court, would, ought to or probably would satisfy a jury beyond a reasonable doubt of the existence of the corpus delicti. Independent evidence of the corpus delicti may consist solely of circumstantial evidence. Whether the independent evidence tending to prove the corpus delicti is sufficient to warrant a reasonable inference of the existence thereof depends, of course, upon the particular facts of each case." '

"Bush v. State, 695 So.2d 70, 117 (Ala. Cr. App. 1995), aff'd, 695 So.2d 138 (Ala. 1997), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997), quoting C. Gamble, McElroy's Alabama Evidence § 304.01 (4th ed. 1991) (footnotes omitted in Bush); see also Howell v. State, 571 So.2d 396 (Ala. Cr. App. 1990). 'The presentation of facts, from which the jury may reasonably infer that the crime charged was committed, requires the submission of the question to the jury.' Watters v. State, 369 So.2d 1262, 1272 (Ala. Cr. App. 1978), rev'd on other grounds, 369 So.2d 1272 (Ala. 1979).

> "Further, it is well settled that
>
> " ' "inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti." '

"Bush, 695 So.2d at 117–18, quoting Bridges v. State, 284 Ala. 412, 417, 225 So.2d 821, 826 (1969); see also Bracewell, 506 So.2d at 360; Spear, 508 So.2d at 308. 'While a confession is inadmissible as prima facie proof of the corpus delicti, it can be used along with other evidence to satisfy the jury of the existence of the corpus delicti.' Bracewell, supra, at 360; see also Howell, 571 So.2d at 397. As Professor Gamble has observed:

> ***30** " 'The purpose of requiring proof of the corpus delicti, as a condition precedent to the admission of a confession, is to insure its trustworthiness. For this reason, there is some judicial language to the effect that corroborative evidence independent of the confession need not be sufficient to establish corpus delicti but must be sufficient independent evidence which would tend to establish the trustworthiness of the confession.'

"McElroy's Alabama Evidence, § 200.13 at 100 (5th ed. 1996). Finally, we have held:

> " ' "Evidence of facts and circumstances, attending the particular offense, and usually attending the commission of similar offenses—or of facts to the discovery of which the confession has led, and which would not probably have existed if the offense had not been committed—would be admissible to corroborate the confession. The weight which would be accorded them, when connected with the confession, the jury must determine, under proper instructions from the court." '

"Bush, supra, at 118, quoting Matthews v. State, 55 Ala. 187, 194 (1876); see also Bracewell, supra."
Maxwell v. State, 828 So.2d 347, 357–58 (Ala. Crim. App. 2000).

> "The corpus delicti evidence required to have a confession admitted is not the same as the corpus delicti evidence required to sustain a conviction. Here, in order [to] make Shinnock's confessions admissible, all the State had to present was independent evidence that provided an inference that the crime charged was committed. Malinski [v. State], 794 N.E.2d [1071] at 1086 [(Ind. 2003)]. Such evidence may be circumstantial. Id. Further, there is no requirement that all of the elements of the crime be proven prior to introduction of the confessions. See Jones v. State, 253 Ind. 235, 249, 252 N.E.2d 572, 580 (1969) ('it is not necessary to make out a prima facie case as to each element of the crime charged nor is it necessary to prove each element of the crime charged beyond a reasonable doubt before a confession is admissible.')"

Shinnock v. State, 76 N.E.3d 841, 844 (Ind. 2017). "[T]he State need not present independent evidence corroborating every element of the charged offense before a defendant's statement may be used to prove the corpus delicti." People v. Lara, 368 Ill.Dec. 155, 171, 983 N.E.2d 959, 975 (2012).

Here, adequate proof of the corpus delicti was established to render Collins's confession admissible. Proof of the corpus delicti may be based on circumstantial evidence, and the circumstantial evidence against Collins was strong. As the State asserts in its brief, the nature of the killing suggested a murder for hire. The State presented evidence indicating that Collins did not know Bell before the night of the shooting, that Collins had no connection to the community where the shooting occurred, that Wrenn had purchased a .454 caliber handgun, that Collins was with Bell within seconds of the shooting, that Collins was wearing the same color shirt as the shooter, and that Collins admitted that he killed Bell with the .454 caliber handgun Wrenn had given him. The

circumstantial evidence supported the corpus delicti of the murder-for-hire charges; therefore, Collins's confession was properly admitted. Collins is due no relief on this claim.

X.

Collins next argues that prosecutorial misconduct denied him a fair trial. He cites several instances in support of this contention.

> " 'In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict.' Smith v. State, 698 So.2d 189, 202–03 (Ala. Cr. App. 1996), aff'd, 698 So.2d 219 (Ala. 1997), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) (citations omitted); Bush v. State, 695 So.2d 70, 131 (Ala. Cr. App. 1995), aff'd, 695 So.2d 138 (Ala. 1997), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997) (citations omitted). 'The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So.2d 360, 364 (Ala. Cr. App. 1990), aff'd, 590 So.2d 369 (Ala. 1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). 'Prosecutorial misconduct is subject to a harmless error analysis.' Bush v. State, 695 So.2d at 131 (citations omitted); Smith v. State, 698 So.2d at 203 (citations omitted)."

***31** Simmons v. State, 797 So.2d 1134, 1161–62 (Ala. Crim. App. 1999) (opinion on return to remand).

Also, the circuit court gave the following instruction to the jury:

> "Ladies and gentlemen of the jury, you are to based your verdict on the evidence in this case. Evidence to be considered by you is the testimony from the witness stand, any exhibits that were offered and received into evidence, presumptions of law not refuted by evidence. You are not to consider as evidence the indictment that I just read to you earlier, the arguments of the lawyers or the rulings of the Court."

(R. 1000.) "[A]n appellate court 'presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary.' " Ex parte Belisle, 11 So.3d 323, 333 (Ala. 2008).

A.

First, Collins argues that it was error for the prosecutor to state the following during voir dire:

> "I've been through this 14 years altogether. Twelve as our [District Attorney] out of all the capital murder cases I've had over the last 12 years I only pursued it four times. This is one of those four. One was here in Sumter County when a teacher got shot right on the schoolhouse steps. Another one was in south Marengo County where a three year old was shot over $400 a month child support, killed her so the daddy wouldn't have to pay child support. Another was a friend he'd known his whole life cut him and slit his throat and set him on fire. Other than that, we've never pursued it.
>
> "I don't mind telling y'all that we're pursuing it in this case because it's a contract killing. I think the evidence is gonna show that just to kill for money, don't know them, don't care, no value of human life whatsoever. So it's not something we do lightly and I want y'all to understand, okay."

(R. 109–110.) Collins did not object to these comments.

> " 'While this failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice.' Ex parte Kennedy, 472 So.2d [1106,] at 1111 [(Ala. 1985)] (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' Johnson v. Wainwright, 778 F.2d 623, 629 n. 6 (11th Cir. 1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987)."

Kuenzel v. State, 577 So.2d 474, 489 (Ala. Crim. App. 1990). Accordingly, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

> "In this case, the prosecutor told the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision. This is a permissible line of commentary. See Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999) (holding

that it was not a violation of Caldwell [v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)] for the prosecutor to note 'a number of things have to happen' before a death sentence is sought); see also Sellers v. Ward, 135 F.3d 1333, 1343 (10th Cir. 1998) (prosecutor's suggestion that he personally approved of death penalty and statements that 'many hurdles had to be jumped before a capital murder trial could ever occur' were insufficient to suggest that anyone other than the jury had the burden to make ultimate sentencing decision). Thus, we reject Mr. Fox's claims based on a Caldwell violation."

***32** Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000).

We believe that "[t]he complained-of-comments, when viewed in context, are merely argument as to why the prosecutor believed the death penalty was appropriate in this case...." and did not urge the jury to ignore its role in the sentencing phase. Phillips v. State, [Ms. CR–12–0197, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015). Collins is due no relief on this claim.

B.

Collins next argues that, in closing argument in the guilt phase, the prosecutor improperly vouched for the credibility of its chief witness, Investigator Davis, when the prosecutor made the following argument:

"If I believe somebody comes in here and intentionally lies to you as a jury to try and effect an outcome of a case, I'm gonna tell you I think that's what they're doing. I think that's my responsibility as an officer of this Court, as the D.A. for Sumter, Greene and Marengo County. That's my job to some extent. I believe it's my responsibility to do that because I believe I should take up for the system. In order for it to be fair for everyone, we've got to protect it. I'm gonna own what I do, but they're not gonna own what they're doing because they're telling you Luther Davis is a liar. He's a crooked cop. He's coming in here and he' telling you something that's not true."

(R. 975.) Defense counsel objected; the circuit court overruled the objection. The prosecutor then continued:

"What did they tell you? He didn't say this. Luther Davis is make (sic) it up. How many times they say that? Think of all the other statements that he's miswriting. Luther Davis is crooked. He's a crooked cop, but then they come up here and go this isn't personal.

"It is personal. It is a personal attack on the law enforcement in your community and the prosecution of the cases. It is personal and make them own that because I'd submit to you based on the testimony that you've heard it's unfounded, it's unwarranted and it's wrong."

(R. 975–76.)

In brief, the State argues that the prosecutor was replying in kind to the arguments that had been made by defense counsel after counsel attacked the credibility of Investigator Davis. Defense counsel has made the following argument:

"Ms Angela Jackson, when she testified the first question asked is what color was Sherman Collins wearing? She said rust, but in her statement it said orange. Who wrote the statement? Investigator Davis. Who wrote all the statement? Investigator Davis....

"In fact, Ms. Jackson said—you know, I take issue with some of the statement and this is the State's own witness. She said I didn't say everything like he has it written. We are basing a capital murder case on a statement of a defendant that was written by an investigator after he's been a month in isolation and all of the State's witnesses, not just one, just about every one found inaccuracies in the statements that Investigator Davis write.

"If you'll remember, I sat—I read Tommy Charles Nixon's statement to him and this is the security guard, the State's witness, and he says no. At least five things that I said he didn't say in his statement. Only one sentence in the entire statement is something that he admitted to.

***33** "Now are all these people getting up here and lying? No. I'm gon[na] tell you that the investigators are trained to interrogate, elicit information, and they know that they could go to Dollar General and buy a tape recorder if they wanted one. But if you tape record somebody's statement, you're getting something that's too accurate. That would be the best evidence to you. Let's turn on the tape recorder and see what the defendant says when he comes in, but they don't want you to hear that."

(R. 945–46.) Indeed, a great portion of defense counsel's closing argument was an attack on the credibility of Investigator Davis.

" 'A prosecutor has a right to reply in kind to the argument of defense counsel. This "reply-in-kind" doctrine is based on fundamental fairness.' Ballard v. State, 767 So.2d 1123, 1135 (Ala. Crim. App. 1999). ' "When the door is opened

by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will suddenly be subject to reply." ' Davis v. State, 494 So.2d 851, 855 (Ala. Crim. App. 1986)."

Thompson v. State, 153 So.3d 84, 174 (Ala. Crim. App. 2012).

"This court has held on many occasions that in order to determine whether a statement of the prosecutor was improper, 'it must be examined in its context and in light of what had transpired, that is, in light of preceding argument of defense counsel, to which the prosecutor's argument was an answer.' Washington v. State, 259 Ala. 104, 65 So.2d 704 (1953); Gibson v. State, 347 So.2d 576 (Ala. Crim. App. 1977); Rutledge v. State, [482 So.2d 1250] (Ala. Crim. App. 1983). The rule in Alabama is that 'remarks or comments of the prosecuting attorney, including those which might otherwise be improper, are not grounds for reversal when they are invited, provoked, or occasioned by accused's counsel and are in reply to or retaliation for his acts and statements.' Shewbart v. State, 33 Ala.App. 195, 32 So.2d 241, cert. denied, 249 Ala. 572, 32 So.2d 244 (1947); Camper v. State, 384 So.2d 637 (Ala. Crim. App. 1980); Wilder v. State, 401 So.2d 151 (Ala. Crim. App.), cert. denied, 401 So.2d 167 (Ala. 1981), cert. denied, 454 U.S. 1057, 102 S.Ct. 606, 70 L.Ed.2d 595 (1981); Miller v. State, 431 So.2d 586 (Ala. Crim. App. 1983); Rutledge, supra."

Henderson v. State, 460 So.2d 331, 333 (Ala. Crim. App. 1984).

We agree with the State that the prosecutor's arguments were a reply-in-kind to the arguments made by Collins's counsel concerning the credibility of Investigator Davis. The argument did not so infect the trial with unfairness that Collins was denied due process. See Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Collins is due no relief on this claim.

This Court has examined the record for any error with respect to Collins's conviction for capital murder, whether or not brought to this Court's attention or to the attention of the trial court, and we find no error, plain or otherwise, in the guilt phase of the proceedings. Therefore, this Court affirms Collins's conviction for capital murder.

Penalty–Phase Issues

XI.

Collins next argues that the prosecutor erred in eliciting improper victim-impact evidence during the penalty phase of his trial. The record shows that the State called LaShaun Wallace as a witness in the penalty phase. Wallace testified that he grew up with Bell and that they were like brothers. When asked how Bell's death affected Wallace and Bell's family, Wallace stated:

"That night—everybody sitting out there, we're all family and friends of his and for us to have to go down there and see him in that—see him dead and died the way that he died was hurtful and it continued to after two and half years affect our family. Every day that we see something on Facebook, people talk to us about it, we see his son, it—I mean, there's never a dry eye in the house. It's never. When his son comes over, he still hollers and screams for his daddy. Where's my daddy and we can't do anything about it. We can't do nothing.

***34** "His mom breaks down so much, but she tries to be so strong because of who she is and how the family looks up to her and how she's the only support they have. This is her second child she has lost to a gun. And for two thousand dollars for you to say that you don't mind taking someone's life, that hurts because he was worth way more than that. He was worth way more than that to all of us.

"He wasn't an evil person. He wasn't a bad person. He was none of that. Every fight he every got into or anything was because of us or me. He wasn't a bad person. I don't see no reason for you just to walk up and not even to have an altercation with him, not even to know him and just pull this trigger and then just go on about your business for two thousand dollars. You came two states over for two thousand dollars? You don't care about a life. To me that makes me feel like this wasn't a job. This was just something you like to do. And being in jail for the rest of your life that you get the opportunity to still continue to do what you like to do.

"I done been in this world for a long time and I done been in the military and I been in a lot of wars and I've met a lot of people that was good and bad. I've been around a lot of killers and for someone like that to just show no remorse, that's something they're going to continue to do any change that they get and I feel like even if they didn't offer him

two thousand dollars, he would have been happy to do it for free. That's just the type of person that he is."

(R. 1034–35.) Collins did not object to Wallace's testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

"In Booth v. Maryland, 482 U.S. 496, 502, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that a defendant's Eighth Amendment rights were violated by the sentencing authority's consideration of any victim-impact evidence. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court partially overruled Booth to allow the sentencing authority to consider evidence of the effect of the victim's death upon family and friends. Payne, 501 U.S. at 830 n. 2, 111 S.Ct. 2597 ('Our holding today is limited to the holdings of [Booth] ... that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.').

"In Ex parte McWilliams, 640 So.2d 1015 (Ala. 1993), this Court noted that Payne had only partially overruled Booth and that it had left intact the proscription against victim-impact statements containing 'characterizations or opinions of the defendant, the crime, or the appropriate punishment.' 640 So.2d at 1017. The Court in McWilliams held that a trial court errs if it 'consider[s] the portions of the victim impact statement wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment.' Id."

Ex parte Washington, 106 So.3d 441, 445 (Ala. 2011).

"As a general matter ... victim impact evidence is not offered to encourage comparative judgments of this kind —for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."

***35** Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

" '[W]e have repeatedly held that victim-impact evidence is admissible at the penalty phase of a capital trial. See Smith v. State, 213 So.3d 255, 299 (Ala. Crim. App. 2007); Gissendanner v. State, 949 So.2d 956 (Ala. Crim. App. 2006); Miller v. State, 913 So.2d 1148 (Ala. Crim. App. 2004); Stallworth v. State, 868 So.2d 1128 (Ala. Crim. App. 2001); Smith v. State, 797 So.2d 503 (Ala. Crim. App. 2000); Williams v. State, 795 So.2d 753 (Ala. Crim. App. 1999).' Lee v. State, 44 So.3d 1145, 1174 (Ala. Crim. App. 2009)."

Revis v. State, 101 So.3d 247, 296 (Ala. Crim. App. 2011).

"Although some states have limited the admission of victim-impact evidence at a penalty phase to instances where that evidence is relevant to an aggravating circumstance, Alabama is not one of those states. See Laux v. State, 985 N.E.2d 739, 749 (Ind. App. 2013) ('Victim impact testimony is not admissible in the sentencing phase of a capital trial if that testimony is irrelevant to the alleged aggravating factor.'); See also Joan T. Buckley, J.D., Victim Impact Evidence in Capital Sentencing Hearings—Post–Payne v. Tennessee, 79 A.L.R.5th 33 (2000)."

Bohannon v. State, 222 So.3d at 517.

While victim-impact evidence is admissible in the penalty phase of a capital-murder trial, Wallace should not have testified about his opinion of Collins. This Court has held that the improper presentation of victim-impact evidence at the penalty phase of a capital-murder trial may constitute harmless error. See Whitehead v. State, 777 So.2d 781 (Ala. Crim. App. 1999) (holding that unlawful admission of victim-impact evidence in the penalty phase to the effect that defendant should be sentenced to death was harmless error).

"We do find that some of the victim impact testimony admitted over [the defendant's] objection was improper. Although, in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court of the United States overruled its previous decision in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), we have noted that 'Payne left undisturbed Booth's holding that the state could not use information or testimony concerning "a victim's family members" characterizations and opinions about the crime, the defendant, and the appropriate sentence.' Sermons v. State, 262 Ga. 286, 287(1), 417 S.E.2d 144 (1992) (quoting Payne, 501 U.S. at 830 n. 2, 111 S.Ct. 2597). We find that this limit to victim impact testimony was violated in several minor instances at Stinski's trial. However, even assuming as we do that these limited improprieties amounted to constitutional violations, they do not require reversal of Stinski's death sentence because they were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24(III), 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) ('before a federal constitutional error can be held harmless,

the court must be able to declare a belief that it was harmless beyond a reasonable doubt').”

***36** Stinski v. State, 286 Ga. 839, 854, 691 S.E.2d 854, 871 (2010).

Here, Wallace's testimony, while a minor violation of the holding in Payne, was harmless beyond a reasonable doubt. See Whitehead, supra. Collins is due no relief on this claim.

XII.

Collins next argues that the prosecutor's arguments in the penalty phase resulted in his denial of a fair trial.

“ ‘In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' Bankhead v. State, 585 So.2d 97, 106 (Ala. Crim. App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991), aff'd on return to remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So.2d 1146 (Ala. 1993). ‘ “Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused.” ' Carroll v. State, 599 So.2d 1253, 1268 (Ala. Crim. App. 1992), aff'd, 627 So.2d 874 (Ala. 1993), quoting United States v. Reed, 887 F.2d 1398, 1402 (11th Cir. 1989). The relevant question is whether the prosecutor's conduct ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).”

Minor v. State, 914 So.2d 372, 415 (Ala. Crim. App. 2004).

“ ‘[S]tatements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead v. State, 585 So.2d 97, 106–07 (Ala. Crim. App. 1989). ‘Although the failure to object will not preclude [plain-error] review, it will weigh against any claim of prejudice.' Sale v. State, 8 So.3d 330, 345 (Ala. Crim. App. 2008).”

Luong v. State, 199 So.3d 173, 213 (Ala. Crim. App. 2015).

A.

Collins argues that the prosecutor erred in making the following statements:

“I want to remind y'all of something I told you Monday, and that is over the past 12 years that I've been privileged to serve all of you as the District Attorney for this circuit, I tried my best to be very careful and selective of when to pursue the death penalty. This is only the fourth time that we've done that is those 12 years.

“I told you Monday the first time was in a killing in Margengo County when a father paid someone to kill his child for $400 a month child support basically is all that was over. The second one was another case in south Marengo County where a guy flagged him down for a ride that he was gonna cut his throat and robbed him and then he set him on fire before he had a chance to die. The third one is one that you're probably familiar with because it happened right here at Livingston High School. There was a long history of domestic violence and the defendant in that case shot my victim repeatedly in the face right there on the steps of the Livingston High School. This is only the fourth time.

***37** “It's the only time that I've ever had a capital murder case where the only aggravator that made it capital was that it was a killing or a murder for pecuniary gain or a contract killing, so I had to look at it and think about it.”

(R. 1018–19.) In closing argument in the penalty phase, an assistant district attorney also argued:

“Now [the District Attorney] told you that in the 12 to 14 years that he's been doing this he's only sought the death penalty in I think he said four cases. I've been here a lot longer. I've only argued for the death penalty in about five more cases in the entire 30 years. It's not something that we do lightly. It's not something that we come to a jury for and ask for the death penalty lightly. This is very, very serious. There's no question about that. But this crime committed by Sherman Collins was very, very serious.”

(R. 1076–77.) At the conclusion of the penalty phase, the prosecutor also stated: “[W]hat you've got to decide for Sumter County and for this community is what is the appropriate sentence for somebody who comes into this county and murders somebody for hire, for money, takes a life for money here in this county. What is the appropriate sentence.” (R. 1076.)

Collins did not object to the prosecutor's comments. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

> "In our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate. See Hall v. State, 820 So.2d 113, 143 (Ala. Crim. App. 1999). On the other hand, it is impermissible for a prosecutor to urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. See Guthrie [v. State, 616 So.2d [914] at 931–32 [(Ala. Crim. App. 1993)] (holding that a prosecutor's statement that ' "[w]hen 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" ' improperly '[led] the jury to believe that the whole governmental establishment had already determined that the sentence should be death and [invited] the jury to adopt the conclusion of others, ostensibly more qualified to make the determination, rather than deciding on its own').
>
> "When the prosecutor's comments are viewed in context, it is clear that he was properly arguing in favor of a sentence of death and properly reminding the jury of the gravity of its penalty-phase role. For instance, in stating that, 'if this case does not call for the death penalty, what does,' the prosecutor was properly arguing that a death sentence is appropriate and appealing to the jury to do justice. See Hall, 820 So.2d at 143. Also, the prosecutor's comment that his office does not seek a death sentence lightly was not an improper request for the jury to ignore its penalty-phase duty. Instead, this comment merely reminded the jury of the gravity of its penalty-phase decision by informing the jury that in making its penalty phase decision it has an awesome responsibility—one that the State does not lightly ask a jury to shoulder. Cf. Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000) (holding that a 'prosecutor['s] [comment to] the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision[, was] a permissible line of commentary')."

***38** Vanpelt v. State, 74 So.3d 32, 91–92 (Ala. Crim. App. 2009).

> "In this case, the prosecutor told the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision. This is a permissible line of commentary. See Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999) (holding that it was not a violation of Caldwell [v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)] for the prosecutor to note 'a number of things have to happen' before a death sentence is sought); see also Sellers v. Ward, 135 F.3d 1333, 1343 (10th Cir. 1998) (prosecutor's suggestion that he personally approved of death penalty and statements that 'many hurdles had to be jumped before a capital murder trial could ever occur' were insufficient to suggest that anyone other than the jury had the burden to make ultimate sentencing decision). Thus, we reject Mr. Fox's claims based on a Caldwell violation."

Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000).

When reviewing the above comments in light of the entire arguments, we conclude that the prosecutor did not diminish the jury's responsibility in the sentencing process. In fact, the prosecutor stated that it was the jury's decision as to what sentence should be imposed. Accordingly, we find no plain error in the above prosecutor's arguments. Collins is due no relief on this claim.

XIII.

Collins next argues that his sentence of death is unconstitutional because, he says, it violates the United States Supreme Court's holdings 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, Collins argues that Alabama has the same sentencing scheme as Florida and that Hurst mandates that his death sentence be reversed because, he says, a jury and not a judge should determine each element that support a sentence of death. Collins argues that, based on the logic in Hurst, the only sentence available to Collins is a sentence of life imprisonment without the possibility of parole.

In Ex parte Bohannon, the Alabama Supreme Court determined that the decision in Hurst did not invalidate Alabama's capital-sentencing procedure. Specifically, our Supreme Court held:

> "The United States Supreme Court in its recent decision in Hurst [v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)] applied its holding in Ring [v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], 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. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury ....

***39** "Our reading of Apprendi [v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)], 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.

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

Ex parte Bohannon, 222 So.3d 525, 531–33 (Ala. 2016). See also State v. Billups, [Ms. CR–15–0619, June 17, 2016] —— So.3d ——, —— (Ala. Crim. App. 2016) (holding that the decision of the Supreme Court of the United States in Hurst did not invalidate Alabama's capital-sentencing scheme).[13]

Here, the lone aggravating circumstance was that the murder was committed for pecuniary gain. This aggravating circumstance was supported by the jury's verdict in the guilt phase finding Collins guilty of murder for hire.

According to the Supreme Court's holding in Ex parte Bohannon, Collins's sentence of death does not violate the United States Supreme Court's holding in Hurst v. Florida; therefore, Collins is due no relief on this claim.

XIV.

***40** Collins last argues that this case is due to be remanded for the circuit court to correct its sentencing order to make specific findings of facts as required by § 13A–5–47(d), Ala. Code 1975. The State agrees and requests that this case be remanded to the circuit court for that court to fully comply with its statutory obligation under § 13A–5–47(d), Ala. Code 1975. We agree. The court's sentencing order merely states that Collins was sentenced to death. (C. 414.)

At the time that Collins was sentenced § 13A–5–47(d), Ala. Code 1975,[14] provided:

> "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each

aggravating circumstance enumerated in Section 13A–5–49, each mitigating circumstance enumerated in Section 13A–5–51, and any additional mitigating circumstances offered pursuant to Section 13A–5–52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it."

This statute contains the word shall and is mandatory. "[W]ritten findings of fact are a component necessary to channel the trial court's discretion in determining a sentence, and they are critical to the mandatory appellate review of the death sentence." Largin v. State, [Ms. CR–09–0439, December 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

In this case, the circuit court not only did not make specific findings of facts concerning the application of the aggravating and the mitigating circumstances, but it also failed to enter written findings of fact summarizing the offense and Collins's involvement in the murder.

Accordingly, for the reasons stated above Collins's convictions are hereby affirmed and this case is remanded to the Sumter Circuit Court for that court to fully comply with the provisions of § 13A–5–47(d), Ala. Code 1975. Due return should be filed in this Court within 72 days from the date of this opinion.

AFFIRMED AS TO CONVICTION; REMANDED FOR CORRECTION OF SENTENCING ORDER.

Kellum, J., concurs. Windom, P.J., and Burke, J., concur in the result. Joiner, J., dissents, with opinion.

JOINER, Judge, dissenting.

I dissent from this Court's decision to affirm Sherman Collins's convictions and death sentence. I do not agree with this Court's determination that the admission of Kelvin Wrenn's statements to law-enforcement officers implicating Collins in Detrick Bell's murder was harmless beyond a reasonable doubt.

In the case before us, the State's evidence against Collins included Collins's written confession, witness statements identifying a black male in an orange shirt at the scene of Bell's murder as a person of interest, and Wrenn's statement to law-enforcement officers implicating Collins in Bell's murder. There are, however, a couple of significant problems with some of this evidence.

First, Wrenn's statement is, as the State concedes and this Court holds, inadmissible under the United States Supreme Court's decision in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Second, although there were witness statements identifying a black male in an orange shirt at the scene of shooting, not a single witness positively identified Collins as Bell's shooter even though some of those witnesses were mere feet from where Bell was shot. (R. 445, 450–56, 459, 461–62, 483, 486–89, 526, 529, 560–63, 605.) As a result, Collins's written confession provided the only admissible evidence indicating that (1) Collins was the shooter and (2) that the murder was committed for pecuniary gain.[15]

***41** At the hearing on the motion to suppress Collins's statement, it was clear that Investigator Luther Davis prepared the statement, purportedly on Collins's behalf. Importantly, Collins testified at that hearing that he signed the statement only because he had been kept isolated in a jail cell for more than a month and he was promised a deal pursuant to which he would receive, at most, a 10–year prison sentence in exchange for admitting to killing Bell. (R. 261–63.)

Collins's statement was admissible under these circumstances; whether Collins was, as he claimed at the suppression hearing, induced to make the statement solely by the promise of a deal goes to the weight the jury should give to that statement. As an appellate judge looking at the cold record, I simply cannot (and should not) determine whether Collins's statement to the police was true or whether his later testimony at the suppression hearing was true. In my view, however, the admission of Wrenn's statement is a likely reason why Collins chose not to testify at trial, and Collins's failure to testify at trial prevented the jury from having all the evidence it should have had in determining Collins's guilt.

Before trial, Collins should have expected vigorous cross-examination about his claim that his statement to the police was made only in exchange for a deal. What Collins arguably should not have anticipated, however, is the State's use of Wrenn's clearly inadmissible statement to bolster the version of events in Collins's statement to the police. With no opportunity to confront Wrenn at trial, Collins's decision calculus changed. Instead of being cross-examined only about his own inconsistent statements, Collins would have to attempt to discredit Wrenn's statements. It also bears repeating

that he would have to do so with no opportunity to cross-examine Wrenn himself.

This Court has previously held that a prejudicial error may be harmless if "evidence of guilt is 'virtually ironclad.' " Carroll v. State, 215 So.3d 1135, 1164 (Ala. Crim. App. 2015), judgment vacated on other grounds, —— U.S. ——, 137 S.Ct. 2093, 197 L.Ed.2d 893 (2017). Where evidence of a defendant's guilt is not "virtually ironclad" or even "overwhelming," however, a prejudicial error cannot be deemed harmless beyond a reasonable doubt. See, e.g., Rigsby v. State, 136 So.3d 1097, 1101 (Ala. Crim. App. 2013) (holding that prejudicial error that resulted from prosecutor's violation of defendant's right against self-incrimination was not harmless because the evidence of the defendant's guilt was not overwhelming).

As established above, the legally admissible evidence in this case was not "virtually ironclad." The State's evidence, excluding Collins's written confession, does not overwhelmingly establish Collins's guilt. The only other evidence against Collins, apart from his confession, was Wrenn's statement to law-enforcement officers along with some witnesses' statements identifying a black male in an orange shirt at the scene of Bell's murder as a person of interest. No witnesses ever positively identified Collins as Bell's shooter. (R. 445, 450–56, 459, 461–62, 483, 486–89, 526, 529, 560–63, 605.) None of the State's evidence, apart from Collins's confession, suggested that Bell was murdered by Collins in exchange for $2,000 from Kelvin Wrenn. (C. 17, 380; R. 1010.)

Based on the foregoing, I believe that the evidence in this case was not so "ironclad" as to render harmless the prejudicial error of admitting Wrenn's egregiously inadmissible statement. Therefore, I disagree with the Court's conclusion that this error was harmless beyond a reasonable doubt; I respectfully dissent.

On Return to Remand

***42** The appellant, Sherman Collins, was convicted of murdering Detrick Bell for pecuniary gain, an offense defined as capital by § 13A-5-40(a)(7), Ala. Code 1975, and conspiracy to commit murder, see § 13A-4-3, Ala. Code 1975. The jury recommended, by a vote of 10 to 2, that Collins be sentenced to death. The circuit court sentenced Collins to death for the capital-murder conviction and to 120 months' imprisonment for the conspiracy conviction. (C. 407.) Collins appealed. By opinion issued October 13, 2017, this Court affirmed Collins's convictions and remanded the case to the circuit court for that court to correct its sentencing order to comply with the provisions of former § 13A-5-47(d), Ala. Code 1975, i.e., to enter a sentencing order in which the court makes specific findings of fact concerning the aggravating and mitigating circumstances and summarizing the offense and Collins's involvement in it.[1] See Collins v. State, [Ms. CR-14-0753, October 13, 2017] —— So. 3d —— (Ala. Crim. App. 2017). The circuit court has filed its amended sentencing order with this Court. The parties have also filed briefs on return to remand. We consider the issues raised in Collins's brief on return to remand.

Sentencing Order

In its order on return to remand sentencing Collins to death, the circuit court found one aggravating circumstance -- that the murder was committed for "pecuniary or other valuable consideration or pursuant to a contract or for hire." See § 13A-5-49(6), Ala. Code 1975. The circuit court made the following findings of fact:

> "The evidence revealed that the defendant, Sherman Collins, was from New Orleans, Louisiana, and he came to Sumter County, Alabama with his girlfriend, Angela Jackson, her mother and her children to visit her sister, Keon Jackson, for Father's day. Keon Jackson was the girlfriend of Kelvin Wrenn and she lived with him in the Morning Star Community. Angela Jackson testified that she visited her sister, Keon Jackson, approximately four (4) times in Sumter County, Alabama. The evidence revealed defendant, Sherman Collins, had accompanied Angela Jackson when she came to visit Keon Jackson at Kelvin Wrenn's home at least on one (1) occasion. The evidence further revealed that defendant, Sherman Collins, visited Keon Jackson and Kelvin Wrenn in Sumter County, Alabama. In addition, the evidence further revealed Keon Jackson and Kelvin Wrenn would visit Angela Jackson and defendant, Sherman Collins, in New Orleans, Louisiana.
>
> "On the night of the offense, defendant Collins rode to [a] rap concert with Wrenn in Wrenn's car. The testimony revealed Wrenn gave defendant Collins two (2) hand guns, a large Magnum and a small .22 pistol. The big Magnum was used to kill Detrick Bell.

> "As stated in the factual background, Detrick Bell and Terrod Sturdivant went to the Morning Star Community Center to the same rap concert attended by defendant Sherman Collins and Kelvin Wrenn. While defendant Collins, Wrenn, Sturdivant and Bell were in the concert Sturdivant received a phone call and walked outside of the building. Detrick Bell followed Sturdivant outside, along with several other individuals including defendant Sherman Collins and Grant Kimbrough. Kimbrough introduced defendant Collins to Bell and the two shook hands. As Sturdivant walked away four or five steps to answer his phone, without any provocation, defendant Collins shot a big part of Detrick Bell's head off and calmly walked away from the Morning Star Community Center. Under these circumstances, a fact-finder can reasonably conclude this was an intentional killing for pecuniary or other valuable consider or for hire. The evidence supports this conclusion. In addition, the statement of defendant, Sherman Collins, stated: 'Kelvin and I was getting ready to go to a rap concert and he was telling me about a man named Speedy (Detrick Bell) that robbed his brother. Kelvin told me that he would give me two thousand dollars to kill Speedy (Detrick Bell). Therefore, there is no doubt that this was a killing for pecuniary or other valuable consideration or hire.' "
>
> ***43** (Return to Remand, C.R. 2-4.)

The circuit court found that no statutory mitigating circumstances contained in § 13A-5-51(1), Ala. Code 1975, applied in Collins's case. The court then stated:

> "The Court will now address the evidence presented by [Collins] as mitigation evidence that is nonstatutory evidence. The defendant, Sherman Collins, was born to a single parent on June 26, 1976. The evidence indicated there was never a father in the house; however, his brother, Elvin Collins, practically raised [Collins].
>
> "The evidence revealed defendant Collins was a smart child, who was funny and wanted to learn. Defendant Collins did well in school because his brother, Elvin, encouraged him and rewarded him for doing well. The evidence further indicated Elvin taught defendant Collins how to write his name at age two, ride a bike and throw a football. Defendant Collins played high school football and basketball. After graduation, Elvin Collins moved to California for approximately a year and a half. Elvin Collins indicated when he returned, he never got back in touch with Defendant, Sherman Collins. The testimony presented showed that defendant Collins, after graduation, started with 'bad friends and made bad decisions.'
>
> "The defense counsel provided mitigation evidence that defendant Collins grew up in a really poor environment called the Melpomene Housing Project. Yet, [Collins] was able to make it through high school as an honor student and a two-sport athlete. [Collins] received assistance from his friend and cousin, Fred Stemley, who testified, that defendant Collins should receive a life sentence without parole because 'everybody changes.'
>
> "Finally, it appears the gist of the nonstatutory mitigation circumstances of defendant, Sherman Collins, was poor environment and lack of a father figure in the home. However, based upon the evidence presented, in my humble opinion, these facts do not convert into mitigating circumstances that outweigh the aggravating circumstance of this case. The facts reflect a certain pathos, but they do little to mitigate."

(Return to remand, C.R. 5-7.)

I.

Collins first argues that the circuit court failed to give meaningful consideration to undisputed mitigating evidence; therefore, Collins argues, the court violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Specifically, Collins argues that the circuit court failed to give adequate consideration to Collins's upbringing, his family background, his academic record, his athletic achievements, and his lack of a father figure.

The United State Supreme Court in Lockett 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."

438 U.S. at 604, 98 S.Ct. 2954. The Lockett court did not hold that a court is required to find all evidence presented in mitigation is, in fact, mitigation. "The circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance." Calhoun v. State, 932 So.2d 923, 975 (Ala. Crim. App. 2005). See also Ex parte Ferguson, 814 So.2d 970, 976 (Ala. 2001).

***44** "A sentencer in a capital case may not refuse to consider or be 'precluded from considering' mitigating factors. Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978)). The defendant in a capital case generally must be allowed to introduce any relevant mitigating evidence regarding the defendant's character or record and any of the circumstances of the offense, and consideration of that evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987); Ex parte Henderson, 616 So.2d 348 (Ala. 1992); Haney v. State, 603 So.2d 368 (Ala. Cr. App. 1991), aff'd, 603 So.2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993). Although the trial court is required to consider all mitigating circumstances, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. Carroll v. State, 599 So.2d 1253 (Ala. Cr. App. 1992), aff'd, 627 So.2d 874 (Ala.1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994). See also Ex parte Harrell, 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985)."

Williams v. State, 710 So.2d 1276, 1347 (Ala. Crim. App. 1996).

"It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer ... although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer ...."

Haney v. State, 603 So.2d 368, 389 (Ala. Crim. App. 1991). See also Scott v. State, 163 So.3d 389 (Ala. Crim. App. 2012). Therefore, Collins is due no relief on this claim.

II.

Collins next argues that the circuit court erred in not properly weighing the jury's recommendation of 10 to 2 for the death penalty. He cites Ex parte Carroll, 852 So.2d 833 (Ala. 2002), in support of his argument.[2] Collins also argues that the circuit court improperly stated in its order that the jury's recommendation was unanimous, when in fact the jury returned with a recommendation of death by a vote of 10 to 2. In the circuit court's order, the court stated: "The jury heard evidence of aggravating and mitigating circumstances, and the jury returned a unanimous verdict, recommending the defendant be sentenced to death." (Return to remand, p. 3.) Collins also asserts that the court further compounded its error by stating the following:

"When the court weighs the aggravating circumstance against the mitigating circumstance in the manner required by the law, there is absolutely no question and can be no question in the mind of any reasonable human being that the aggravating circumstance far outweighs the mitigating circumstances."

(Return to remand, p. 9-10.) Collins asserts that two jurors did recommend that he be sentenced to life imprisonment without parole; therefore, he contends that the court's comment about "any reasonable human being" was not appropriate and was factually erroneous.

***45** The State argues that the Carroll line of cases do not apply in this case because the circuit court did not override the jury's recommendation.[3] In the alternative, the State asserts that this Court should again remand this case to the circuit court for that court to correct the factual errors -- that the jury returned a unanimous verdict and that there could be no question in the mind of any reasonable human being that the aggravating circumstance far outweighs the mitigating circumstances -- contained in its amended sentencing order.

This Court has held that minor misstatements of fact in a sentencing order may constitute harmless error. In Luong v. State, 199 So.3d 173 (Ala. Crim. App. 2015), we stated:

"The purpose of a written sentencing order in a death case is to aid the appellate court in reviewing the propriety of the lower court's sentence of death. Ex parte Kyzer, 399 So.2d 330, 338 (Ala. 1981). This Court has recognized that some errors in a sentencing order require remand and that other errors are 'technical errors' that result in no injury to the appellant and are harmless. See Spencer v. State, 58 So.3d 215 (Ala. Crim. App. 2008) (remanding case for the court to set out its reasons for overriding the jury's recommendation of life imprisonment without parole); Apicella v. State, 809 So.2d 841 (Ala. Crim. App. 2000) (remanding case for court to make specific findings of facts as to each aggravating circumstance and each mitigating circumstance set out in § 13A–5–49, Ala. Code 1975, and § 13A–5–51, Ala. Code 1975); Ex parte Tomlin, 443 So.2d 47 (Ala. Crim. App. 1979) (remanding case after trial court

> improperly considered an aggravating circumstance that was not a statutory aggravating circumstance). See also Gavin v. State, 891 So.2d 907 (Ala. Crim. App. 2003) (holding that trial court's failure to enter specific findings as to all aggravating circumstances when it specifically found and made findings concerning the existence of three aggravating circumstances was not plain error); Sockwell v. State, 675 So.2d 4, 30 (Ala. Crim. App. 1993) ('While some of the factual matters in the trial court's sentencing order were not based upon evidence contained in the record, we hold that error in the trial court's sentencing order is not so egregious as to require a new sentencing order.')."

199 So.3d at 219. See Johnson v. State, 820 So.2d 842 (Ala. Crim. App. 2000) ("[W]e view the misstatement as to the amount stolen in the robbery to be an immaterial matter that had no effect on the trial court's decision and the imposition of the death penalty.").

While we have held that a minor factual error in a sentencing order is harmless, we agree with the State that the factual errors in this case should be corrected. Accordingly, this case is again remanded to the Sumter Circuit Court for that Court to correct the factual errors in its sentencing order. In light of the factual errors and their significance, the circuit court is further directed to reweigh the aggravating circumstances and the mitigating circumstances after considering the correct recommendation made by the jury, i.e., 10 votes for death and 2 votes for life imprisonment without the possibility of parole, rather than, as reflected in its current sentencing order, an unanimous vote in favor of the death penalty. Due return should be filed in this Court within 42 days from the date of this opinion.

***46** REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum and Burke, JJ., concur. Joiner, J., dissents, without opinion.

On Return to Second Remand

PER CURIAM.

Sherman Collins was convicted of capital murder for killing Detrick Bell for pecuniary gain, see § 13A-5-40(a)(7), Ala. Code 1975, and of conspiracy to commit murder, see § 13A-4-3, Ala. Code 1975. The jury recommended, by a vote of 10 to 2, that Collins be sentenced to death for his capital-murder conviction. The trial court followed the jury's recommendation. The trial court also sentenced Collins to 10 years in prison for his conspiracy conviction. Collins appealed.

In our opinion on original submission, this Court affirmed Collins's convictions. Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] —— So. 3d —— (Ala. Crim. App. 2017). As to Collins's death sentence, however, this Court remanded Collins's case to the trial court for that court to correct its sentencing order and instructed that court to comply with § 13A-5-47(d), Ala. Code 1975,[1] by making specific findings of fact concerning the existence or nonexistence of each aggravating and mitigating circumstance and by summarizing the offense and Collins's involvement in it. Id. at ——.

On February 7, 2018, the trial court made return to this Court, providing this Court with a corrected sentencing order. In that corrected sentencing order, the trial court summarized the offense and Collins's involvement in it, and found one aggravating circumstance to exist--that the murder was committed for "pecuniary or other valuable consideration or hire." (Corrected Record on Return to Remand, C. 4-6.) Although the trial court found no statutory mitigating circumstances to exist in Collins's case, it did find nonstatutory mitigating circumstances to exist. (Corrected Record on Return to Remand, C. 6-9.) Specifically, the trial court found Collins's "poor environment and lack of a father figure in the home" to be mitigating circumstances, but concluded that those facts "do little to mitigate." (Corrected Record on Return to Remand, C. 9.) After reweighing the aggravating and mitigating circumstances, the trial court again sentenced Collins to death. (Corrected Record on Return to Remand, C. 9-10.)

After return was made to this Court, and in accordance with Rule 28A, Ala. R. App. P., this Court gave the parties an opportunity to file supplemental briefs on return to remand. Both Collins and the State did so.

In his brief on return to remand, Collins argued that the trial court's corrected sentencing order was erroneous for two reasons. First, Collins claimed that the trial court "failed to give meaningful consideration to undisputed mitigating evidence." Collins v. State, [Ms. CR-14-0753, July 13, 2018] —— So. 3d ——, —— (Ala. Crim. App. 2017) (opinion on return to remand). Second, Collins claimed that the trial court did not properly weigh the jury's 10 to 2 recommendation for

the death penalty and "improperly stated in its order that the jury's recommendation was unanimous." —— So. 3d at ——.

***47** The State, on the other hand, argued that Collins's claims were meritless but recognized that the trial court's corrected sentencing order did include a factual error. Thus, the State suggested that "this Court ... order a second limited remand to allow the trial court to correct" that error. (State's brief on return to remand, pp. 1, 10.)

On July 13, 2018, this Court issued an opinion rejecting Collins's claim that the trial court failed to give meaningful consideration to undisputed mitigation evidence. —— So. 3d at ——. "In light of the factual errors and their significance," however, we remanded Collins's case to the trial court for that court to correct the "factual errors in its sentencing order." Collins, —— So. 3d at —— (opinion on return to remand). We further instructed the trial court to again "reweigh the aggravating circumstances and the mitigating circumstances after considering the correct recommendation made by the jury, i.e., 10 votes for death and 2 votes for life imprisonment without the possibility of parole." Id.

On October 3, 2018, the trial court made return to this Court, providing this Court with its corrected sentencing order. (Record on Return to Second Remand, C. 3-10.) In its corrected sentencing order, the trial court noted that the "jury heard evidence of aggravating and mitigating circumstances, and the jury returned a verdict recommending the defendant be sentenced to death on a vote of ten (10) for death and two (2) for life imprisonment without the possibility for parole." (Record on Return to Second Remand, C. 3.) The trial court concluded its corrected sentencing order as follows:

> "After giving full measure and weight to the aggravating and mitigating circumstances, and taking into account the recommendation of the jury contained in its advisory verdict, it is the judgment of this court that the single aggravating circumstance outweighs the mitigating circumstances shown by the evidence in this case. The aggravating circumstance speaks for itself and carries great weight in the court's mind. In addition, the jury voted ten (10) to two (2) for death. Further, it is reasonably clear that the murder of Detrick Bell by defendant, Sherman Collins, was deliberately and intentionally planned and carried out. When Sherman Collins was introduced to Detrick Bell and within seconds, shot him in the head and literally blowing his brains out, Collins unequivocally displayed a savage intention to kill another human being for Two Thousand Dollars ($2,000). There is very little mistake about the evil intent of this defendant.
>
> "When the court weighs the single aggravating circumstance against the mitigating circumstances in the manner required by law, there is no question and can be few questions in the minds of most human beings that the aggravating circumstance far outweighs the mitigating circumstances. Accordingly, it is ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Sherman Collins, be punished by death."

(Capitalization in Original.) (Record on Return to Second Remand, C. 9-10.)

On return to second remand, this Court again gave both Collins and the State the opportunity to file supplemental briefs, see Rule 28A, Ala. R. App. P. On November 7, 2018, Collins informed this Court that he did "not intend to file a brief on return to second remand." The State, likewise, did not file a brief on return to second remand.

***48** Having reviewed the trial court's corrected sentencing order on return to second remand, we conclude that the corrected sentencing order now complies with this Court's instructions and satisfies the statutory requirements of § 13A-5-47(d), Ala. Code 1975. Thus, we now turn to our remaining duties as an appellate court to examine the record for plain error under Rule 45A, Ala. R. App. P., and to review the propriety of Collins's death sentence under § 13A-5-53, Ala. Code 1975.

We start with our duty to review Collins's death sentence under § 13A-5-53, Ala. Code 1975.

As set out above, Collins was convicted of capital murder for killing Detrick Bell for pecuniary gain, see § 13A-5-40(a)(7), Ala. Code 197, and the jury recommended by a vote of 10 to 2 that the trial court sentence Collins to death. After receiving a presentence investigation report (1st Supp. C. 17-21) and conducting a judicial-sentencing hearing (R. 1104-14), the trial court followed the jury's recommendation and sentenced Collins to death. Although this Court twice remanded this case to the trial court to correct its sentencing order, the trial court ultimately complied with our instructions and the statutory requirements of § 13A-5-47(d), Ala. Code 1975, reweighed the aggravating circumstance and mitigating circumstances, and sentenced Collins to death.

After examining the record on appeal, this Court finds nothing to show that Collins's death sentence was imposed as a result

of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

Additionally, § 13A–5–53(b)(2), Ala. Code 1975, requires this Court to independently reweigh the aggravating and mitigating circumstances to determine whether Collins's sentence of death was the proper sentence.

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

Stanley v. State, 143 So. 3d 230, 333 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court).

Here, the trial court, in its corrected sentencing order, found the existence of only one aggravating circumstance (that the offense was committed for pecuniary gain), no statutory mitigating circumstances, and the following nonstatutory mitigating circumstances:

> ***49** "The defendant, Sherman Collins, was born to a single parent on June 26, 1976. The evidence indicated there was never a father in the house; however, his brother, Elvin Collins, practically raised the defendant.
>
> "The evidence revealed defendant Collins was a smart child, who was funny and wanted to learn. Defendant Collins did well in school because his brother, Elvin, encouraged him and rewarded him for doing well. The evidence further indicated Elvin taught defendant Collins how to write his name at age two, ride a bike and throw a football. Defendant Collins played high school football and basketball. After graduation, Elvin Collins moved to California for approximately a year and a half. Elvin Collins indicated when he returned, he never got back in touch with Defendant, Sherman Collins. The testimony presented showed that defendant Collins, after graduation, started with 'bad friends and made bad decisions.'
>
> "The defense counsel provided mitigation evidence that defendant Collins grew up in a really poor environment, called the Melpomene Housing Project. Yet, the defendant, was able to make it through high school as an honor student and a two sport athlete. The defendant received assistance from his friend and cousin, Fred Stemley, who testified, that defendant Collins should receive a life sentence without parole because 'everybody changes.' "

(Record on Return to Second Remand, C. 14-15.) As explained above, however, the trial court gave very little weight to the nonstatutory mitigating circumstances it found to exist. We agree with the trial court's findings and, after independently weighing the aggravating circumstances and the mitigating circumstances, this Court holds that Collins's sentence of death is appropriate.

Additionally, as required by § 13A—5—53(b)(3), Ala. Code 1975, this Court must determine whether Collins's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. Again, Collins was convicted of capital murder for killing Detrick Bell for pecuniary gain, see § 13A-5-40(a)(7), Ala. Code 1975. "This Court notes that a sentence of death has been imposed in similar cases. See Smith v. State, 908 So. 2d 273 (Ala. Crim. App. 2000) (murder for pecuniary gain); Sockwell v. State, 675 So. 2d 4 (Ala. Crim. App. 1993) (murder for pecuniary gain); Parker v. State, 587 So. 2d 1072 (Ala. Crim. App. 1991) (murder for pecuniary gain)." Vanpelt v. State, 74 So. 3d 32, 98 (Ala. Crim. App. 2009). It is further noted that Smith, Sockwell, Parker, and Vanpelt all, as in Collin's case, involved only one aggravating circumstance--that the offense was committed for pecuniary gain. Thus, Collins's death sentence is neither excessive nor disproportionate.

Finally, turning to our duty to examine the record under Rule 45A, Ala. R. App. P., we have searched the entire record for any error that may have adversely affected Collins's substantial rights and have found none.

Accordingly, Collins's death sentence is affirmed.[2] Additionally, Collins's conspiracy-to-commit-murder sentence is affirmed.

***50** AFFIRMED.

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

All Citations

--- So.3d ----, 2017 WL 4564447

Footnotes

1 Bell's name is spelled both “Deitrick” and “Detrick” in the record. We have spelled Bell's name as it appears in the indictment—“Detrick.” (C. 17.)

2 Jackson was charged with hindering prosecution because she lied to police about Collins's identity. (R. 325.) She testified that, in exchange for her truthful testimony at Collins's trial the State agreed to dismiss the hindering prosecution charge. (R. 326.)

3 Kelvin Wrenn was indicted for capital-murder and conspiracy to commit murder and was convicted of murder and conspiracy to commit murder. Wrenn was sentenced to 40 years' imprisonment on the murder conviction and to 20 years' imprisonment on the conspiracy conviction. On July 1, 2016, this Court affirmed his conviction on direct appeal, without an opinion. See Wrenn v. State (No. CR–14–1535, July 1, 2016) —— So.3d —— (Ala. Crim. App. 2016)(table).

4 The record shows that Kimbrough was charged “in connection with the murder.” (R. 535.)

5 We note that effective May 19, 2000, the Alabama Supreme Court is no longer required to conduct a plain-error review. See Rule 39(a)(2)(D), Ala. R. App. P.

6 Collins's convictions for capital murder and conspiracy to commit murder do not violate the Double Jeopardy Clause. As this Court stated in Williams v. State, 830 So.2d 45 (Ala. Crim. App. 2001), when considering whether Williams's convictions for robbery/murder and conspiracy to commit first-degree robbery constituted a double-jeopardy violation:

> “Under § 13A–4–3, ‘[a] person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement.’ On the other hand, an objective of murder made capital pursuant to § 13A–5–40(a)(2), requires no agreement to effect that offense. See §§ 13A–6–2(A)(1); 13A–8–41; and 13A–8–43, Ala. Code 1975. Likewise, the offense of murder made capital pursuant to § 13A–5–40(a)(2) requires proof of an intentional killing; § 13A–4–3 requires no such proof. Clearly, the two offenses for which the appellant was convicted and sentenced are not the same under the Blockburger [v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932),] test. Therefore, we find no merit in the appellant's argument that his rights under the Double Jeopardy Clause were violated.”

Williams, 830 So.2d at 48.

7 A Times Picayune article dated May 8, 1994, was admitted into evidence in the penalty phase. This article contained the names of all graduates who had graduated from Booker T. Washington High School with honors. Collins name was on that list.

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

9 In Van Hook, the third party did not testify and the testimony was similar to what was presented in this case.

10 Rule 615, Fed. R. Evid., provides that “the court must order witnesses excluded.” (Emphasis added.) “Under Rule 615 [Fed. R. Evid.) sequestration must be given unless the party opposing the exclusion has convinced the court to exercise its discretion to except a particular witness from the sequestration order on the basis of his or her necessity to the presentation of a party's cause.” Government of Virgin Islands v. Edinborough, 625 F.2d 472, 474 (3d Cir. 1980).

11 To protect the anonymity of the jurors we are using their initials.

12 Although the record shows that T.T. was struck by use of a peremptory strike, we do not know which party struck T.T. because the strikes were not recorded. (2 Suppl. R. 3.)

13 As part of this issue, Collins argues that his death sentence violates Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), because, he says, the jury was led to believe that the ultimate determination on the sentence Collins should receive would be made by the judge and not the jury. Specifically, he asserts that the judge and the

prosecutor should not have referred to the jury's verdict in the penalty phase as a recommendation. This Court has upheld a death penalty in the face of similar references. See Ferguson v. State, 814 So.2d 925, 940–41 (Ala. Crim. App. 2000).

14 Effective April 11, 2017, § 13A–5–47, Ala. Code 1975, was amended and the language in subsection (d) is now contained in subsection (b).

15 The State also offered testimony and records from a store owner in Demopolis that Wrenn had purchased two guns, including a Taurus brand Raging Bull .454, at his store; and photographs of the crime scene and autopsy of the victim. (C. 315–17, 341–50; 353–55, 35879; R. 377–400, 400–37, 865–870, 888, 893.) None of this forensic evidence, however, directly implicated Collins in Bell's murder.

1 Section 13A-5-47 was amended effective April 11, 2017; as part of that amendment, subsection (d) was deleted. The amendment does not apply retroactively to Collins. See § 13A-5-47.1, Ala. Code 1975.

2 In Carroll, the Alabama Supreme Court held that the circuit court must consider a jury's recommendation of life imprisonment without the possibility of parole as a mitigating circumstance. Previous to the holding in Carroll, the Supreme Court in Ex parte Taylor, 808 So.2d 1215 (Ala. 2001), had held that when a court chooses to override a jury's recommendation of life imprisonment without parole the court must set out specific reasons for giving the jury's recommendation the consideration that it did. However, in this case the court did not override the jury's recommendation of death.

3 Though not applicable here, we note that Alabama's capital statute was recently amended to remove the judicial-override provision. Act No. 2017-131, Ala. Acts 2017. Section 13A-5-47, Ala. Code 1975, now reads: “Where the jury has returned a verdict of death, the court shall sentence the defendant to death. Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.” Section 13A-5-46, Ala. Code 1975, provides: “The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.”

1 As we pointed out in our opinion on return to remand, § 13A-5-47, Ala. Code 1975, was amended effective April 11, 2017; the amendment, in part, deleted subsection (d) from that statute. That amendment does not apply retroactively to Collins. See § 13A-5-47.1, Ala. Code 1975.

2 Collins's capital-murder conviction and his conspiracy-to-commit-murder conviction were affirmed in our opinion on original submission.

End of Document

Appendix B

2021 WL 940525
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Sherman COLLINS

v.

STATE of Alabama

CR-14-0753

|

March 12, 2021

Synopsis

Background: Defendant was convicted following a bifurcated trial in the Circuit Court, Sumter County, No. CC-12-109, of murder for pecuniary gain and conspiracy to commit murder, and defendant was then sentenced to death for the capital-murder conviction and 120 months' imprisonment for his conspiracy conviction. Defendant appealed. The Court of Criminal Appeals, 2017 WL 456447, affirmed conviction but remanded for correction of sentencing order, specifying that Circuit Court was to enter sentencing order in which it made specific findings of fact concerning aggravating and mitigating circumstances and summarizing offense and defendant's involvement in it. On return to remand, the Court of Criminal Appeals, 2018 WL 3407967, again remanded with instructions. On return to second remand the Court of Criminal Appeals, 2019 WL 5608055, affirmed the death sentence. Defendant applied for rehearing.

The Court of Criminal Appeals held that the trial court did not abuse its discretion in denying motion to strike a particular juror for cause.

Application for rehearing overruled.

Windom, P.J., concurred specially and filed opinion, which McCool, J., joined.

Minor, J., concurred in the result.

Cole, J., dissented and filed opinion.

Appeal from Sumter Circuit Court (CC-12-109)

On Application for Rehearing

Opinion

PER CURIAM.

***1** Sherman Collins was convicted of capital murder for the intentional killing of Detrick Bell for pecuniary gain, a violation of § 13A-5-40(a)(7), Ala. Code 1975, and conspiracy to commit murder, a violation of § 13A-4-3, Ala. Code 1975. The jury recommended, by a vote of 10 to 2, that Collins be sentenced to death for his capital-murder conviction. The trial court followed that recommendation. The trial court also sentenced Collins to 120 months' imprisonment for his conspiracy conviction.

In our opinion on original submission, this Court affirmed Collins's convictions and his 120-month sentence. But this Court remanded Collins's case to the trial court for that court "to correct its sentencing order to make specific findings of facts as required by § 13A-5-47(d), Ala. Code 1975," as to Collins's death sentence. Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] ––– So. 3d ––––, –––– (Ala. Crim. App. 2017) ("Collins I"). Ultimately, the trial court complied with our instructions, and we affirmed Collins's death sentence. Collins v. State, [Ms. CR-14-0753, Oct. 25, 2019] ––– So. 3d ––––, –––– (Ala. Crim. App. 2019) (opinion on return to second remand). Collins has now filed an application for rehearing with this Court, asking "this Court to reconsider its decision in this case and reverse his convictions and death sentence." (Collins's application, p. 89.)

Although none of Collins's arguments in his application warrant granting him relief, Collins correctly points out that this Court did not address his argument about the trial court's denial of his motion to strike for cause potential juror R.C. (Collins's application, p. 63.) Specifically, Collins argues in his application for rehearing that, although this Court addressed his arguments as to veniremembers T.T., Ke.S., Ka.S., T.D., and N.J., this Court "overlooked the erroneous denial of defense counsel's challenge for cause of R.C." (Collins's application, p. 67.) Thus, we address his argument as to potential juror R.C.

In his brief on original submission, Collins argued that, because "[p]otential juror R.C. sua sponte offered during voir dire that he had retained [Nathan] Watkins [an assistant

district attorney] for legal services," the trial court should have granted his motion to strike R.C. for cause.

As we explained in our opinion on original submission,

> " 'To justify a challenge for cause, there must be a proper statutory ground or " 'some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.' " Clark v. State, 621 So. 2d 309, 321 (Ala. Cr. App. 1992) (quoting Nettles v. State, 435 So. 2d 146, 149 (Ala. Cr. App. 1983)). This court has held that "once a juror indicates initially that he or she is biased or prejudiced or has deep seated impressions" about a case, the juror should be removed for cause. Knop v. McCain, 561 So. 2d 229, 234 (Ala. 1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law. Ex parte Taylor, 666 So. 2d 73, 82 (Ala. 1995). A juror "need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it." Kinder v. State, 515 So. 2d 55, 61 (Ala. Cr. App. 1986).'
>
> ***2** "Ex parte Davis, 718 So. 2d 1166, 1171-72 (Ala. 1998).
>
> " 'The test for determining whether a strike rises to the level of a challenge for cause is "whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence." Marshall v. State, 598 So. 2d 14, 16 (Ala. Cr. App. 1991). "Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause." Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983). "The decision of the trial court 'on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion.' " Nettles, 435 So. 2d at 153.'
>
> "Dunning v. State, 659 So. 2d 995, 997 (Ala. Crim. App. 1994).
>
> " 'A trial judge is in a decidedly better position than an appellate court to assess the credibility of the jurors during voir dire questioning. See Ford v. State, 628 So. 2d 1068 (Ala. Crim. App. 1993). For that reason, we give great deference to a trial judge's ruling on challenges for cause. Baker v. State, 906 So. 2d 210 (Ala. Crim. App. 2001).'
>
> "Turner v. State, 924 So. 2d 737, 754 (Ala. Crim. App. 2002).
>
> "Moreover, most of [the] challenged jurors were removed by the use of peremptory strikes. '[T]he Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike. Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002).' Pace v. State, 904 So. 2d 331, 341 (Ala. Crim. App. 2003). Cf. Ex parte Colby, 41 So. 3d 1 (Ala. 2009) (may not be harmless when multiple challenges for cause are involved)."

Collins I, —— So. 3d at ——.

During voir dire, Collins's counsel asked whether any veniremembers had "any business dealings with anyone in the District Attorney's Office." In response, R.C. said, "I have a question. Is this Mr. Watkins the same one that was with Pruitt, Pruitt and Watkins? I dealt with Mr. Watkins." (R. 146.) Later, Collins moved to strike R.C. for cause, arguing that R.C. "indicated a relationship with Mr. Watkins." (R. 225.) Watkins responded, "[R.C.] said when I was with Pruitt, Pruitt and Watkins that I had done some legal work for him. I really don't have any recollection of it. That was prior to 2002." (R. 225.) The trial court denied Collins's motion.

As we held on original submission concerning Watkins's prior legal work for potential jurors T.T., Ke.S. and Ka.S., " '[i]n the absence of a statute so providing, a venireperson is not absolutely disqualified because he has been a client of an attorney for one of the parties.' " Collins I, —— So. 3d at —— (quoting State v. Douglas, 132 S.W. 3d 251, 258 (Mo. App. 2004)). When that business relationship is not ongoing and when the record does not suggest bias in favor of the attorney who represented the veniremember, the trial court does not err in denying a motion to strike that veniremember for cause. Collins I, —— So. 3d at ——.

Here, although it appears that Watkins had done legal work for R.C., Watkins explained that he had no recollection of the work and that the business relationship had terminated about 12 years before Collins's trial. Nothing in the record reflects that the assistant district attorney (Watkins) was currently doing any legal work for R.C., and nothing suggests that R.C. was biased in favor of the State. Accordingly, the trial court did not err in denying Collins's motion to remove R.C. for cause.

***3** For these reasons, Collins's application for rehearing is overruled.

APPLICATION FOR REHEARING OVERRULED.

Kellum, J., concurs. Windom, P.J., concurs specially, with opinion, which McCool, J., joins. Minor, J., concurs in the result. Cole, J., dissents, with opinion.

WINDOM, Presiding Judge, concurring specially.

Both parties, as well as this Court, agree that the admission of a statement given by Kelvin Wrenn, a nontestifying codefendant, violated Sherman Collins's Sixth Amendment right of cross-examination. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Constitutional violations such as this may be held harmless only "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Judge Joiner's dissent on original submission summarized his view of the evidence against Collins: "In the case before us, the State's evidence against Collins included Collins's written confession, witness statements identifying a black male in an orange shirt at the scene of [Detrick] Bell's murder as a person of interest, and Wrenn's statement to law-enforcement officers implicating Collins in Bell's murder." Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] —— So. 3d ——, —— (Ala. Crim. App. 2017) (Joiner, J., dissenting). Judge Cole's dissent today on application for rehearing appears to adopt Judge Joiner's view of the evidence and states that this Court's "main opinion [on original submission] ostensibly agreed with Judge Joiner's assessment of the dearth of other evidence pointing to Collins's guilt beyond a reasonable doubt." —— So. 3d at —— (Cole, J., dissenting).

I do not agree with Judge Cole's perspective on the main opinion. I do agree with both Judge Joiner's and Judge Cole's dissenting opinions, though, that the harmless-error analysis in this Court's main opinion on original submission was wanting. The main opinion held that the error was harmless because Collins's confession "contained more detail than the statements that were attributed to Wrenn, and it was corroborated by other testimony." Collins, —— So. 3d at ——. I do not believe that the main opinion adequately set forth the strength of the State's evidence, and I believe this failing is shared by the dissents.

As the main opinion recognized, Collin's confession was compelling evidence of his guilt.[1] Collins admitted to shooting Bell in exchange for Wrenn's promise to pay him $2,000. In other words, Collins admitted to committing a capital offense and to an aggravating circumstance that made his offense death-eligible. See §§ 13A-5-40(a)(7) and 13A-5-49(6), Ala. Code 1975.

With respect to identifying Collins as the shooter, I believe there is more to be gleaned from the record than some "witness statements identifying a black male in an orange shirt at the scene of [Detrick] Bell's murder as a person of interest." Collins, —— So. 3d at —— (Joiner, J., dissenting). Bell was killed by a gunshot to the head while standing outside the Morning Star Community Center with Terrod Sturdivant and Martez Rodgers. According to Sturdivant, Bell was shot just moments after Collins was introduced to their group by Grant Kimbrough. (R. 485-86.) Even so, neither Sturdivant nor Rodgers could identify the shooter – Sturdivant had turned his back to Bell immediately before the shooting to answer a call on his cell phone and Rodgers stated that it was too dark to identify the shooter. (R. 453, 483.) Rodgers was, however, able to provide a description of the shooter's apparel – he repeatedly testified that the shooter was wearing an orange shirt and blue jeans. (R. 452, 455-58, 461, 463, 467.)

***4** Angela Jackson, Collins's girlfriend, testified that Collins was wearing an orange shirt and blue jeans that evening, and Sturdivant and Rodriguez Brunson confirmed that Collins was wearing an orange shirt bearing the logo of Reese's brand candy. (R. 342, 484, 555.) Additionally, Tommy Charles Nixon, who was working as a security guard at the community center, testified that he saw a man in an orange shirt bearing the Reese's logo arrive that evening with Wrenn, and Jackson testified that Collins went to the community center with Wrenn. (R. 342, 610.)

Of course, the color of a person's shirt is not akin to a fingerprint or DNA evidence – shirt color is hardly unique. Nonetheless, I believe the color of Collins's shirt is inculpatory under the circumstances here. Sturdivant testified that Collins was the only person in the vicinity of the shooting wearing an orange shirt. (R. 530.) This is significant because both Sturdivant and Rodgers described a shooting at close range. Rogers in particular testified that the shooter was a few feet away from Bell, and he agreed that "this guy in the orange

shirt and blue jeans just walked up out of the blue and shot and killed [Bell].” (R. 461, 471.)

Bell's death was indeed “out of the blue.” The shooting was not the culmination of an escalating altercation; both Rodgers and Sturdivant testified that Bell had not been arguing with anyone at the community center. (R. 460, 523.) Nixon likewise testified that there had been “no fights at all” at the community center that evening. (R. 595.) Nor was Bell's murder part of a robbery; Sturdivant testified that he collected money that fell from Bell's pocket after the shooting. (R. 492.) The shooting of Bell was a premeditated act and the motive – money – is thoroughly explained by Collins's own confession that the killing was a murder for hire.

I also find Collins's actions after the shooting to be incriminating. Rodgers stated that after Bell was shot, the shooter walked away from the community center. (R. 453.) Sturdivant, after hearing the gunshot, stated that he fled to a safe spot behind a vehicle, generally noting that “[e]verybody was running.” (R. 527.) There was an exception, of course. Sturdivant saw Collins walking “towards the road ... by himself.” (R. 488.) Like Sturdivant, Nixon saw Collins after the shooting. At the time of shooting, Nixon was in an area near the road and moved toward the community center upon hearing the gunshot. Nixon described the scene as “chaos,” with people “scatter[ing] to their cars.” (R. 632-33.) Nixon, however, saw one person walking away from the community center toward the road – a man in an orange shirt, who was the same individual he had seen arrive at the community center with Wrenn. (R. 612, 632.) There is no doubt this individual was Collins. Collins's casually walking away from the scene of the shooting is, in my opinion, highly suspect.

Finally, I find the portion of Wrenn's statement that was admitted into evidence to be of limited value. The statement provided Wrenn's motive for wanting Bell killed, along with the source of Collins's murder weapon. Against the backdrop of the State's other evidence, this added little to the State's case and was not particularly prejudicial to Collins.

In sum, the State's evidence indicated that the shooter was in relatively close range to Bell and was wearing an orange shirt; the shooter fired his pistol once, striking Bell in the head, and walked away toward the road; Collins, who had just been introduced to Bell, was the only person in the vicinity wearing an orange shirt and was the only person seen walking away toward the road. When the foregoing evidence is considered in conjunction with Collins's own confession, I can “confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Arsdall, 475 U.S. at 681, 106 S.Ct. 1431. Therefore, I concur in overruling Collins's application for rehearing.

McCool, J., concurs.

COLE, Judge, dissenting.

***5** I agree with this Court's assessment of Sherman Collins's argument concerning potential juror R.C. However, I was not a member of this Court when the opinion on original submission was decided, and I believe this Court erred on original submission when it found that trial court's error in admitting his codefendant's statements to law enforcement was harmless. In my view, Collins's argument warrants granting his application for rehearing and reversing his convictions and sentences. Thus, I respectfully dissent.

In his brief on appeal and in his application for rehearing, Collins argues that the trial court erred when it admitted “two redacted written statements made by [his] nontestifying codefendant Kelvin Wrenn.” (Collins's brief, p. 18; Collins's application, p. 48.) The State conceded that the admission of Wrenn's statements was error but argued that, “in the full context of Collins's case, the error was harmless.” (State's brief, p. 17.) According to the State, because Collins gave a statement to law enforcement confessing his involvement in Detrick Bell's murder, the error was harmless.

This Court agreed with Collins and the State that the trial court's admission of Wrenn's statement was erroneous and that it violated Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). This Court then noted that “ ‘[t]he mere finding of a violation of the Bruton rule in the course of the trial ... does not automatically require reversal of the ensuing criminal conviction.’ ” Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] —— So. 3d ——, —— (Ala. Crim. App. 2017) (“Collins I”) (quoting Schneble v. Florida, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972)). This Court explained that, in this case, “Collins fully confessed to all elements of the charges against him,” that his “confession was properly admitted into evidence,” that the confession “contained more detail than the statements that were attributed to Wrenn, and [that] it was corroborated by other testimony.” Therefore, this Court held that the “Bruton violation was harmless beyond a reasonable doubt.” Collins I, —— So. 3d at ——.

After reviewing this Court's decision, the arguments of the parties, the record on appeal, and caselaw relevant to harmless-error analysis, I am convinced that this Court's harmless-error analysis in this case was incorrect.

This Court did correctly conclude (1) that a Bruton violation is subject to harmless-error analysis, (2) that, because a Bruton violation is a constitutional error, it is "harmless" only if the error is harmless beyond a reasonable doubt, and (3) that, in some cases, a defendant's confession can render harmless the erroneous admission of a codefendant's statement. But this Court incorrectly concluded that the admission of Wrenn's statements was harmless.

In Neelley v. State, 494 So. 2d 669, 674 (Ala. Crim. App. 1985), this Court explained the harmless-error standard as follows:

> " '[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed. 2d 705 (1967). It must appear 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' id. at 24, 87 S. Ct. at 828, because if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' id. at 23, 87 S. Ct. at 827 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230-231, 11 L.Ed. 2d 171 (1963)), then the error must be considered harmful.
>
> ***6** "... 'The two standards employed by the courts to determine whether a trial error is harmless are the "overwhelming evidence" test and the "harmless beyond a reasonable doubt" test.' Note: State v. Bonuchi: The Harmless Error Rule Applied To Miranda Exclusions, 27 St. Louis U.L.J. 727, 728 (1983):
>
> > " 'Under the "overwhelming evidence" standard, the court on appeal will reverse the conviction only if the constitutionally admissible evidence does not provide an overwhelming indication of the defendant's guilt. Under the "harmless beyond a reasonable doubt" test, however, the conviction will be reversed if the tainted evidence could have reasonably contributed to the verdict.' Id., at 728."

In Carroll v. State, 215 So. 3d 1135, 1164 (Ala. Crim. App. 2015), this Court explained:

> "In Ex parte Greathouse, 624 So. 2d 208, 211 (Ala.1993), the Alabama Supreme Court held that an error may be harmless if 'evidence of guilt is "virtually ironclad." ' (citations and quotation marks omitted). ' "When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." ' Wiggins v. State, 193 So. 3d 765, 785 (Ala. Crim. App. 2014) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L.Ed. 2d 302 (1991)). Thus, the erroneous admission of a confession will be harmless if, excluding the confession, the remainder of the 'evidence of guilt is "virtually ironclad." ' Ex parte Greathouse, 624 So. 2d at 211. See also Albarran [v. State], 96 So. 3d [131] at 154 [(Ala. Crim. App. 2011)]; Richardson v. State, 819 So. 2d 91, 103 (Ala. Crim. App. 2001)."

In other words, "[t]he harmless error rule excuses the error of admitting inadmissible evidence only because the evidence was so innocuous or cumulative that it could not have contributed substantially to the adverse verdict." Ex parte Baker, 906 So. 2d 277, 284 (Ala.2004) (emphasis added).

Although this Court held that the admission of Wrenn's statements was harmless because those statements corroborated Collins's statement to law enforcement, that "corroboration" is precisely the reason the admission of Wrenn's statements were not harmless and likely had a "substantial and injurious effect or influence in determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007).

Here, Collins's defense was based, in part, on a multi-pronged attack of his statement to law enforcement. Part of that strategy was to show that it was law enforcement, not Collins, who actually wrote out the statement and that other State witnesses, whom law enforcement had also written statements for, noted issues or inaccuracies with the way law enforcement transcribed their conversations. (See R. 945.) But Collins primarily attacked his statement by arguing that it was coerced based on the conditions of Collins's pretrial confinement. (See R. 943-44.) Certainly, the jury was free to give whatever weight it chose to Collins's defense theory about his statement to law enforcement. But the erroneous admission of Wrenn's statement, which corroborates parts of Collins's statement, would have had a negative impact on

the arguments Collins made about his statement, undercutting Collins's defense.

***7** In fact, in its rebuttal closing argument, after talking about Collins's confession to the crime, the State undercut Collins's defense regarding the circumstances surrounding his confession by pointing to Wrenn's statement, which was later determined to have been erroneously admitted into evidence:

> "[The defense] make[s] pretty quick comments about his co-conspirator's Kelvin Wrenn's statement. Why? Because that really doesn't fit in this whole strategy that this is all just something trumped up by Investigator Davis. That don't fit at all.
>
> "Why doesn't it fit at all, ladies and gentlemen? Because you know that Investigator Davis wasn't the only one that interviewed Kelvin Wrenn. You heard testimony from Agent Bryan Manley who was asked to come and assist the Sumter County Sheriff' s Office in the investigation of this case and he alone with David Ratliff, another agent, they interviewed Kelvin Wrenn. They interviewed Kelvin Wrenn without even knowing what he said in his prior statements. Luther Davis wasn't even present. They documented a statement from Kelvin Wrenn separate and apart from Luther Davis. You've heard portions of the statements that Kelvin Wrenn gave to Investigator Davis and portions of statements that he gave to Agent Bryan Manley. You will have those when you go back in the jury room and deliberate and arrive at a verdict in this case.
>
> "In the statement Kevin Wrenn gave to Investigator Davis on June 18th of 2012--and again, the portions that the Court ruled were admissible for purposes of this case, I'll submit to you, ladies and gentlemen, take a look at the parts where he said, 'I grabbed my .22 pistol and I gave Sherman my .454 pistol. I saw Detrick Bell and I told Sherman I did not like Detrick because he had someone to break into my mother's house years ago. I talked to Sherman and asked him what did he do with my gun he used to kill Detrick?' That's what Kelvin Wrenn said in his statement that was to Investigator Davis.
>
> "On June the 19th he gave a statement to Agent Bryan Manley and to Agent David Ratliff. In that statement, in that interview and there were two agents there, so. 'I agreed to help with helping with security. Later that evening while driving to the rap party at the Morning Star Community Center I asked Sherman to help me with security. When we got to the Morning Star Community Center, I gave Sherman my .454 revolver pistol and I had a .22 Magnum revolver. I pulled--I rolled down my window and told him we were going to help with security. Minutes later I saw Speedy [Detrick Bell] and told Sherman that I don't like him. Speedy, because he sent somebody to break into my mama's house.'
>
> "[The defense] didn't talk much about that, did they? That doesn't quite fit into their theory to y'all that this is all about a crooked cop just making it up, making it fit his investigation and falsely accusing somebody of doing something they didn't do. It doesn't quite fit into their argument that this is a broken system. It doesn't fit into their argument that our system doesn't work. Doesn't fit into their argument that the system that was in place when this investigation was done is unfair because this shows you that an independent source documented the exact same thing that this officer did. It is a true reflection of what Sherman Collins' co-conspirator was reporting to law enforcement.
>
> ***8** "And you know what? He's saying the same thing to whoever is asking him, and he's saying that Sherman Collins is involved in the death of Detrick Bell. He's trying to get his gun back from him, the one he used to kill Detrick Bell. He's admitting that he gave him the gun. He's admitting that he pointed him out at the Morning Star Community Center that night as the person that he didn't like. They don't want you to consider that. They want to try to distract you and make you believe that his is all just a sham.
>
> "How can you reconcile that, ladies and gentlemen? How can you reconcile defense counsel's allegations that Luther Davis has lied to you in his testimony with the evidence that you heard from these other witnesses? I mean, I don't even know how they can stand before you and make those allegations that he's crooked, that this is a sham, that he purgered [sic] himself when you look at this evidence. But that's what they're telling you."

(R. 983-86.)

As Judge Joiner explained in his dissenting opinion on original submission:

> "[T]he legally admissible evidence in this case was not 'virtually ironclad.' The State's evidence, excluding Collins's written confession, does not overwhelmingly establish Collins's guilt. The only other evidence against Collins, apart from his confession, was Wrenn's statement

> to law-enforcement officers along with some witnesses' statements identifying a black male in an orange shirt at the scene of Bell's murder as a person of interest. No witnesses ever positively identified Collins as Bell's shooter. (R. 445, 450-56, 459, 461-62, 483, 486-89, 526, 529, 560-63, 605.) None of the State's evidence, apart from Collins's confession, suggested that Bell was murdered by Collins in exchange for $2,000 from Kelvin Wrenn. (C. 17, 380; R. 1010.)"

Collins I, —— So. 3d at —— (Joiner, J., dissenting). The main opinion ostensibly agreed with Judge Joiner's assessment of the dearth of other evidence pointing to Collins's guilt beyond a reasonable doubt when it concluded that Collins's confession, by itself, rendered the admission of Wrenn's statements harmless.

In my view, this Court cannot point to Collins's confession to find the admission of Wrenn's statements harmless when Collins's defense turned largely on the propriety of his statement to law enforcement. I cannot say with an abiding conviction that, given the State's reliance on Wrenn's statements to disprove Collins's arguments about his statement to law enforcement, the admission of Wrenn's statement did not have a substantial impact on the jury's verdict. Perhaps the jury would have disbelieved Collins's defense about his confession if Wrenn's statement had not been admitted into evidence, but Collins is entitled to the opportunity to present his argument to a jury not tainted by Wrenn's inadmissible statements and the State's reliance on Wrenn's statements to undercut Collins's argument.

In sum, because I am not certain that the erroneous admission of Wrenn's statement did not have an impact on the jury's verdict and because an "uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')," O'Neal v. McAninch, 513 U.S. 432, 438, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), I would grant Collins's application for rehearing and reverse his convictions and sentences.

Thus, I respectfully dissent.

All Citations

--- So.3d ----, 2021 WL 940525

Footnotes

1 I see no reason to exclude it from consideration in a harmless-error analysis. See Collins, —— So. 3d at —— (Joiner, J., dissenting) ("The State's evidence, excluding Collins's written confession, does not overwhelmingly establish Collins's guilt. (emphasis added)).

Appendix C

IN THE SUPREME COURT OF ALABAMA

June 24, 2021

1200443

Ex parte Sherman Collins. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Sherman Collins v. State of Alabama) (Sumter Circuit Court: CC-12-109; Criminal Appeals: CR-14-0753).

ORDER

The Petition for Writ of Certiorari filed by Sherman Collins on March 26, 2021, having been submitted to this Court,

IT IS ORDERED that the Petition is GRANTED in PART as to only the issue stated in Ground XV of said Petition—whether the lower court's holding that Petitioner's convictions do not violate the Double Jeopardy clause conflicts with state and federal law—and DENIED in PART as to all other grounds. *See* Ala. R. App. P. 39(f).

IT IS FURTHER ORDERED as follows:

1. that Petitioner may file a brief addressing only the issue stated in Ground XV of said Petition in accordance with Rule 39(g)(1);

2. that Respondent may then file a response brief in accordance with Rule 39(g)(2);

3. that, should either Petitioner or Respondent choose not to file a brief, such party shall instead timely file a waiver of the right to file such brief in accordance with Rule 39(g)(1)–(2);

4. that Petitioner may then file a reply brief to Respondent's brief in accordance with Rule 39(g)(3); and

5. that requests for oral argument, if any, shall be made in accordance with Rule 39(h).

IN THE SUPREME COURT OF ALABAMA

June 24, 2021

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

Witness my hand this 24th day of June, 2021.

Clerk of Court,
Supreme Court of Alabama

FILED
June 24, 2021
9:04 AM

Clerk
Supreme Court of Alabama

cc:
D. Scott Mitchell
Hon. Eddie Hardaway
James Hubbard
Randall S. Susskind
Steven Marshall
Lauren A. Simpson
Al Terry

Appendix D

2021 WL 5143906
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

EX PARTE Sherman COLLINS
(In re: Sherman Collins
v.
State of Alabama)

1200443
|
November 5, 2021

Synopsis
Background: Defendant was convicted following a bifurcated trial in the Circuit Court, Sumter County, No. CC-12-109, of murder for pecuniary gain and conspiracy to commit murder, and defendant was then sentenced to death for the capital-murder conviction and 120 months' imprisonment for his conspiracy conviction. Defendant appealed. The Court of Criminal Appeals, 2017 WL 456447, affirmed conviction but remanded for correction of sentencing order. On return to remand, the Court of Criminal Appeals, 2018 WL 3407967, again remanded with instructions. On return to second remand, the Court of Criminal Appeals, 2019 WL 5608055, affirmed the death sentence. Defendant applied for rehearing. The Court of Criminal Appeals, 2021 WL 940525, denied rehearing. Defendant petitioned for a writ of certiorari.

The Supreme Court, Mendheim, J., held that criminal conspiracy is a lesser-included offense of murder for hire.

Affirmed in part, reversed in part, and remanded with instructions.

Mitchell, J., concurred specially and filed opinion.

Petition for Writ of Certiorari to the Court of Criminal Appeals (Sumter Circuit Court, CC-12-109; Court of Criminal Appeals, CR-14-0753)

Opinion

MENDHEIM, Justice.

***1** Sherman Collins petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision in Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] —— So. 3d ——, 2017 WL 4564447 (Ala. Crim. App. 2017) (opinion on original submission); [Ms. CR-14-0753, July 13, 2018] —— So. 3d at —— (opinion on return to remand); [Ms. CR-14-0753, Oct. 25, 2019] —— So. 3d ——, 2019 WL 5608055 (opinion on return to second remand); and [Ms. CR-14-0753, Mar. 12, 2021] —— So. 3d ——, 2021 WL 940525 (on application for rehearing), affirming Collins's convictions in the Sumter Circuit Court for capital murder for the intentional killing of Detrick Bell for pecuniary gain, a violation of § 13A-5-40(a)(7), Ala. Code 1975, and for criminal conspiracy, a violation of § 13A-4-3, Ala. Code 1975, and affirming his resulting sentences of death for his capital-murder conviction and of 120 months' imprisonment for his criminal-conspiracy conviction. We granted certiorari review to consider whether the Court of Criminal Appeals' decision is in conflict with Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); we conclude that it is. As a result, we affirm the Court of Criminal Appeals' decision insofar as it affirms Collins's capital-murder conviction and his resulting sentence to death and we reverse the Court of Criminal Appeals' decision insofar as it affirms Collins's criminal-conspiracy conviction and his resulting sentence to 120 months' imprisonment. We also remand this cause to the Court of Criminal Appeals to remand the cause to the trial court to set aside Collins's criminal-conspiracy conviction and resulting sentence.

Facts and Procedural History

An extensive recitation of the facts, which is not necessary for our purposes in this case, is set forth in Collins. In short, on June 17, 2012, Collins entered into an agreement with Kelvin Wrenn to kill Detrick "Speedy" Bell in exchange for $2,000, and, in accordance with the agreement, Collins shot and killed Bell. Collins confessed to entering into an agreement with Wrenn to kill Bell and to killing Bell. Collins was charged and, following a jury trial, convicted of capital murder for the intentional killing of Bell for pecuniary gain, a violation of § 13A-5-40(a)(7), and of criminal conspiracy, a violation of § 13A-4-3. Collins was sentenced to death for his capital-

murder conviction and to 120 months' imprisonment for his criminal-conspiracy conviction. Collins appealed.

In affirming Collins's convictions on appeal, the Court of Criminal Appeals noted the following:

> "Collins's convictions for capital murder and conspiracy to commit murder do not violate the Double Jeopardy Clause. As this Court stated in Williams v. State, 830 So. 2d 45 (Ala. Crim. App. 2001), when considering whether Williams's convictions for robbery/murder and conspiracy to commit first-degree robbery constituted a double-jeopardy violation:
>
> > " 'Under § 13A-4-3, [Ala. Code 1975,] "[a] person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement." On the other hand, an objective of murder made capital pursuant to § 13A-5-40(a)(2), [Ala. Code 1975,] requires no agreement to effect that offense. See §§ 13A-6-2(A)(1); 13A-8-41; and 13A-8-43, Ala. Code 1975. Likewise, the offense of murder made capital pursuant to § 13A-5-40(a)(2) requires proof of an intentional killing; § 13A-4-3 requires no such proof. Clearly, the two offenses for which the appellant was convicted and sentenced are not the same under the Blockburger [v. United States, 284 U.S. 299 (1932),] test. Therefore, we find no merit in the appellant's argument that his rights under the Double Jeopardy Clause were violated.'
>
> ***2** "Williams, 830 So. 2d at 48."

Collins, —— So. 3d at —— n.6 (opinion on original submission).

Standard of Review

" ' "This Court reviews pure questions of law in criminal cases de novo." ' " Ex parte Knox, 201 So. 3d 1213, 1216 (Ala. 2015) (quoting Ex parte Morrow, 915 So. 2d 539, 541 (Ala. 2004), quoting in turn Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)).

Discussion

As noted above, this Court granted certiorari review to consider whether the above-quoted portion of the Court of Criminal Appeals' decision is in conflict with Blockburger, supra. In his brief before this Court, Collins argues that the Court of Criminal Appeals' decision is in conflict with Blockburger because, he argues, "[t]he offense of capital murder for hire, as charged in this case under Ala. Code [1975,] § 13A-5-40(a)(7), encapsulates the offense of conspiracy to commit murder." Collins's brief at p. 12. Collins argues that the crime of criminal conspiracy defined in § 13A-4-3(a) is a lesser-included offense of murder for hire as defined in § 13A-5-40(a)(7). Collins argues that his convictions and sentences for murder for hire and for criminal conspiracy violate double-jeopardy principles. Collins is correct.

In Williams v. State, 830 So. 2d 45 (Ala. Crim. App. 2001), the case relied upon by the Court of Criminal Appeals below, the Court of Criminal Appeals provided the following explanation of the Blockburger test:

> "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not. The test emphasizes the elements of the two offenses. If each offense requires proof of a fact that the other does not, then the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the offenses. In essence, the Blockburger rule is one of statutory construction. The assumption underlying the rule is that the legislative branch of government ordinarily does not intend to punish for the same offense under two different statutes. Therefore, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments, at least in the absence of a clear indication of contrary legislative intent. See Ex parte Rice, 766 So. 2d 143 (Ala. 1999)."

830 So. 2d at 47-48.

Under § 13A-4-3(a),

> "[a] person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause

> the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement."

Section 13A-5-40(a)(7) makes a capital offense "[m]urder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire." In the present case, the State charged Collins with violating § 13A-5-40(a)(7), alleging that he had entered into an agreement with Wrenn, whereby Collins agreed to murder Bell in exchange for Wrenn's paying Collins $2,000, and that Collins did, in fact, murder Bell. The State also charged Collins with violating § 13A-4-3(a), alleging that Collins had entered into an agreement with Wrenn, whereby Collins agreed to murder Bell in exchange for Wrenn's paying Collins $2,000, and that Collins took some overt act to effect an objective of the agreement. Obviously, murder made capital pursuant to § 13A-5-40(a)(7) requires proof of an intentional killing; § 13A-4-3(a) requires no such proof. This is something that distinguishes the crimes. However, in this case, the State relied upon the same facts to prove that Collins violated § 13A-4-3(a) in proving that Collins violated § 13A-5-40(a)(7). Stated differently, once the State proved that Collins had violated § 13-5-40(a)(7), it did not need to prove any additional fact to prove that Collins had also violated § 13A-4-3(a). We conclude that, as charged in this case, criminal conspiracy is a lesser-included offense of murder made capital pursuant to § 13A-5-40(a)(7). See § 13A-1-9(a)(1), Ala. Code 1975 ("A defendant may be convicted of an offense included in an offense charged. An offense is an included one if ... [i]t is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged.").

***3** Although we have not heretofore made such a conclusion, Mississippi, which has laws similar to our own concerning murder for hire and criminal conspiracy, has determined that criminal conspiracy is a lesser-included offense of murder for hire. In Stewart v. State, 662 So. 2d 552, 561 (Miss. 1995), the Mississippi Supreme Court stated:

> "Conspiracy and the underlying substantive offense are normally distinct and separate offenses. Pinkerton v. United States, 328 U.S. 640, 643, 66 S. Ct. 1180, 1181, 90 L.Ed. 1489 (1946); Griffin v. State, 545 So. 2d 729, 730 (Miss. 1989). Nevertheless, there are times when a defendant may not be charged with both conspiracy and the substantive offense. Pinkerton, 328 U.S. at 643, 66 S. Ct. at 1181. 'One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime.' Id.
>
> "Miss. Code Ann. § 97-3-19(2)(d) (1972) capital murder provision reads as follows:
>
> > " '(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
> >
> > > " '(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals.'
>
> "We find that once the State has proven murder under this definition, no other evidence must be produced in order to establish the crime of conspiracy. Conspiracy to commit murder-for-hire is completely enveloped by our definition of murder-for-hire found in § 97-3-19(2)(d) of the capital murder statute."

We find convincing the reasoning set forth in Stewart by the Mississippi Supreme Court and conclude that criminal conspiracy is a lesser-included offense of murder for hire.

It is significant to note Stewart's reliance upon Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Pinkerton is a significant case in double-jeopardy precedent -- relied upon by many other federal cases (some of which the State relies upon in its brief before this Court) -- that sets forth well-established principles concerning a criminal defendant's convictions for both a substantive offense and a conspiracy to commit that substantive offense. Pinkerton states, in pertinent part:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. Clune v. United States, 159 U.S. 590, 594, 595 [16 S.Ct. 125, 40 L.Ed. 269 (1895)]. A conviction for the conspiracy may be had though the substantive offense was completed. See Heike v. United States, 227 U.S. 131, 144 [33 S.Ct. 226, 57 L.Ed. 450 (1913)]. And the plea of double jeopardy is no defense to a conviction for both offenses. Carter v. McClaughry, 183 U.S. 365, 395 [22 S.Ct. 181, 46 L.Ed. 236 (1902)]. It is only an identity of offenses which is fatal. See Gavieres v. United States, 220 U.S. 338, 342 [31 S.Ct. 421, 55 L.Ed. 489 (1911)]. Cf. Freeman v. United States, 6 Cir., 146 F.2d 978 [(1945)]. A conspiracy is a partnership in crime. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253 [60 S.Ct. 811, 84 L.Ed. 1129 (1940)]. It has ingredients, as

well as implications, distinct from the completion of the unlawful project. As stated in United States v. Rabinowich, 238 U.S. 78, 88 [35 S.Ct. 682, 59 L.Ed. 1211 (1915)]:

***4** " 'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.'

"And see Sneed v. United States, 5 Cir., 298 F. 911, 912, 913 [(1924)]; Banghart v. United States, 4 Cir., 148 F.2d 521 [(1945)].

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in Sneed v. United States, supra, 298 F. at page 913, 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

Pinkerton, 328 U.S. at 643-44, 66 S.Ct. 1180. Therefore, under federal law, it is well established that a substantive crime and a conspiracy to commit that substantive crime are generally separate and distinct offenses. However, the Pinkerton Court expressly recognized an exception to the above-quoted general principles:

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U.S. 354, 355, 356 [46 S.Ct. 513, 70 L.Ed. 986 (1926)]; Gebardi v. United States, 287 U.S. 112, 121, 122 [53 S.Ct. 35, 77 L.Ed. 206 (1932)]."

Pinkerton, 328 U.S. at 643, 66 S.Ct. 1180 (emphasis added). This makes clear that, under federal law, if the conspiracy to commit a substantive crime is a lesser-included offense of the substantive crime, then the "conspiracy charge may not be added to the substantive charge." Id. This is exactly what the Mississippi Supreme Court recognized in Stewart, and that exception applies to the facts of the present case.

Despite the exception stated in Pinkerton, the State notes that some federal cases involving the federal murder-for-hire statute, 18 U.S.C. § 1958, have concluded that a federal criminal defendant charged with violating § 1958 may be convicted of and sentenced for both the substantive offense of murder for hire and conspiring to commit the substantive offense of murder for hire. See, e.g., United States v. Lingenfelter, 473 F. App'x 303 (4th Cir. 2012), United States v. Bicaksiz, 194 F.3d 390 (2d Cir. 1999), Plunkett v. United States, Criminal Action No. 4:04-cr-70083, June 6, 2011 (W.D. Va. 2011) (not reported in Federal Supplement), and United States v. Gomez, 644 F. Supp. 2d 362 (S.D.N.Y. 2009). The State urges this Court to adopt the approach taken by these federal cases rather than that taken by the Mississippi Supreme Court in Stewart. The federal cases relied upon by the State, however, are inapposite to the present case and Alabama law.

The United States Supreme Court has explained that

"Blockburger [v. United States, 284 U.S. 299 (1932),] established a rule of statutory construction in these terms:

" 'The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.' [Whalen v. United States,] 445 U.S. [684,] 691-692 [100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)] (emphasis added).

***5** "We went on to emphasize the qualification on that rule:

" '[W]here the offenses are the same ... cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.' Id., at 693 (emphasis added)."

Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). In short, the United States Supreme Court has stated that the Blockburger test is a rule of statutory construction that, if met, indicates that Congress did not intend to authorize cumulative punishments for the same offense, but such intention derived from applying the Blockburger test may be controverted by a special authorization of Congress indicating its intention otherwise. Congress's intent is the significant factor.

Collins notes that, in Alabama, the legislature has passed a law expressly stating its intent in situations such as the one presented in this case where a criminal defendant is charged with a substantive offense and a lesser-included offense. Collins directs this Court's attention to § 13A-1-8(b)(1), Ala. Code 1975, which states, in pertinent part: "When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if ... [o]ne offense is included in the other, as defined in Section 13A-1-9[, Ala. Code 1975]." (Emphasis added.) As set forth above, criminal conspiracy is a lesser-included offense of murder for hire. In § 13A-1-8(b)(1), the legislature makes clear that a criminal defendant may not be convicted of both of those crimes based on the same conduct. See also § 13A-4-5(b)(3), Ala. Code 1975 ("A person may not be convicted on the basis of the same course of conduct of both the actual commission of an offense and ... [c]riminal conspiracy of the offense.") Accordingly, unlike federal law, Alabama law makes abundantly clear that the legislature does not intend for a criminal defendant to be convicted of both murder for hire and the lesser-included offense of criminal conspiracy; the federal cases concerning § 1958 have no application in the present case and are not persuasive.

Lastly, we note that, in the present case, the Court of Criminal Appeals relied upon Williams, supra, in concluding that Collins's double-jeopardy rights were not violated. Williams, however, is a distinguishable case. In Williams, the criminal defendant was convicted of criminal conspiracy and murder made capital because it was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. The Court of Criminal Appeals stated in Williams that "the offense of murder made capital pursuant to § 13A-5-40(a)(2)[ ] requires no agreement to effect that offense." Williams, 830 So. 2d at 48. Accordingly, the Court of Criminal Appeals concluded that "the two offenses for which [Williams] was convicted and sentenced are not the same under the Blockburger test. Therefore, we find no merit in [Williams]'s argument that his rights under the Double Jeopardy Clause were violated." Id. As explained above, however, the two offenses for which Collins was convicted and sentenced are the same under the Blockburger test; the crime of criminal conspiracy does not require proof of a fact that the crime of murder for hire does not.[1]

Conclusion

***6** Based on the foregoing, Collins has established a conflict between the Court of Criminal Appeals' decision and Blockburger; the Court of Criminal Appeals erred in concluding that Collins's convictions and sentences for murder for hire and criminal conspiracy do not violate the Double Jeopardy Clause. As a result, we affirm the Court of Criminal Appeals' decision insofar as it affirms Collins's capital-murder conviction and his resulting sentence to death and reverse the Court of Criminal Appeals' decision insofar as it affirms Collins's criminal-conspiracy conviction and his resulting sentence to 120 months' imprisonment. See Heard v. State, 999 So. 2d 992, 1009 (Ala. 2007) ("[W]hen a jury returns a verdict finding a defendant guilty of capital murder on one count and guilty of a lesser-included offense of another count, if that lesser-included offense is also a lesser-included offense of the offense resulting in the capital-murder conviction, under § 13A-1-8(b) and § 13A-1-9, Ala. Code 1975, the conviction for the lesser-included [offense] cannot stand."). We also remand this cause to the Court of Criminal Appeals with instructions for it to remand this cause to the circuit court for it to set aside Collins's conviction for criminal conspiracy and his resulting sentence therefrom. No return to remand need be filed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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

Mitchell, J., concurs specially.

MITCHELL, Justice (concurring specially).

Often overlooked is the fact that state law can provide greater protections of individual rights than protections under federal law.[2] This case offers an example.

Here, Sherman Collins cited three provisions in support of his argument that the two offenses for which he was convicted constitute the "same offense": (1) the Fifth Amendment to the United States Constitution, as analyzed under the test set out in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); (2) § 13A-1-8(b), Ala. Code 1975; and (3) § 13A-4-5(b), Ala. Code 1975. The majority opinion

primarily rules in favor of Collins based on Blockburger and § 13A-1-8(b)(1), and I fully concur in the opinion.

I write separately to point out that in enacting § 13A-4-5(b)(3), Ala. Code 1975, which provides that "[a] person may not be convicted on the basis of the same course of conduct of both the actual commission of an offense and ... [c]riminal conspiracy of the offense,"[3] the Legislature has provided even greater protections for criminal defendants than under federal law. Whereas federal law recognizes that "the commission of [a] substantive offense and a conspiracy to commit it are separate and distinct offenses," Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), and that convictions for both may stand so long as the Blockburger "same elements" test is satisfied, the Alabama statute sweeps more broadly and definitively, protecting a criminal defendant from being convicted based on the same course of conduct of both "criminal conspiracy of the offense" (an inchoate crime) and "the actual commission of an offense" (a substantive crime).

***7** To some, it may seem counterintuitive that state law can contain greater rights protections than federal law -- causing some litigants to cite state-law provisions but not develop any arguments around them or, worse, to bypass state law entirely. That is a mistake. I encourage parties in future cases involving counterpart rights under state and federal law not to assume either that the state-law right is inferior and unworthy of attention or that the state-law right is simply a carbon copy of the federal right. Making those assumptions could cause a litigant to lose his or her case or to obtain less relief than he or she is due.

All Citations

--- So.3d ----, 2021 WL 5143906

Footnotes

1 As he did before the Court of Criminal Appeals, Collins also argues before this Court that the trial court's admission of a confession made by Wrenn, Collins's codefendant, allegedly violated Collins's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment to the United States Constitution. We need not address this argument, however, because we specifically denied certiorari review of this issue. In his petition for certiorari review, Collins, citing Rule 39(a)(1)(D), Ala. R. App. P., alleged that the Court of Criminal Appeals' determination of this Confrontation Clause issue conflicted with prior decisions of the United States Supreme Court. We did not find Collins's allegation of conflict convincing and denied certiorari review of that particular issue. Accordingly, that issue is not properly before us, and, thus, we need not consider Collins's argument.

2 In this case, we have an Alabama statute that provides superior protection. But we are beginning to see the emergence of cases across the country where litigants correctly recognize that state constitutions may better protect individual rights than the United States Constitution. See, e.g., Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017) (holding that the Georgia state constitution's protection against compelled self-incrimination extends beyond testimony -- as the federal right has been interpreted -- to incriminating acts, such as breath tests); see also Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 16-20, 76 (Oxford Univ. Press 2018). The Alabama Constitution, like other state constitutions, is a relatively untapped source of law for the protection of individual rights, and it may hold promise for future litigants in a variety of contexts.

3 The Commentary to § 13A-4-5 explains that subsection (b) "deal[s] only with convictions, not with multiple charges or counts in an indictment or complaint." That is, a defendant may be charged with both criminal conspiracy of an offense and the actual commission of the offense, but not convicted of both.

Appendix E

IN THE SUPREME COURT OF ALABAMA

November 23, 2021

1200443 Ex parte Sherman Collins. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Sherman Collins v. State of Alabama) (Sumter Circuit Court: CC-12-109; Criminal Appeals : CR-14-0753).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on November 5, 2021:

Affirmed In Part; Reversed In Part; and Remanded With Instructions. Mendheim, J. - Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur. Mitchell, J., concurs specially.

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 23rd day of November, 2021.

Julia Jordan Weller

Clerk, Supreme Court of Alabama