No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2022

HEATHER LEAVELL-KEATON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

MARK LOUDON-BROWN
mloudonbrown@schr.org

SOUTHERN CENTER FOR HUMAN RIGHTS
60 Walton Street NW
Atlanta, Georgia 30303
Tel: (404) 688-1202
Fax: (404) 688-9440

Counsel of Record for Petitioner

November 16, 2022

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2022

HEATHER LEAVELL-KEATON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

MOTION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

TO THE HONORABLE CLARENCE THOMAS, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Eleventh Circuit:

Petitioner Heather Leavell-Keaton, by and through undersigned counsel and pursuant to Supreme Court Rule 13, respectfully requests an extension of time of thirty (30) days to file her Petition for Writ of Certiorari in this Court. In her Petition, Ms. Leavell-Keaton will seek review of the decision of the Alabama Court of Criminal Appeals affirming her capital murder conviction and death sentence. *See* Attachment A. On October 21, 2022, the Supreme Court of Alabama denied Ms. Leavell-Keaton's petition for writ of certiorari to the Alabama Court of Criminal Appeals. *See* Attachment B.

Ms. Leavell-Keaton invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Her time to file a Petition for Writ of Certiorari in this Court elapses on January 19, 2023. She therefore makes this request more than ten (10) days before the date her petition would be due without an extension of time. In support of this request, Ms. Leavell-Keaton shows the following as good cause:

Ms. Leavell-Keaton was convicted of capital murder and sentenced to death in Mobile County, Alabama, in 2015. On appeal, the Alabama Court of Criminal Appeals reversed her sentence and remanded for resentencing. *See* Order, *Heather Leavell-Keaton v. State of Alabama*, No. CR-14-1570 (Ala. Crim. App. Oct. 6, 2020). On January 6, 2021, Ms. Leavell-Keaton was sentenced to death again. On return to remand, the Court of Criminal Appeals vacated the trial court's sentencing order and remanded for the court to enter specific findings regarding the aggravating factors and mitigating circumstances that were weighed prior to sentencing. *See* Order on Return to Remand, *Heather Leavell-Keaton v. State of Alabama*, No. CR-14-1570 (Ala. Crim. App. May 28, 2021). On return to second remand, the Court of Criminal Appeals affirmed Ms. Leavell-Keaton's convictions and death sentence. *See Keaton v. State*, No. CR-14-1570, 2021 WL 5984951 (Ala. Crim. App. Dec. 17, 2021) (Attachment A).

On May 20, 2022, the Court of Criminal Appeals overruled Ms. Leavell-Keaton's application for rehearing. *See* Notice, *Heather Leavell-Keaton v. State of Alabama*, No. CR-14-1570 (Ala. Crim. App. May 20, 2022). On October 21, 2022,

the Supreme Court of Alabama denied Ms. Leavell-Keaton's writ of certiorari to the Court of Criminal Appeals.

Undersigned counsel requests this extension of time because of professional obligations in this and other capital cases pending trial, direct appeal, and collateral review. For example, among other deadlines, counsel has oral argument in a capital case in the Supreme Court of Georgia on December 6, 2022, *see Jeremy Moody v. State of Georgia*, No. S23P0046; counsel has pretrial hearings in a death penalty case set for January 24-26, 2023, *see State of Georgia v. Royhem Deeds*, No. 20R-1162 (Super. Ct. Dodge. Co.); and counsel has been concurrently litigating Ms. Leavell-Keaton's state habeas petition, *see Heather Leavell-Keaton v. State of Alabama*, No. CC-2012-3096.60 (Cir. Ct. Mobile Co.).

Finally, a Petition for Writ of Certiorari is essential in this case because Ms. Leavell-Keaton has been sentenced to death and the issues she will raise in her petition will implicate important issues of federal constitutional law. With an extension of thirty (30) days, undersigned counsel will be able to present the relevant issues to this Court.

WHEREFORE, Ms. Leavell-Keaton respectfully requests that this Court grant her a thirty (30) day extension of time within which to file her Petition for Writ of Certiorari, up to and including February 21, 2023.

Respectfully submitted, this 16th day of November 2022.

/s/ *Mark Loudon-Brown*
MARK LOUDON-BROWN
mloudonbrown@schr.org

SOUTHERN CENTER FOR HUMAN RIGHTS

60 Walter Street, NW
Atlanta, GA 30303
Tel: (404) 688-1202
Fax: (404) 688-9440

Counsel of Record for Petitioner

ATTACHMENT A

Rel: December 17, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-14-1570

Heather Leavell Keaton

v.

State of Alabama

Appeal from Mobile Circuit Court (CC-12-3096)

On Return to Second Remand

McCOOL, Judge.

Heather Leavell Keaton was convicted of murder made capital because the victim, Jonathan Chase DeBlase ("Chase"), was less than 14 years of age. See § 13A-5-40(a)(15), Ala. Code 1975. Keaton was also convicted of reckless manslaughter in connection with the death of Chase's sister, Natalie DeBlase ("Natalie"). See § 13A-6-3(a)(1), Ala. Code 1975. Keaton was sentenced to death for her capital-murder conviction and was sentenced to 20 years' imprisonment for her reckless-manslaughter conviction.

Facts and Procedural History

In December 2010, the partial skeletal remains of Natalie and Chase (hereinafter sometimes collectively referred to as "the children") were discovered in heavily wooded areas in Alabama and Mississippi, respectively. All that remained of Natalie were 68 bones and 3 teeth, and all that remained of Chase were 21 bones and 2 teeth. It was later determined that Natalie had died approximately nine months earlier in March 2010, when she was four years old, and that Chase had died approximately six months earlier in June 2010, when he was three years old. At the time of the children's deaths, Keaton was in a romantic

relationship with the children's father, John Joseph DeBlase, and was living with DeBlase and the children.

In 2012, DeBlase and Keaton were each charged with three counts of capital murder in connection with the children's deaths -- two counts for intentionally causing the death of a person under 14 years of age, see § 13A-5-40(a)(15), and one count for intentionally causing the death of two or more people by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. In November 2014, DeBlase was convicted of all three counts of capital murder and was sentenced to death, and this Court affirmed DeBlase's convictions and death sentence. See DeBlase v. State, 294 So. 3d 154 (Ala. Crim. App. 2018), cert. denied, 294 So. 3d 154 (Ala. 2019), cert. denied, 590 U.S. ___, 140 S. Ct. 2678 (2020).

Keaton's trial began in May 2015, and the evidence presented at her trial tended to establish the following facts. Keaton's vision is severely impaired by multiple conditions, including aniridia, a posterior cataract, glaucoma, and nystagmus. However, although the impairment of Keaton's vision is "pretty extreme" (R. 4388), she is able to perform some typical daily activities, including reading text at close distances, writing,

preparing meals, completing basic household chores, and maneuvering about familiar areas without assistance.

DeBlase and Keaton's relationship began in October 2008 while Keaton was a student at Spring Hill College in Mobile, despite the fact that DeBlase was still married to the children's mother, Corrine Heathcock, at that time. Early in 2009, DeBlase and Heathcock separated, and the children lived in Mobile with DeBlase and his parents following the separation. In March 2009, Keaton took a leave of absence from her studies and began living with DeBlase, his parents, and the children. However, problems subsequently arose between Keaton and DeBlase's mother, Ann DeBlase, regarding the manner in which Keaton disciplined the children. Specifically, Ann testified that she was troubled by an incident in which she saw Keaton put the children "in time-out" (R. 3725) by putting "duct tape on their hands ... behind their back[s] ... where they couldn't move around" (R. 3726) and putting duct tape "on [their] mouth[s]." (R. 3727.) In July 2009, Ann and her husband "told [Keaton] ... she needed to move on because of the way she was treating the [children]" (R. 3730), so Keaton moved to Louisville, Kentucky -- her

hometown -- and DeBlase and the children remained with DeBlase's parents. However, Keaton returned to Mobile in December 2009, and DeBlase and the children moved out of DeBlase's parents' house at that time and lived with Keaton in various places over the next several months. Around that same time, Keaton became pregnant with DeBlase's child.

During January 2010, DeBlase, Keaton, and the children lived with several of DeBlase's friends, and DeBlase's friends testified to statements Keaton had made that tended to demonstrate her contempt for the children. Specifically, DeBlase's friends testified that Keaton had said she "[did not] want to help [DeBlase] raise [the children]" (R. 3846); that, on separate occasions and to separate people, Keaton had referred to the children as "demon spawns from hell" (R. 3806) and the "spawn of Satan" (R. 3980); that Keaton had said Natalie was "a discipline problem" who "thought she was a princess and ... needed to be taught that she wasn't" (R. 3979); and that Keaton had said she "was concerned that [the children] were going to be jealous of" (R. 3979) Keaton's then unborn child. Testimony from DeBlase's friends also indicated that Keaton had treated

the children cruelly, including testimony that Keaton had "struck Natalie in the head" with a hairbrush (R. 3697) and had refused to feed the children adequately. Specifically, one of DeBlase's friends testified that he had seen Keaton give the children only "a few little pieces" of lettuce for dinner one night (R. 3659), despite their evident hunger, and that, for breakfast the following morning, Keaton had forced the children to share only a small, single-serving box of cereal. Other friends of DeBlase similarly testified that the children appeared to be underfed and unusually hungry during the early months of 2010. (R. 3814, 3849, 3881.)

Near the end of January 2010, DeBlase, Keaton, and the children moved to Peach Place Inn in Mobile, and DeBlase and Keaton lived there until they were evicted in July 2010. As noted, it was during that period that both the children died, and the manager of Peach Place Inn testified that the children "always looked pale" and "sickly" during their time at Peach Place Inn. (R. 3929.) In addition, one of DeBlase's friends saw DeBlase, Keaton, and Chase at a Wal-Mart discount store in March 2010 -- the month Natalie died -- and that friend testified that Chase "looked

emergency room sick" at that time but that DeBlase and Keaton did not seem concerned about Chase's health. (R. 3872.)

After DeBlase and Keaton were evicted from Peach Place Inn, they moved to Louisville and lived in an apartment owned by Keaton's mother, Hellena Keaton. Although both the children were dead by that time, Hellena testified that Keaton told her the children were staying with DeBlase's relatives in Las Vegas "until [DeBlase and Keaton] could get settled somewhere." (R. 4539.) However, in November 2010, Hellena overheard part of a telephone conversation between Keaton and DeBlase, and Hellena testified that what she heard from Keaton during the conversation "cause[d] [her] concern." (R. 4547.) Hellena subsequently questioned Keaton about the conversation, and, according to Hellena, Keaton then admitted that Natalie was dead. A few days later, Hellena and her fiancé informed the Louisville Police Department that they "believed that DeBlase had killed his two children" (R. 2873), and they requested a welfare check because they believed Keaton "was being held captive" by DeBlase. (R. 2874.) Later that day, police officers with the Louisville Police Department conducted the welfare check, and, although

the officers observed no "signs ... of someone being held against their will" (R. 2684), Keaton informed the officers that she wanted to leave the apartment. Thus, because DeBlase was in the apartment at that time, the officers remained in the apartment while Keaton gathered some personal property, and Hellena and her fiancé then drove Keaton to the Louisville Police Department. Later that afternoon, neighbors saw DeBlase leave the apartment with a suitcase.

At the Louisville Police Department, Keaton provided a statement to Sgt. Kevin Thompson, and the audiovisual recording of the statement was played for the jury. During that statement, Keaton admitted that the children had died months earlier, and she provided the following accounts of the children's deaths.

Regarding Natalie's death, Keaton noticed that, a few days before Natalie died, her breath smelled "toxic" and "kind of smelled like death" (State's Exhibit 481 at 24:19-36), and Natalie also began "using the bathroom on herself all the time" and "puked up some black stuff." (Id. at 10:44, 12:18.) Keaton claimed that she urged DeBlase to take Natalie to a hospital but that DeBlase refused, and Keaton claimed that she was

unable to seek medical attention for Natalie because DeBlase would take her cellular telephone with him anytime he left the apartment and would physically restrain her if she tried to leave the apartment. On March 4, 2010, DeBlase was scheduled to attend classes at Blue Cliff Career College, but Natalie was still "using the restroom on herself" (id. at 26:39), so Keaton "asked [DeBlase] to stay home from school." (Id. at 13:21.) However, DeBlase told Keaton that, "if [Natalie was] giving [her] some problems, ... just ... put some tarp down in the closet and just put [Natalie] in there for a little while" and "put something in front of [the closet] like either a suitcase or the night stand." (Id. at 13:24-45.) Keaton claimed, however, that it was DeBlase who actually put Natalie in the closet because Keaton "couldn't lift [her]." (Id. at 26:00.) Natalie was in the closet "maybe six to eight hours" (id. at 26:33) while DeBlase was at school, and, at some point during that time, Keaton "heard [Natalie] crying 'Daddy, Daddy.' " (Id. at 14:08.) Keaton then went to the closet and told Natalie that DeBlase would "come and check on [her] when he [got] back" (id. at 14:38), at which point Natalie "started to scream louder" with a "very weird scream" that "sounded like ... a drowning and a strangled

type of scream." (Id. at 15:10-18.) Despite Natalie's apparent distress, Keaton left her in the closet, and when Keaton later checked on her again, Natalie was "not responsive" (id. at 5:42), so Keaton telephoned DeBlase and told him he needed to return to the apartment to check on Natalie. When Sgt. Thompson reminded Keaton that she had just claimed that DeBlase would take her cellular telephone with him anytime he left the apartment, Keaton claimed that "he left it sometimes; it kind of just depend[ed]" on her behavior. (Id. at 15:37.) When DeBlase returned to the apartment later that night, he checked on Natalie and "said that he ... thought she was nonresponsive, and he asked [Keaton] to leave the room, and, when he came out, he said that he had done different things, and [Natalie] still hadn't responded, and he thought that maybe she ... was [dead]." (Id. at 6:02-19.) DeBlase then put Natalie in his van and drove with Keaton and Chase to a heavily wooded area, where DeBlase "told [Keaton] to stay in the van, and then [he] got out and ... opened the trunk and ... walked toward the trees." (Id. at 20:16-25.) Citing her lack of vision, Keaton claimed that she did not see what occurred after DeBlase

got out of the van, but she "assumed that he buried [Natalie]" while she remained in the van with Chase. (Id. at 23:11.)

Regarding Chase's death, Keaton noticed that, in June 2010, Chase "got the same smell on his breath" that Keaton had smelled on Natalie's breath and "start[ed] kind of having accidents, too, like [Natalie] did." (State's Exhibit 481 at 33:50-34:15.) Keaton claimed that, given Natalie's recent death, she urged DeBlase to take Chase to a hospital but that DeBlase refused. One morning later that month, Keaton asked DeBlase to wake Chase for breakfast, and after DeBlase had "been in [Chase's bedroom] a long time," Keaton "went in there and said 'what's taking so long,' and [DeBlase] ... said 'I don't think Chase is responsive,' and [he] asked [her] to leave the room again." (Id. at 36:21-33.) At some point after Keaton left Chase's bedroom, DeBlase "came out and [he] said ... [he had] tried anything [he] could think of and he said he "[thought] that [Chase was] also [dead]." (Id. at 36:58-37:08.) Keaton then returned to Chase's bedroom, and she thought she was able to "feel [Chase] breathing" and to "hear [Chase] trying to ... moan something" (id. at 38:23-27), so she urged DeBlase to "call an ambulance." (Id. at 37:42.) However, DeBlase

told Keaton that she was "just imagining it because [she was] upset" (id. at 38:28) and then "told [her] ... to get in the van, and he drove off again" to a heavily wooded area where he presumably buried Chase while she remained in the van. (Id. at 38:42.)

Approximately two weeks later, Sgt. Angela Prine of the Mobile Police Department traveled to Louisville and, based on the information Keaton had provided to Sgt. Thompson, obtained a warrant authorizing Keaton's arrest on child-abuse charges. Following her arrest, Keaton provided a statement to Sgt. Prine, and an audiovisual recording of the statement was played for the jury. During that statement, Keaton provided a different account of Natalie's death than she had provided to Sgt. Thompson. Keaton reiterated that Natalie was "throwing up something black" a few days before she died (State's Exhibit 483 at 27:01), but Keaton did not claim that Natalie had been put in a closet while DeBlase was at school. Rather, Keaton claimed that she "asked [DeBlase] to go get Natalie for dinner" one evening but that DeBlase returned and told her that Natalie "was nonresponsive" (id. at 18:58) and that he was "going to go back and check" on her. (Id. at 24:10.) After DeBlase checked

on Natalie, he said that she was "still not responding" and "[felt] kind of cold," so he "asked [Keaton] to get [Natalie] some warm clothes." (Id. at 24:28-36.) However, while Keaton was gathering clothes for Natalie, DeBlase "came back out" and said that Natalie was "still not responding" (id. at 24:42) and that he "thought that maybe she was dead." (Id. at 27:34.) DeBlase then "told [Keaton] to get in the van" (id. at 28:44), and he drove Natalie's body to a heavily wooded area. Once again, Keaton claimed that she did not know what occurred when DeBlase got out of the van, and she claimed that, when she asked DeBlase "what happened to Natalie," DeBlase "wouldn't tell [her]" and, instead, told her "it's done" and "don't worry about it." (Id. at 32:43-51.) Keaton's account of Chase's death was largely consistent with the account she provided to Sgt. Thompson. When asked why she did not report the children's deaths, Keaton alleged that DeBlase "told [her] he would kill [her]" if she reported the children's deaths and, moreover, that she "had no way" to report their deaths because DeBlase "ha[d] [her] phone." (Id. at 1:00:25.) Keaton further alleged that she could not report the children's deaths because DeBlase "had people watching out for [her]" to prevent her from leaving

their apartment while he was away. (Id. at 1:02:33.) During the course of Keaton's statement, Sgt. Prine informed Keaton that DeBlase's friends had accused her of physically abusing the children, but Keaton denied the accusations and claimed that DeBlase's friends were "all habitual liars" who were conspiring against her because she had refused to give them money. (Id. at 58:30.)

Cynthia Howard, a social worker with the Kentucky Cabinet for Health and Family Services, arrived at the Louisville Police Department shortly after Keaton's statement to Sgt. Prine and spoke with Keaton to "get details about what had happened and what possible risk there was to [Keaton's] baby." (R. 3010.) While speaking with Howard, Keaton again recounted the circumstances of Natalie's death, and those circumstances were somewhat consistent with Keaton's statement to Sgt. Thompson. Specifically, Keaton told Howard that Natalie "was throwing up black stuff" on the day she died (R. 3017); that Keaton "wasn't feeling well herself that day and ... was begging [DeBlase] to stay home and take care of ... the [children] for her" (R. 3017); that DeBlase "refused to do it and ... told her to put ... Natalie in the closet, lock her in the closet and leave her

there, which [Keaton] did" (R. 3017-18); that, while Natalie was locked in the closet, she "continued to scream for her dad to help her and it continued and continued and continued" (R. 3019); that Natalie eventually "stopped yelling out for her dad" but that Keaton "didn't check on her" (R. 3019); that DeBlase removed Natalie from the closet when he returned home and took her to a bedroom but "would not let [Keaton] go in the bedroom" (R. 3019); that, when DeBlase returned from the bedroom, he "said Natalie was dead" and "put Natalie in the trunk of the vehicle" (R. 3020); and that DeBlase then drove to "some remote location" where "they buried [Natalie's] body." (R. 3021.) Howard testified that Keaton was "very non-descript about anything to do with Chase and how he might have died" (R. 3022), but she testified that Keaton did admit that "they had buried Chase as well." (R. 3021.) Howard also testified that Keaton "felt that [DeBlase] had possibly poisoned" the children (R. 3014) and specifically believed that DeBlase "might have ... given [the children] antifreeze because [Keaton] had seen DeBlase give antifreeze to one of the dogs and enjoy[ ] watching the dog die." (R. 3018.)

Following her arrest, Keaton was incarcerated in the Mobile County jail, and Rosanna Taylor, who was also incarcerated in the jail at that time, testified that Keaton would "talk to [her] about the [children] ... [a]ll of the time." (R. 3481.) Regarding the substance of their conversations, Taylor testified:

> "Q. What did [Keaton] tell you about the [children]? What did she say about them?
>
> "A. She told me that she fed them antifreeze and she cooked for them and [DeBlase] would pre-measure it before he would leave for massage therapy school and she would pour it in their food. She told me Princess Natalie acted like a princess and, you know, how she would discipline the children and --
>
> "Q. And how would she discipline the children?
>
> "A. Natalie would move when [Keaton] was brushing her hair and [Keaton] would hit [Natalie] with the brushes. Several times [Keaton] told me that [she] and [DeBlase] would burn [the children] with cigarette lighters and cigarettes and candle wax. ...
>
> "....
>
> "Q. Did she say what type of kids they were?
>
> "A. Well, she despised Natalie.
>
> "...."

"Q. And ... how did they cook the food or how --

"A. In different pots and pans. They each had a set. [DeBlase and Keaton] had one set that they would eat their meals in, which the poison wouldn't be -- the antifreeze would not be in there. And she would cook the [children's meals] in another set, which that's where she used the antifreeze.

"....

"Q. Did she ever -- was there any talk about how ... they would feed the [children]?

"A. She would -- at first, they would eat it because, I guess, they didn't know the difference. And, as time progressed, she would force feed them because they wouldn't take it anymore and they knew something was wrong. And she said that out of her own mouth, that they knew something was wrong with it and she would make them eat it. And, if they wouldn't, they would get punished.

"Q. Did she say what would happen after they ate the food?

"A. They would throw up black stuff.

"Q. Did she tell you -- could she smell anything?

"A. Yeah. ... They threw up black stuff and they smelled like they were dying from the inside out.

"....

"Q. Did she tell you anything about any antifreeze before?

"A. ... [DeBlase] would go buy it and he would measure it out everyday before he left how much to put in each meal. And it wasn't for them to do both of [the children]. It was for them to do Natalie. But ... when she passed, Chase became a liability because he kept asking where his sister was.

"....

"Q. Did she ever say anything about them having a dog?

"A. The grandmother had a dog and [Keaton] told me [DeBlase] fed it antifreeze to see how long it would take to kill a living thing. ...

"Q. Talking back about, specifically, Natalie, ... did [Keaton] tell you what happened to Natalie when she died --

"A. Well ... on that day, [Natalie] was in the bathroom at first because she had ... lost control of her bowels and ... was urinating and defecating on herself. So, they put her in the bathroom on an air mattress. And she said [Natalie] was ... crying all day long and she said she was tired of it. So, she called [DeBlase] and [DeBlase] came home and he took Natalie out of the bathtub and went in the room. And she said that [Natalie] was screaming and screaming and screaming and, finally, that it was silent. [DeBlase] came to the door and asked for a change of clothes.

"....

"Q. What did they do after that?

"A. They loaded her body up in the van and loaded Chase up and went and dumped her body.

"....

"Q. And, after they dumped Natalie, what happened after that with Chase?

"A. They stopped poisoning. You know, they weren't poisoning him. He wasn't -- they were going to keep Chase. Chase wasn't the issue.

"Q. And then, what did she tell you next about what happened with Chase?

"A. About four months later, ... they would go in public and Chase would ask where his sissy was, and that's when she called him a liability and said that they started doing Chase.

"Q. And what did they do to Chase?

"A. Started feeding him the poison, the antifreeze.

"Q. And what do you remember about what did she say happened to Chase?

"A. Chase would start urinating on hi[m]self as well. You know, he was young, so he wasn't fully potty trained then. You know, she told me that he would wear diapers anyway. And she put him in the corner in the living room where the dining room table was supposed to be; she put him in the corner, taped him to a broomstick, and sat him on a tarp because he had peed and defecated on hi[m]self.

"Q. Did she tell you what she used to put him to the broomstick?

> "A. Uh-huh, masking tape. Like they used tape and then they taped his mouth shut so he couldn't cry.
>
> "Q. Did she tell you where Chase died?
>
> "A. I don't recall that. I do recall that she told me they wrapped him up ... in the tarp that they had him in the corner on when he did pass. That's what they wrapped him up in and loaded him in the van as well.
>
> "....
>
> "Q. Did she tell you ... how she felt after Natalie and Chase were gone?
>
> "A. They didn't have any responsibilities. [DeBlase] even asked her could they stop and get this game because they didn't have anymore responsibilities.
>
> "Q. How was her demeanor when she talked to you about these things?
>
> "A. She didn't have any remorse. It wasn't -- she didn't get sad. It's like she didn't care. She was not human."

(R. 3481-88.)

Parts of Taylor's testimony were corroborated by other people who had heard Keaton make incriminating statements while in the Mobile County jail. Donna Frazier, who was also incarcerated in the jail, testified that Keaton had admitted that she and DeBlase "got rid of Natalie" and

then "had to get rid of Chase or else they were going to be in trouble" because Chase "cried all the time continuously for his sister." (R. 3533.) Frazier also testified that Keaton had told her that Keaton's aunt's dog "had been poisoned [with antifreeze] to see how long it took for [the antifreeze] to kill it."[1] (R. 3534.) Crystal Arnold, who was also incarcerated in the jail, testified that Keaton had admitted that she had punished Natalie and Chase by "duct tap[ing] ... a broom to their back[s] and mak[ing] them stand in the corner." (R. 3378.) Latonya Jones, a correctional officer at the jail, testified that she had once walked past the area where Keaton "was already in a conversation" with another inmate (R. 3550) and had "heard [Keaton] say, 'well, we got rid of the girl first because she was eating too much. And then, later, ... got rid of the boy.' " (R. 3559.)

A few days after Keaton was arrested, DeBlase was apprehended in Florida and was extradited to Mobile, and on December 3, 2010, he directed law enforcement officers to the general areas where he had

[1]As noted, Taylor testified that the dog belonged to either Keaton's grandmother or DeBlase's grandmother.

buried the children. After several days of searching, Chase's partial skeletal remains were discovered on December 8, 2010 -- approximately six months after his death -- and Natalie's partial skeletal remains were discovered on December 11, 2010 -- approximately nine months after her death. Near Chase's remains, searchers found pieces of multiple plastic garbage bags and, "within just a few feet of where the skull was located" (R. 3332), found pieces of partially decomposed "duct tape and a [sock] ... attached to the duct tape." (R. 3328.) During a search of DeBlase's van, Sgt. Thompson found a bottle of antifreeze, and dogs trained to detect the scent of cadavers searched the van and "gave [their] trained indication for cadavers" near the back of the van. (R. 3098.)

In July 2012, the children's remains were exhumed following their proper burial, and Dr. Staci Turner, a medical examiner with the Alabama Department of Forensic Sciences, performed autopsies. Dr. Turner could not make an unequivocal determination regarding the cause or causes of the children's deaths but, instead, testified that there were "several likely factors," including "poisoning, dehydration, starvation, asphyxia, which is prevention of getting air into the body by some means, and it could be

a combination of one or more of those things." (R. 4070, 4083-84.) When asked specifically if the cause of death "could have been poisoning with antifreeze," Dr. Turner testified that "[i]t could have been" but that she could not conclusively make such a determination from the autopsies. (R. 4072.) Forensic testing of the children's remains and the items found near their remains did not detect the presence of antifreeze. However, Madeline Montgomery, the forensic toxicologist who examined the children's remains, provided multiple potential explanations for "why there was no ... antifreeze present," including "that it was never there," that "it could have been washed away by the elements," or that it "was below a level that [her] instrument could detect." (R. 4171.)

Joann Curtin, a forensic anthropologist, also examined the children's remains. Curtin testified that she observed "lines of arrested growth, also known as Harris lines," in Natalie's bones, which, according to Curtin, can result from several factors, including "malnutrition, starvation, poisoning, [or] even psychological stress." (R. 4343.) Curtin was unable to make a similar determination from Chase's remains because his remains were "much more poorly preserved than Natalie's." (R. 4348.) However, Curtin

testified that she did observe "an area of increased porosity" in Chase's skull, which she testified is "consistent with a nutritional deficiency." (R. 4350.)

During the State's case-in-chief, the defense introduced a December 28, 2010, written statement from DeBlase that states, in pertinent part:

> "On the day of March 4, 2010, I choked my daughter Natalie to death cause of the suffering that she was going through cause of [Keaton], and on June 20, 2010, I knew what I was doing when I was choking my son Chase ... cause of the suffering that he was going through cause of [Keaton]. I was blinded by love cause [Keaton] told me that I had to make a choice. A choice that could not of made because I loved her and my children, but at the end I had to stop my children suffering. ... I know what I did was wrong but [Keaton] left me no choice because she would have continue to torute [sic] my children."

(C. 2935.)

On May 27, 2015, the jury found Keaton guilty of capital murder in connection with Chase's death and guilty of reckless manslaughter in connection with Natalie's death. At the penalty phase of trial, the jury unanimously found the existence of one aggravating circumstance -- that the murder of Chase "was especially heinous, atrocious, or cruel compared to other capital offenses," § 13A-5-49(8), Ala. Code 1975 -- and

recommended by a vote of 11-1 that Keaton be sentenced to death. The trial court followed the jury's recommendation and sentenced Keaton to death for her capital-murder conviction and sentenced Keaton to 20 years' imprisonment for her reckless-manslaughter conviction.[2] Because this case involves the death penalty, the appeal of Keaton's capital-murder conviction and death sentence is automatic. See § 13A-5-55, Ala. Code 1975.

On original submission, Keaton correctly argued that the case must be remanded to the trial court because she had not been afforded an opportunity to allocute at the sentencing hearing in accordance with Rule 26.9(b), Ala. R. Crim. P. Thus, on October 6, 2020, this Court, by order, remanded the case to the trial court with limited instructions for that court to afford Keaton an opportunity to allocute and to resentence Keaton

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

after taking into consideration any statement she chose to make. Pursuant to this Court's order, the trial court held a hearing on January 7, 2021, at which Keaton made a brief statement on her behalf, after which the trial court reimposed the original sentences. However, the trial court's resentencing order did not contain the findings of fact required by § 13A-5-47, Ala. Code 1975. Thus, on May 28, 2021, this Court, by order, again remanded the case to the trial court with instructions for that court to issue a new sentencing order that complies with § 13A-5-47, which the trial court did on June 23, 2021.[3] We turn now to the merits of Keaton's appeal.

Standard of Review

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

[3]In its second resentencing order, the trial court adopted its findings of fact from its original sentencing order and added an additional finding that the substance of Keaton's allocution was not mitigating. Contrary to Keaton's contention, that resentencing order provides a sufficient basis for this Court's independent review of the propriety of Keaton's death sentence. See Part XXI, infra.

"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."

Regarding plain-error review, this Court has stated:

"In Ex parte Brown, 11 So. 3d 933 (Ala. 2008), the Alabama Supreme Court explained:

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

> circumstances in which a miscarriage of justice would otherwise result.' United States v. Frady, 456 U.S., at 163, n.14."
>
> " 'See also Ex parte Hodges, 856 So. 2d 936, 947-48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would "seriously affect the fairness or integrity of the judicial proceedings," and that the plain-error doctrine is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result" (internal quotation marks omitted)).'
>
> "11 So. 3d at 938. 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999). Although [Keaton's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)."

Towles v. State, 263 So. 3d 1076, 1080-81 (Ala. Crim. App. 2018). However, plain-error review "does not apply to convictions in which the death penalty has not been imposed." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). Thus, this Court will not review any claim that is related solely to Keaton's reckless-manslaughter conviction unless the claim was properly preserved in the trial court. See id. at ___ (holding, in a case in which the appellant had

been sentenced to death for his capital-murder conviction, that this Court would "not review any argument related [solely] to [the appellant's] conviction for theft of property in the second degree unless the specific argument was raised in the trial court and was preserved for appellate review").

Discussion

I.

Keaton argues that Judge Roderick Stout should have recused himself from presiding over her trial. Because Keaton did not seek Judge Stout's recusal from the trial, we review this claim for plain error only.[4] See Stewart v. State, 730 So. 2d 1203, 1240 (Ala. Crim. App. 1996) (reviewing for plain error a recusal claim that was not raised at trial).

Canon 3.C.(1)(a), Alabama Canons of Judicial Ethics, provides that a judge "should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned, including ... instances where ... [h]e has a personal bias or prejudice concerning a party." The standard

[4]Keaton did seek Judge Stout's recusal from the resentencing proceedings. We address that issue in Part XX.A, infra.

for recusal is an objective one, Woodward v. State, 276 So. 3d 713, 730 (Ala. Crim. App. 2018), and "[t]he necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case." Ex parte George, 962 So. 2d 789, 791 (Ala. 2006) (quoting Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 2 (Ala. 2002)). In other words, " '[t]he question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety.' " Carruth v. State, 927 So. 2d 866, 873 (Ala. Crim. App. 2005) (quoting Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994)). However, "[a]ll judges are presumed to be impartial and unbiased," and "[t]he burden is on the party seeking recusal to prove otherwise." Luong v. State, 199 So. 3d 173, 205 (Ala. 2015).

> " ' " '[T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.' " Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987), quoting Fulton v. Longshore, 156 Ala. 611, 46 So. 989 (1908). Any disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source. Hartman v.

> Board of Trustees of the University of Alabama, 436 So. 2d 837 (Ala. 1983); Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979). Thus,
>
> > " ' " '[T]he disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a character, calculated to impair seriously his impartiality and sway his judgment, and must be strong enough to overthrow the presumption of his integrity.' "
>
> " 'Ross v. Luton, 456 So. 2d [249] at 254 [(Ala. 1989)], quoting Duncan v. Sherrill, 341 So. 2d 946, 947 (Ala. 1977), quoting 48 C.J.S. Judges § 82(b).'
>
> "Ex parte Melof, 553 So. 2d 554, 557 (Ala. Crim. App. 1989), abrogated on other grounds by Ex parte Crawford, 686 So. 2d 196 (1996)."

Salvagio v. State, 274 So. 3d 310, 314 (Ala. Crim. App. 2018).

In support of her claim that Judge Stout should have recused himself from her trial, Keaton relies on the fact that Judge Stout "had already presided over the capital trial and sentencing of DeBlase." (Keaton's brief, p. 12.) Specifically, the crux of Keaton's argument is that DeBlase's sentencing order indicates that Judge Stout had formed a

generally unfavorable opinion of her while presiding over DeBlase's trial and had formed the specific opinion that she was guilty and was more culpable than DeBlase. In addition, Keaton notes that Judge Stout made a finding of fact in her sentencing order that was based on evidence presented at DeBlase's trial and that, before pronouncing her sentence, Judge Stout stated that it had been "very difficult" for him to "separate emotion from [his] job." (R. 5678.) According to Keaton, such circumstances would lead an objectively reasonable person to question Judge Stout's impartiality in her trial.

As noted, "[a]ny disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source." Salvagio, 274 So. 3d at 314 (emphasis added; citations omitted). Thus, as a general rule, the fact that a judge presided over " ' "the same or a related case may not serve as a basis for a recusal motion" ' "; rather, the prejudice or bias that will require recusal " ' "must derive from something other than that which the judge learned by participating in the case." ' " Stewart, 730 So. 2d at 1240 (quoting Parker v. State, 587 So. 2d 1072, 1097 (Ala. Crim. App. 1991), quoting in turn McWhorter v. City of Birmingham, 906 F.2d

674, 678 (11th Cir. 1990)). See Beard v. State, 661 So. 2d 789, 796 (Ala. Crim. App. 1995) (rejecting a recusal claim that was based on the judge's "knowledge of the facts of the [defendant's] case" as a result of presiding over the codefendant's trial), impliedly overruled on other grounds by Ex parte Borden, 769 So. 2d 950 (Ala. 2000).

There is, however, a limited exception to the extrajudicial-source rule. Opinions formed by a judge while acting in a judicial capacity will require recusal in the rare case where those opinions result in " ' " 'pervasive bias and prejudice, ' " ' " against a party, Stewart, 730 So. 2d at 1241 (quoting Parker, 587 So. 2d at 1097, quoting in turn McWhorter, 906 F.2d at 678, quoting in turn Jaffe v. Grant, 793 F.2d 1182, 1189 (11th Cir. 1986)), or " 'a deep-seated favoritism or antagonism that would make fair judgment impossible.' " Ex parte Adams, 211 So. 3d 780, 791 (Ala. 2016) (quoting Liteky v. United States, 510 U.S. 540, 555 (1994)). However, demonstrating that recusal is required under this exception is a heavy burden -- see Shu Ling Ni. v. Board of Immigr. Appeals, 439 F.3d 177, 181 (2d Cir. 2006) (describing the burden as "substantial"); and United States v. Parker, 837 F. App'x 341, 346 (6th Cir. 2020) (describing

the burden as "an 'uphill battle' " (quoting Burley v. Gagacki, 834 F.3d 606, 616 (6th Cir. 2016))) -- and that burden is not satisfied merely by demonstrating that a judge has formed an unfavorable opinion of a party, including an opinion that a defendant is guilty, because such opinions do not necessarily result in bias or prejudice that prevents fair judgment. See Parker, 587 So. 2d at 1097 (holding that recusal was not required for a judge who had allegedly "prejudged" the defendant's culpability while presiding over an accomplice's trial because the defendant "made no showing of pervasive bias and prejudice"); Mayberry v. State, 285 So. 2d 507, 510 (Ala. Crim. App. 1972) (holding that the trial judge did not err by refusing to recuse himself from ruling on the defendant's motion for a new trial, despite the fact that the judge had formed an opinion during trial that the defendant was " 'guilty as sin,' " because "an impression of guilty would not necessarily bias him"); McMahon v. Hodges, 382 F.3d 284, 290 (2d Cir. 2004) (holding that recusal was not required for a judge who had "undoubtedly formed opinions about [the defendant's] guilt during the course of [the codefendant's] trial" because the judge "had not evidenced the 'deep-seated favoritism or antagonism that would make fair judgment

impossible' " (quoting Liteky, 510 U.S. at 555)); Parker, 837 F. App'x at 345, 346 (holding that recusal was not required because the judge's "negative disposition" toward the defendant was "based on the facts of the proceeding and prior contact with [a] related case" and because the defendant had "not shown that the judge's opinion was extreme or threw into question the ability to judge fairly"); and Robison v. Wichita Falls & North Texas Cmty. Action Corp., 507 F.2d 245, 253 (5th Cir. 1975) (noting that "a determination of bias does not follow from the fact that a hearing examiner or trial judge may entertain an unfavorable opinion of a party as a result of evidence received in a prior or connected hearing").

Here, Keaton alleges that Judge Stout had formed a generally unfavorable opinion of her while presiding over DeBlase's trial and had formed the specific opinion that she was guilty and was more culpable than DeBlase. However, Keaton's only evidence of alleged bias or prejudice stemming from those alleged opinions is Judge Stout's adverse findings of fact based on conflicting evidence and his decision to sentence her to death despite mitigating circumstances. Such evidence does not come close to satisfying the heavy burden of demonstrating "pervasive

bias and prejudice," Stewart, 730 So. 2d at 1241 (citations omitted), or "a deep-seated favoritism or antagonism that would make fair judgment impossible." Ex parte Adams, 211 So. 3d at 791 (citation omitted). See Andrade v. Chojnacki, 338 F.3d 448, 462 (5th Cir. 2003) (holding that adverse findings of fact did not "even arguably" " 'reveal such a high degree of favoritism or antagonism as to make fair judgment impossible' " (quoting Liteky, 510 U.S. at 555)); United States v. Wisecarver, 644 F.3d 764, 771 (8th Cir. 2011) (holding that adverse findings of fact did not demonstrate "deep-seated bias or animosity"); and Beard, 661 So. 2d at 796 (holding that the defendant had not demonstrated "pervasive bias or prejudice" where the defendant's recusal claim was based on the facts that the trial judge had presided over the codefendant's trial and had sentenced the defendant to death). Furthermore, this Court has reviewed the entire record of Keaton's case and has not found any evidence to support the conclusion that Judge Stout was biased or prejudiced against Keaton to any extent. To the contrary, the record reflects that Judge Stout appreciated the magnitude of a capital-murder trial and conscientiously did everything in his power to ensure that Keaton received

a fair trial, including making multiple rulings in her favor. Thus, even if Judge Stout did form unfavorable opinions of Keaton during DeBlase's trial, those opinions did not require Judge Stout's recusal because there is no indication that they impaired his ability to preside over Keaton's trial fairly and impartially.[5]

Keaton's only other grounds for recusal are Judge Stout's finding of fact in her sentencing order that was based on evidence presented at DeBlase's trial and Judge Stout's statement that it had been "very difficult" for him to "separate emotion from [his] job." It is true that Keaton's sentencing order states that her "cell phone was traced" after a warrant was issued for her arrest (C. 50), and it is true that no such evidence was presented at her trial. However, that unsupported finding of fact -- which was a peripheral fact wholly irrelevant to Keaton's

---

[5]Keaton's reliance on State v. Moore, 988 So. 2d 597 (Ala. Crim. App. 2007), is misplaced. The issue in Moore was "whether a judge should recuse himself or herself after a case has been reversed on appeal," i.e., " 'whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous.' " Id. at 601 (quoting United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977)). Thus, Moore is not applicable here.

convictions and sentences -- was harmless error, and, regardless, an error in a trial judge's findings of fact is not evidence of bias or prejudice. See In re J.P. Linahan, Inc., 138 F.2d 650, 654 (2d. Cir. 1943) (noting that a trial judge's "findings of fact may be erroneous, for, being human, he is not infallible" but that such error "does not brand him as partial and unfair"). Likewise, the fact that Judge Stout found the case to be emotional does not demonstrate that he was personally biased or prejudiced against Keaton; to the contrary, this Court has acknowledged that a trial judge " 'is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom.' " Luong, 199 So. 3d at 206 (quoting Allen v. State, 290 Ala. 339, 342, 276 So. 2d 583, 586 (1973)). See also Creager v. State, 737 N.E.2d 771, 783-84 (Ind. Ct. App. 2000) (noting that "the mere fact a judge has an emotional reaction does not demonstrate that the judge is biased or prejudiced" and holding that recusal was not required for a judge who "was emotionally upset during the sentencing phase at trial"). Moreover, Judge Stout merely stated that it had been difficult for him to separate

emotion from his duties, not that he had been unable to do so, and the record does not reflect that any of his rulings were emotionally based.

Based on the foregoing, Keaton has not demonstrated that an objectively reasonable person would question the presumptions of impartiality and integrity with which Judge Stout was cloaked. Salvagio, 274 So. 3d at 314. Thus, there was no basis for Judge Stout's recusal from Keaton's trial, and Judge Stout certainly did not commit plain error by not sua sponte recusing himself from the trial. Accordingly, Keaton is not entitled to relief on this claim.

II.

Keaton argues that the trial court erred by denying her motion for a change of venue because, she says, the pretrial publicity of her case prevented her from obtaining an impartial jury in Mobile County.

> " 'When requesting a change of venue, "[t]he burden of proof is on the defendant to 'show to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried.' " ' Jackson v. State, 791 So. 2d 979, 995 (Ala. Crim. App. 2000) (quoting Hardy v. State, 804 So. 2d 247, 293 (Ala. Crim. App. 1999), aff'd, 804 So. 2d 298 (Ala. 2000), quoting in turn Rule 10.1(b), Ala. R. Crim. P.).

> " '[T]he determination of whether or not to grant a motion for change of venue is generally left to the sound discretion of the trial judge because he has the best opportunity to assess any prejudicial publicity against the defendant and any prejudicial feeling against the defendant in the community which would make it difficult for the defendant to receive a fair and impartial trial.'

"Nelson v. State, 440 So. 2d 1130, 1132 (Ala. Crim. App. 1983). Therefore, '[a] trial court's ruling on a motion for a change of venue is reviewed for an abuse of discretion.' Woodward v. State, 123 So. 3d 989, 1049 (Ala. Crim. App. 2011).

> " 'In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated "actual prejudice" against him on the part of the jurors; 2) when there is "presumed prejudice" resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected.'

"Hunt v. State, 642 So. 2d 999, 1042-43 (Ala. Crim. App. 1993), aff'd, 642 So. 2d 1060 (Ala. 1994).

> "....

"Prejudice is presumed ' "when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." ' Hunt, 642 So. 2d at 1043 (emphasis omitted) (quoting Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)). ' "To justify a presumption of prejudice under this standard, the publicity must be both extensive and sensational

> in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice." ' Jones v. State, 43 So. 3d 1258, 1267 (Ala. Crim. App. 2007) (quoting United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990)). 'In order to show community saturation, the appellant must show more than the fact "that a case generates even widespread publicity." ' Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993) (quoting Thompson v. State, 581 So. 2d 1216, 1233 (Ala. Crim. App. 1991)). Only when 'the pretrial publicity has so "pervasively saturated" the community as to make the "court proceedings nothing more than a 'hollow formality' " ' will presumed prejudice be found to exist. Oryang, 642 So. 2d at 983 (quoting Hart v. State, 612 So. 2d 520, 526-27 (Ala. Crim. App.), aff'd, 612 So. 2d 536 (Ala. 1992), quoting in turn, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)). 'This require[s] a showing that a feeling of deep and bitter prejudice exists in [the county] as a result of the publicity.' Ex parte Fowler, 574 So. 2d 745, 747 (Ala. 1990)."

Floyd v. State, 289 So. 3d 337, 372-74 (Ala. Crim. App. 2017). The burden of demonstrating that prejudice is to be presumed from pretrial publicity has been described as "enormous" and " 'extremely heavy.' " Blackmon v. State, 7 So. 3d 397, 411, 412 (Ala. Crim. App. 2005) (quoting Blanton v. State, 886 So. 2d 850, 877 (Ala. Crim. App. 2003)). Thus, " '[t]he presumptive prejudice standard is "rarely" applicable, and is reserved for only "extreme situations." ' " Blanton, 886 So. 2d at 877 (quoting Hunt v.

State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993), quoting in turn Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985)).

In her motion for a change of venue, Keaton claimed that the pretrial publicity of her case was so extensive and inflammatory that prejudice to her should be presumed, and she submitted evidence in support of that claim at a hearing on the motion. Specifically, Keaton submitted a certified business record from "WALA-TV/FOX 10 News" that reflects each date her case was referenced in WALA's news coverage from March 2014 to January 2015. (4th Supp. C. 83-99.) However, that business record does not contain the substance of WALA's coverage but, instead, is simply a list of "search results for Heather Keaton." (Id.) Keaton also submitted an uncertified document that appears to be a transcript of seven instances of brief news coverage from "WPMI television" (R. 461) regarding her case. (4th Supp. C. 100-101.) Handwritten notations on that transcript indicate that the coverage occurred from November 2014 to February 2015, and the transcript reflects that the coverage indicated that the children had been "strangled and their bodies buried," that DeBlase had been convicted of "torturing

and killing" the children and had been sentenced to death, that Keaton had also been charged with "torturing and murdering" the children and was scheduled to go to trial, that DeBlase and Keaton each blamed the other for the children's deaths, and that Keaton had filed a motion for a change of venue and was awaiting a ruling on the motion. (Id.)

The trial court also heard testimony from two polling experts -- Jerry Ingram, who testified for the defense, and Verne Kennedy, who testified for the State. To form an opinion as to whether Keaton could obtain an impartial jury in Mobile County, Ingram surveyed 300 citizens of Mobile County and, based upon the data he collected, concluded that, "among all potential jurors in Mobile County, 53.5 percent ... feel that [Keaton] is guilty of killing [the children]." (R. 470.) Given that data, Ingram opined that "it's going to be difficult, very difficult for [Keaton] to get a fair trial in [Mobile] County." (R. 471.) However, Ingram conceded that, with "a very large jury pool," obtaining an impartial jury in Mobile County was "not impossible." (R. 480.) Kennedy did not conduct any research of his own but, instead, reviewed the data Ingram had collected and concluded that 50 percent of the citizens of Mobile County had a fixed opinion of

Keaton's guilt. (R. 523-24.) Given that data, Kennedy likewise opined that obtaining an impartial jury in Mobile County "would be more difficult than the average case" but would "certainly not [be] very difficult to do because it simply means you get a larger jury pool to do so." (R. 537.)

In Skilling v. United States, 561 U.S. 358 (2010), the United States Supreme Court identified four factors to consider in determining whether the pretrial publicity of a defendant's case supports a finding of presumed prejudice: " '(1) the size and characteristics of the community where the offenses occurred; (2) the content of the media coverage; (3) the timing of the media coverage in relation to the trial; and (4) the media interference with the trial or its influence on the verdict.' " Luong v. State, 199 So. 3d 139, 146 (Ala. 2014) (citing Skilling, 561 U.S. at 380-85). Accordingly, we consider each of the Skilling factors to determine whether the pretrial publicity of Keaton's case supports a finding of presumed prejudice. See Luong, 199 So. 3d at 147 (stating that the Alabama Supreme Court would "consider[ ] the ... Skilling factors" to determine whether the pretrial publicity of the defendant's case supported a finding of presumed prejudice).

As to the first Skilling factor -- the size and characteristics of the community where the offenses occurred -- the Alabama Supreme Court has been "reluctant to conclude that 12 impartial jurors could not be empaneled" in Mobile County because, as of the 2010 census, Mobile County has "a population of over 400,000 citizens," which "reduces the likelihood of prejudice." Luong, 199 So. 3d at 147. That conclusion is strengthened in this case by the fact that Keaton's own polling expert conceded that, with a sufficiently large jury pool, it would be possible to obtain an impartial jury in Mobile County. Thus, the first Skilling factor weighs against a finding of presumed prejudice. Compare Floyd, 289 So. 3d at 374 (holding that the first Skilling factor weighed in favor of a finding of presumed prejudice in a case that occurred in "a relatively small rural county ... of just over 38,000 residents).

As to the second Skilling factor -- the content of the media coverage -- Keaton alleges that the media coverage of her case was so inflammatory and sensational that it " 'incited anger, revulsion, and indignation to the degree that' a change of venue was required." (Keaton's brief, p. 33 (quoting Luong, 199 So. 3d at 148).) In support of that allegation, Keaton

alleges that the media coverage was "accompanied by vicious public commentary aimed at [her]." (Keaton's brief, p. 33.) The problem with Keaton's argument is that the evidence she presented at the change-of-venue hearing does not support those allegations. As noted, Keaton submitted a list of numerous instances in which her case had been referenced in WALA's news coverage from March 2014 to January 2015, but she did not present evidence of the substance of that coverage. Thus, it is impossible to determine whether WALA's coverage of Keaton's case was inflammatory or sensational, and the mere fact that WALA's coverage was extensive is not sufficient to support a finding of presumed prejudice. See Luong, 199 So. 3d at 147 ("Unequivocally, the record establishes that the media coverage of these offenses and the proceedings ... were extensive; however, this fact alone does not support a finding of presumed prejudice."); and Floyd, 289 So. 3d at 374 ("To justify a presumption of prejudice ..., the publicity must be both extensive and sensational in nature." (emphasis added; citations omitted)). Keaton also submitted what is purportedly a transcript of seven instances of WPMI's news coverage of her case, but that transcript indicates that WPMI's coverage

focused on procedural aspects of the case and factual information regarding the children's deaths, which is not sufficient to support a finding of presumed prejudice. See Luong, 199 So. 3d at 147 (holding that there was no presumption of prejudice from extensive media coverage that "mainly focused on the facts surrounding the offenses and the proceedings of the case"); and Floyd, 289 So. 3d at 374 ("If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice." (citation omitted)). As to her allegation that the media coverage was "accompanied by vicious public commentary," Keaton presented no evidence of such "public commentary."[6] Given the limited evidence Keaton presented at the

[6]We note that Keaton's motion for a change of venue included 15 examples of "public commentary" purportedly published on the Internet by citizens of Mobile County (C. 137-38), and that commentary admittedly can be characterized as "vicious." However, even if such commentary had been admitted into evidence, the Alabama Supreme Court has held that it "cannot conclude that, in this age of digital communication, the published opinions of certain of the citizens in [Mobile County] constitute grounds for presuming that a fair trial could not be conducted in Mobile County." Luong, 199 So. 3d at 147-48. Similarly, we cannot conclude that the published opinions of 15 citizens in a county of more than 400,000 citizens provide grounds for concluding that Keaton could not obtain an impartial jury in Mobile County.

change-of-venue hearing, there is no basis for concluding that the media coverage of her case was inflammatory or sensational. Thus, the second Skilling factor also weighs against a finding of presumed prejudice.

As to the third Skilling factor -- the timing of the media coverage -- the evidence presented at the change-of-venue hearing reflects media coverage of Keaton's case up to February 26, 2015. (4th Supp. C. 83-101.) Thus, there is no evidence of any media coverage in the two months preceding Keaton's May 2015 trial, and other courts have held that a two-month break between media coverage and trial can "work[ ] to eliminate the risk of presumed prejudice." United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002). See also United States v. Hendrix, 752 F.2d 1226 (7th Cir. 1985); People v. Hankins, 361 P.3d 1033 (Colo. App. 2014); and State v. Langford, 67 Wash. App. 572, 837 P.2d 1037 (1992). That is not to say that a two-month break between media coverage and trial will always weigh against a finding of presumed prejudice; that determination will necessarily depend upon the particular facts of each case. In this case, however, the record indicates that the two-month break between the media coverage and trial did in fact serve to eliminate any prejudice to

Keaton. Only five jurors indicated on their juror questionnaires that they had heard any information regarding Keaton's case, and each of those jurors indicated that her knowledge of the case was minimal and that she would decide the case based on the evidence presented at trial. (R. 1540-44, 1725-26, 1827-28, 1971-73, 2287-88.) Therefore, there is no basis for concluding that Keaton was prejudiced by the media coverage that occurred more than two months before trial and which, for all that appears in the record, was not inflammatory or sensational. See Hendrix, 752 F.2d at 1231 (holding that the defendants were not prejudiced by media coverage that last occurred approximately two months before trial because no juror "remembered more than a few details about the case" and each juror "assured the court that they would not be influenced by anything they might have seen or read about the case before trial"). Thus, the third Skilling factor also weighs against a finding of presumed prejudice.

As to the fourth Skilling factor -- the media interference with the trial or its influence on the verdict -- Keaton argues that the media coverage of her case "spilled into [her] trial" when veniremembers V.S.

and J.D., who did not serve on the jury, announced in the presence of the venire their fixed opinions that Keaton was guilty. (Keaton's brief, p. 34.) Specifically, when the trial court asked the venire during general voir dire if anyone had "a fixed opinion as to [Keaton's] guilt or innocence" (R. 1127), V.S. replied, "I think she's guilty" (R. 1128), and J.D. replied, "I have a preconceived notion as to her guilt as well." (R. 1130.) However, V.S. and J.D. did not indicate that they had formed their opinions from the media coverage of Keaton's case (R. 1127-30); therefore, even if V.S. and J.D. did improperly influence the jury's verdict -- a claim we address in Part III.A, infra -- that fact does not support the conclusion that the verdict was improperly influenced by the media coverage. In addition, we note that the trial court repeatedly instructed the jurors throughout the trial that they were not to "access media" and were to "keep [themselves] isolated and insulated from any outside influence or outside sources of information." (R. 2765.) Thus, the fourth Skilling factor also weighs against a finding of presumed prejudice.

In short, each of the Skilling factors weighs against a finding of presumed prejudice in this case; as a result, this is not one of the "extreme

situations" for which the presumptive-prejudice standard is reserved. Blanton, 886 So. 2d at 877 (citations omitted). Accordingly, the trial court did not abuse its discretion by denying Keaton's motion for a change of venue.

In a related claim, Keaton argues that the trial court erred by allowing Kennedy to testify for the State at the change-of-venue hearing. In support of that claim, Keaton notes that, before filing her motion for a change of venue, defense counsel had filed a motion seeking $13,000 to hire Kennedy as a polling expert. However, the trial court stated that $13,000 seemed "awfully high" and instructed defense counsel to "see if there's not someone who ... would not be quite as expensive" (R. 277-78), and counsel ultimately selected Ingram to serve as a polling expert for the defense. At the change-of-venue hearing, defense counsel objected to Kennedy's testimony on the basis that counsel had "met with [Kennedy]" and "gave him information about the case" and that, as a result, Kennedy had a conflict of interest that prohibited him from testifying for the State. (R. 508.) The State argued, however, that Kennedy had "no independent recollection of speaking with" defense counsel and had "no knowledge of

any specifics in this case" (R. 508-09), at which point the following colloquy occurred:

> "THE COURT: Dr. Kennedy, ... has [the prosecutor] correctly stated that you have no significant independent or any independent recollection of discussing Keaton's situation with [defense counsel]?
>
> "KENNEDY: Many people come up to me and say we would like to retain you in an upcoming case. They may name the case or may not, and I never hear from them again. And that's basically what happened.
>
> "THE COURT: So specifically here you have no --
>
> "KENNEDY: I have no recollection of even the names.
>
> "THE COURT: Okay. Fine. So I'm satisfied that he wouldn't appear to have a conflict in giving testimony on behalf of the State in this case in light of the fact that he may have had what appears to be a fairly casual conversation.
>
> "Do you agree with that? I mean, are you suggesting you gave him any data or any hard copies of documents or anything that would be privileged or sensitive ...?
>
> "[DEFENSE COUNSEL]: No."

(R. 511.)

On appeal, Keaton has abandoned her claim that Kennedy had a conflict of interest that precluded him from testifying for the State -- a

claim refuted by the record. Instead, Keaton argues that allowing Kennedy to testify for the State undermined principles of "fundamental fairness" embodied in the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (Keaton's brief, p. 58.) Because Keaton did not raise this specific claim below, we review the admission of Kennedy's testimony for plain error only. See Clark v. State, 896 So. 2d 584, 650 (Ala. Crim. App. 2000) (holding that the appellant's claim was subject to plain-error review because he "did not present the trial court with the specific claim he now raises on appeal").

This Court has held that "the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error." Wilson v. State, 142 So. 3d 732, 751 (Ala. Crim. App. 2010) (citing Ex parte Walker, 972 So. 2d 737, 752 (Ala. 2007)). Here, Keaton argues that she was prejudiced by Kennedy's testimony because, she says, Kennedy "attack[ed] the defense's lower-paid substitute for allegedly inferior work." (Keaton's brief, p. 58.) However, although Kennedy did question some of Ingram's polling methodology, the two experts reached essentially the same conclusions. Specifically, both Kennedy and Ingram testified that

approximately 50 percent of the citizens of Mobile County had a fixed opinion of Keaton's guilt, and they both testified that obtaining an impartial jury in Mobile County would be difficult but not impossible. Thus, because Kennedy reached essentially the same conclusions that Ingram reached, we fail to see how Keaton was prejudiced by Kennedy's testimony. Accordingly, the trial court did not commit plain error by allowing Kennedy to testify for the State at the change-of-venue hearing.

III.

Keaton argues that the trial court committed multiple errors regarding jury selection and alleged juror misconduct. We address each of Keaton's jury-related claims in turn.

A.

Keaton argues that the trial court erred by denying her motion for a mistrial after veniremembers V.S. and J.D., who did not serve on the jury, announced in the presence of the venire their fixed opinions that Keaton was guilty. As noted in Part II, supra, when the trial court asked the venire during general voir dire if anyone had "a fixed opinion as to [Keaton's] guilt or innocence," V.S. replied, "I think she's guilty, "and J.D.

replied, "I have a preconceived notion as to her guilt as well." Defense counsel subsequently moved for a mistrial based on the fact that V.S. and J.D. had announced those opinions in the presence of the venire, but the trial court denied the motion for a mistrial and, almost immediately thereafter, instructed the venire as follows:

> "Ladies and gentlemen, let me tell you now that I reminded you -- a few moments ago, I told you about the presumption of innocence, and this is a part of our criminal justice system that goes back a long time and it's one of the most valuable parts of our judicial system. Everyone, everyone who is accused of a crime, as a matter of law, not public opinion, but as a matter of law is presumed innocent of that charge. And that presumption of innocence, which you enjoy and I enjoy, that presumption of innocence stays with us. We're wrapped up in it until, under the rules of evidence and the rules of procedure that I administer, until the State has satisfied each of the jurors beyond a reasonable doubt that the person charged is guilty. Miss Keaton is not guilty in a court of law until the State has met that burden.
>
> "Now, that may sound like just a bunch of words, but that's really what this country is all about. You read on the news where people get taken away and they disappear or they're brought before some judge and they are punished without having a trial or without having any process. What I just explained to you is one of the main things that separates us from them. And if anyone thinks that's not important, then I suggest they continue to think about it. Does everyone understand that?

> "(Prospective jurors respond in the affirmative.)"

(R. 1132-33.)

Regarding the remedy of a mistrial, this Court has stated:

> " 'A mistrial is an extreme measure that should be taken only when the prejudice cannot be eradicated by instructions or other curative actions of the trial court. Nix v. State, 370 So. 2d 1115, 1117 (Ala. Crim. App.), cert. denied, 370 So. 2d 1119 (Ala. 1979). If an error can be effectively cured by an instruction, a mistrial is too drastic a remedy and is properly denied. Thompson v. State, 503 So. 2d 871, 877 (Ala. Crim. App. 1986).'
>
> "Ex parte Lawrence, 776 So. 2d 50, 55 (Ala. 2000).
>
> " 'Alabama courts have repeatedly held that a mistrial is a drastic remedy, to be used sparingly and only to prevent manifest injustice. The decision whether to grant a mistrial rests within the sound discretion of the trial court and the court's ruling on a motion for a mistrial will not be overturned absent a manifest abuse of that discretion.'
>
> "Peoples v. State, 951 So. 2d 755, 763 (Ala. Crim. App. 2006)."

Chambers v. State, 181 So. 3d 429, 441 (Ala. Crim. App. 2015).

Thus, the venire's exposure to V.S.'s and J.D.'s fixed opinions of Keaton's guilt did not require the extreme remedy of a mistrial unless the

prejudice to Keaton could not be eradicated by the trial court's curative instruction. Although Keaton suggests that the trial court's instruction was inadequate in that regard, we find that the instruction more than adequately emphasized the presumption of innocence with which Keaton was cloaked and the State's burden of rebutting that presumption with evidence that proved Keaton's guilt beyond a reasonable doubt. Also, it is well established that "[j]urors are presumed to follow the trial court's instructions," Campbell v. State, 241 So. 3d 749, 753 (Ala. Crim. App. 2017), and, in this case, the prospective jurors affirmatively indicated that they understood the trial court's instruction regarding the presumption of innocence and the burden of proof. Thus, the trial court's curative instruction sufficiently eradicated any prejudice Keaton might have otherwise suffered from the venire's exposure to V.S.'s and J.D.'s fixed opinions of her guilt. See Oldman v. State, 998 P.2d 957, 964 (Wyo. 2000) (holding that a mistrial was not required after a prospective juror announced his opinion that the defendant was guilty because the trial court "assured itself that the remaining jurors not only understood the presumption of innocence, but that they were committed to it, and that

they understood the State's burden of proof"). This conclusion is further supported by the fact that defense counsel had ample opportunity during individual voir dire to elicit any other fixed opinions of Keaton's guilt, and no other veniremember expressed such an opinion. Accordingly, the trial court did not abuse its discretion by denying Keaton's motion for a mistrial.

In a related claim, Keaton makes the cursory argument that, "[e]ven if a mistrial was not required, the trial court certainly abused its discretion in failing to strike the venire." (Keaton's brief, p. 37.) Because Keaton did not move to strike the venire, we review this claim for plain error only. See Yeomans v. State, 898 So. 2d 878, 892 (Ala. Crim. App. 2004) (reviewing for plain error a claim that was not raised at trial).

" ' "A challenge to the array or a motion to quash or strike the venire will not be sustained unless it is alleged and proved that the whole venire is tainted with prejudice." ' " Wright v. State, 740 So. 2d 1147, 1148 (Ala. Crim. App. 1999) (quoting Huff v. State, 596 So. 2d 16, 22 (Ala. Crim. App. 1991), quoting in turn Cole v. State, 352 So. 2d 17, 19 (Ala. Crim. App. 1977)). Here, we have already noted that the veniremembers are

presumed to have heeded the trial court's curative instruction that Keaton was presumed innocent, Campbell, 241 So. 3d at 753, and individual voir dire did not reveal any other fixed opinions of Keaton's guilt. Thus, the record does not support the conclusion that "the whole venire [was] tainted with prejudice." Wright, 740 So. 2d at 1148 (citations omitted). Accordingly, the trial court did not commit error, plain or otherwise, by not sua sponte striking the venire. See State v. Lucky, 755 So. 2d 845, 854 (La. 1999) (noting that "[a] review of jurisprudence from various jurisdictions reveals that striking an entire jury panel occurs rarely" and that, " ' "[n]ormally, the disqualification of an individual juror for the expression of an opinion, or for making remarks indicating bias, is not a sufficient ground for the challenge of the entire panel" ' " (quoting State v. Williams, 630 S.W.2d 117, 119 (Mo. App. 1981), quoting in turn State v. Weidlich, 269 S.W.2d 69, 71 (Mo.1954))).

B.

Keaton alleges that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), by using its peremptory strikes in a racially discriminatory

manner to exclude black veniremembers from the jury.[7] Because Keaton did not raise a Batson claim at trial, we review this claim for plain error only. See Gobble v. State, 104 So. 3d 920, 948 (Ala. Crim. App. 2010) (reviewing for plain error a Batson claim that was not raised at trial). Initially, we note that both this Court and a plurality of the Alabama Supreme Court have recently questioned whether Batson claims that were not raised at trial should be reviewed on appeal, even under the plain-error standard applicable in death-penalty cases. See Lane v. State, [Ms. CR-15-1087, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (citing cases in which this Court and a plurality of the Alabama Supreme Court have questioned the propriety of raising a Batson claim for the first time on appeal). Regardless, we find no plain error with respect to Keaton's Batson claim.

"For plain error to exist in the Batson context, the record must raise an inference that the [S]tate [or the defendant] engaged in 'purposeful discrimination' in the exercise of its peremptory challenges." Guthrie v.

[7]According to Keaton, she is "of Native American and African American descent." (Keaton's brief on return to first remand, p. 55.)

State, 616 So. 2d 913, 914 (Ala. Crim. App. 1992) (quoting Ex parte Watkins, 509 So. 2d 1074 (Ala. 1987)). Here, Keaton's sole evidence in support of her Batson claim is that the State used approximately two-thirds of its peremptory strikes to exclude 21 of the 23 black veniremembers from the jury, or approximately 91 percent. It is true that one type of evidence that can raise an inference of purposeful discrimination is the fact that the State " 'used peremptory challenges to dismiss all or most black jurors.' " Yancey v. State, 813 So. 2d 1, 3 (Ala. Crim. App. 2001) (quoting Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987)). However, " '[t]he Alabama Supreme Court and this Court have consistently held that numbers alone cannot establish a prima facie case of discrimination in jury selection.' " Shanklin v. State, 187 So. 3d 734, 765 (Ala. Crim. App. 2014) (quoting Gissendanner v. State, 949 So. 2d 956, 961-62 (Ala. Crim. App. 2006) (emphasis added)). Thus, the statistics Keaton cites are not sufficient, standing alone, to raise an inference of purposeful discrimination in the State's use of its peremptory strikes. See Lane, ___ So. 3d at ___ (holding that the fact that the State struck 83 percent of black veniremembers was not sufficient, in and of itself, to raise

an inference of racial discrimination but was a factor to consider if "coupled with other evidence" that tended to establish discriminatory intent).

Moreover, an inference of purposeful discrimination can be rebutted by the State's proffer of legitimate race-neutral reasons for its peremptory strikes. Henderson v. State, 248 So. 3d 992, 1015-16 (Ala. Crim. App. 2017) (citing Batson, 476 U.S. at 93-94). Here, although Keaton did not raise a Batson claim at trial, the State provided the trial court with race-neutral reasons for its strikes (R. 2579-2611) -- some of which also served as the basis for striking white veniremembers -- and Keaton did not allege at trial and does not allege on appeal that the State's reasons were pretextual. See Wilson, 142 So. 3d at 754 (noting that, once the State provides a race-neutral reason for a peremptory strike, "the burden shift[s] to [the defendant] to establish that the prosecutor's reason was pretextual"). Furthermore, we have reviewed the State's reasons for its peremptory strikes and find no hint of pretext therein. In addition, the State did not strike two black veniremembers, despite having more than enough strikes to do so. Although " 'the fact that blacks are ultimately

seated on the jury does not necessarily bar a finding of discrimination under Batson,' " that fact " 'may be taken into account in a review of all the circumstances as one that suggests that the government did not seek to rid the jury of persons who shared the defendant's race.' " Henderson, 248 So. 3d at 1018 (quoting United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990)). Thus, because we do not find that the State's race-neutral reasons for its peremptory strikes were pretextual and because the State could have struck, but did not strike, all black veniremembers from the jury, we cannot say that the trial court committed plain error by not sua sponte finding a Batson violation.[8]

C.

[8]Citing Jackson v. State, 169 So. 3d 1 (Ala. Crim. App. 2010), and Whatley v. State, 146 So. 3d 437 (Ala. Crim. App. 2010), Keaton contends that this Court should remand the case for the trial court to hold a Batson hearing. However, in Jackson and Whatley, the State had not provided the trial courts with race-neutral reasons for its peremptory strikes, and, thus, the courts had not had an opportunity to review the validity of the State's reasons. That is not the case here, and we see no reason to remand for a Batson hearing in a case where the State provided the trial court with race-neutral reasons for its peremptory strikes and where the defendant has not alleged that those reasons were pretextual.

Keaton argues that the trial court failed to conduct an adequate investigation into juror misconduct. During the course of trial, it was brought to the trial court's attention that one juror, M.L., had been "making comments in the presence of other jurors ... about [his] relationship with [the prosecutor]." (R. 3398-99.) During subsequent questioning by the trial court, M.L. admitted that he had mentioned to other jurors that his wife and the prosecutor's husband "used to work together" and that the two couples had "done things together" socially. (R. 3402.) M.L. also admitted that, earlier that week, the prosecutor's husband had contacted M.L.'s wife to tell her that he had seen M.L. in the courtroom. Thereafter, the parties agreed that M.L. should be removed from the jury, and the trial court replaced M.L. with an alternate juror.

After removing M.L. from the jury, the trial court questioned the jurors individually to determine which jurors had heard M.L.'s comments, and 9 of the 12 jurors indicated that they had heard M.L. make brief comments that reflected nothing more than that he and his wife had a personal relationship with the prosecutor and her husband. (R. 3422-65.) The trial court then explained to each juror that M.L. had been removed

from the jury for failing to follow the court's instructions, explained that neither the prosecutor nor anyone else associated with the State had been in contact with any juror, and emphasized the importance of following the court's instructions. Thereafter, the prosecutor's husband provided the trial court with a copy of e-mails he had exchanged with M.L.'s wife earlier that week, and the court read those e-mails into the record:

> "[O]ne is on Monday ... at 3:46 p.m. from [the prosecutor's husband] to [M.L.'s wife]. ... Text says, '[The prosecutor] told me [M.L.] was on her jury. I just stepped in to watch for a minute and there he is. Is he enjoying the experience?' ... The response came back ... at 4:08 p.m. the same day. ... Two words, 'He is!!' "

(R. 3472.) According to the prosecutor's husband, those e-mails were the extent of his contact with M.L.'s wife during the course of Keaton's trial, and he expressly stated that he did not "talk to [M.L.'s wife] about any specifics about the case or anything about the case." (R. 3473.)

Following those discussions, defense counsel moved for a mistrial, arguing that it was impossible to "know for sure how [M.L.'s comments] impacted ... the jurors." (R. 3475.) The trial court denied the motion after noting that the court was "satisfied everyone ha[d] been very forthcoming

and honest in their responses," that the prosecutor's husband's contact with M.L.'s wife was "ill-timed" but "innocent," and that the court did not "think the jury ha[d] ... been tainted or unduly influenced in any way." (R. 3476.)

On appeal, Keaton challenges the adequacy of the trial court's investigation into M.L.'s misconduct. However, although Keaton moved for a mistrial based on M.L.'s misconduct, she did not challenge the adequacy of the trial court's investigation into that misconduct. Thus, we review this claim for plain error only. See Phillips v. State, 287 So. 3d 1063, 1121 (Ala. Crim. App. 2015) (reviewing for plain error the defendant's claim that the trial court's investigation into juror misconduct was insufficient because the defendant "did not object to the trial court's handling of the investigation").

Regarding a trial court's duty to investigate juror misconduct, this Court has stated that

> "'"the trial judge has a duty to conduct a 'reasonable investigation of irregularities claimed to have been committed' before he concludes that the rights of the accused have not been compromised." Holland v. State, 588 So. 2d 543, 546 (Ala. Crim. App. 1991) (emphasis added).

> " 'What constitutes a "reasonable investigation of irregularities claimed to have been committed" will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.
>
> > " ' "Th[e] discretion of the trial court to grant a mistrial includes the discretion to determine the extent and type of investigation requisite to a ruling on the motion. ..."
>
> " 'Woods v. State, 367 So. 2d 974, 980 (Ala. Cr. App.), reversed on other grounds, 367 So. 2d 982 (Ala. 1978), partially quoted in Cox v. State, 394 So. 2d 103, 105 (Ala. Cr. App. 1981). As long as the court makes an inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry.'
>
> "Sistrunk v. State, 596 So. 2d 644, 648-49 (Ala. Crim. App. 1992)."

Shaw v. State, 207 So. 3d 79, 91-92 (Ala. Crim. App. 2014).

According to Keaton, the trial court's investigation into M.L.'s misconduct was inadequate because, she says, the court "did not seek to ferret out improper influence" and "failed to adequately ensure that each juror would not be affected by [M.L.'s] remarks." (Keaton's brief, pp. 41-

42.) However, there is no indication that M.L. shared with the other jurors any information that was relevant to the issues in the trial. Rather, it was undisputed that M.L. merely discussed the fact that he and his wife had a personal relationship with the prosecutor and her husband, and there was no reason for the trial court to believe that the other jurors' knowledge of that relationship would hinder their ability to be impartial if M.L. did not serve on the jury. Thus, given the specific nature of M.L.'s comments, we cannot say that the trial court committed plain error by not asking the jurors if they would be able to disregard those comments. See Shaw, 207 So. 3d at 91 (noting that, when investigating juror misconduct, a trial court is required to conduct only "an inquiry that is reasonable under the circumstances" (citation omitted)). Compare Resurrection of Life, Inc. v. Dailey, 311 So. 3d 748 (Ala. 2020) (where the trial court asked the jurors whether they could disregard information that one juror had discovered while researching issues relevant to the trial).

We acknowledge Keaton's claim that, during the course of its investigation, the trial court "left [the jurors] with the impression that [M.L.] had done nothing wrong, anything he shared with them was

appropriate information to share, and they could consider whatever he shared with them." (Keaton's brief, p. 42.) However, contrary to Keaton's contention, the trial court did not imply that M.L. had "done nothing wrong"; rather, as noted, the court informed the jurors that M.L. had been removed from the jury for failing to follow the court's instructions, and the court emphasized that the prosecutor had not done anything improper. (R. 3431-69.) Also, nothing the trial court said during the course of its investigation indicated that the jurors could "consider whatever [M.L.] shared with them," and, regardless, we have already noted that it was undisputed that M.L. did not share any information with the jurors that was relevant to the issues in the trial. Thus, Keaton is not entitled to relief on this claim.

D.

Keaton argues that the trial court erred by denying her challenges for cause as to veniremembers J.S., M.L., and R.C. A trial court is vested with broad discretion in ruling on challenges for cause, and the trial court's rulings in that regard are " ' "entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of

discretion." ' " Thompson v. State, 153 So. 3d 84, 115-16 (Ala. Crim. App. 2012) (quoting Dunning v. State, 659 So. 2d 995, 997 (Ala. Crim. App. 1994), quoting in turn Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983)).

1. Challenge for cause as to J.S.

Keaton argues that the trial court erred by denying her challenge for cause as to J.S., who served on the jury. In support of that claim, Keaton relies on the fact that, when J.S. was asked if she would "consider a person's age ... in reaching a decision about life or death," she stated that a defendant's age "doesn't phase" her if the defendant is at least 18 years old. (R. 1220.)

However, in Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011), cert. denied, 568 U.S. 1032 (2012), this Court held that "there is no requirement that a court strike a juror based on his/her feelings towards certain types of mitigating evidence." Albarran, 96 So. 3d at 160 (citing Morgan v. Illinois, 504 U.S. 719 (1992)). In other words, a veniremember is not prohibited from serving on the jury in a capital case "simply [because he or she] might not find specific types of mitigating circumstances to be particularly persuasive." Lane, ___ So. 3d at ___.

Thus, defense counsel was not entitled to present J.S. with a specific mitigating circumstance that Keaton planned to proffer in the penalty phase of trial and then have J.S. struck for cause once she indicated that she would not assign any weight to that mitigating circumstance. Accordingly, the trial court did not abuse its discretion by denying Keaton's challenge for cause as to J.S. See Albarran, 96 So. 3d at 161 ("Because a prospective juror is not disqualified from serving on a capital jury based on that juror's views of certain types of mitigation, the circuit court committed no error in failing to remove [a veniremember] for cause based on her responses to questions concerning certain types of mitigating evidence."); and Lane, ___ So. 3d at ___ (holding that the trial court did not err by denying a challenge for cause that was based on a veniremember's indication that she would not assign any weight to specific mitigating circumstances).

2. Challenge for cause as to M.L.

Keaton argues that the trial court erred by denying her challenge for cause as to M.L. However, as noted above, the trial court removed M.L. from the jury during the trial, and there is no basis in the record for

concluding that M.L. improperly influenced the other jurors before he was removed from the jury. See Part III.C, supra. Thus, even if the trial court erred by denying Keaton's challenge for cause -- and we do not suggest it did -- the error was harmless because M.L. ultimately did not serve on the jury and because Keaton did not have to use a peremptory strike to keep him off the jury. See Revis v. State, 101 So. 3d 247, 308 (Ala. Crim. App. 2011) ("Juror A.P. did not serve on Revis's jury, and Revis did not have to use one of his peremptory challenges to remove him from the jury. Thus, any error resulting from the trial court's failure to excuse Juror A.P. for cause would have been harmless."); and Jackson v. State, 169 So. 3d 1, 89 (Ala. Crim. App. 2010) ("Jackson suffered no prejudice because he did not have to use one of his peremptory challenges to remove [a veniremember] and she did not serve on his jury."). Accordingly, Keaton is not entitled to relief on this claim.

3. Challenge for cause as to R.C.

Keaton argues that the trial court erred by denying her challenge for cause as to R.C., who did not serve on the jury because defense counsel used a peremptory strike to remove her. In support of that claim, Keaton

relies on the fact that, during individual voir dire by defense counsel, R.C. stated that, because she knew DeBlase had been convicted, she "would have the presumption that [Keaton] is also guilty." (R. 2033.)

Prospective " '[j]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court.' " Francis v. State, [Ms. CR-18-1090, December 16, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (quoting Johnson v. State, 820 So. 2d 842, 855 (Ala. Crim. App. 2000)). " ' "Thus, even though a prospective juror admits to a potential bias, if further voir dire examination reveals that the juror can and will base his decision on the evidence alone, then a trial judge's refusal to grant a motion to strike for cause is not error." ' " Lane, ___ So. 3d at ___ (quoting Osgood v. State, [Ms. CR-13-1416, Oct. 21, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016), quoting in turn Perryman v. State, 558 So. 2d 972, 977 (Ala. Crim. App. 1989)). It is the trial court who is in the best position to make such rehabilitation determinations because it is the court who " 'is in the best position to hear a prospective juror and to observe his or her demeanor.' "

Thompson, 153 So. 3d at 116 (quoting Ex parte Dinkins, 567 So. 2d 1313, 1314 (Ala. 1990)).

Here, after R.C. indicated that she presumed Keaton was guilty, the trial court emphasized its earlier instructions regarding the presumption of innocence and the State's burden of proof, at which point the following colloquy occurred:

> "THE COURT: ... Do you feel you could follow the instructions about the presumption of innocence and the burden of proof or ... do you really feel you know enough about the case that you really are not sure you could follow those instructions?
>
> "[R.C.]: I think I could start from ground zero with it. I mean, in my heart, I believe I could and just come in and just look at the facts that are presented, yes. You know, I'd just have to remind myself that -- what's at stake and that that is the law. I mean, I'm human. You have opinions, but I think I could -- I think I could do it.
>
> "THE COURT: And if a juror has a fixed, preconceived notion about the guilt of the defendant, we need to know that.
>
> "[R.C.]: Right.
>
> "THE COURT: And if that's a strong feeling that's going to stay with the juror, we need to know. Everybody is entitled to know that.
>
> "....

> "[R.C.]: I haven't heard enough evidence in this case. Like I said, I followed it, but not the details. So, I don't know enough -- I'm going on -- based on what happened with the children's father, just the outcome of that trial and so on.
>
> "THE COURT: In all fairness, I mean, do you honestly, sincerely, as you sit here today, do you honestly, sincerely -- and you're still under oath, of course -- do you feel that you can put any information ... out of your conscious brain and focus on the evidence that comes in and what you actually hear in this case because this is all about this case --
>
> "[R.C.]: Absolutely.
>
> "THE COURT: -- not anybody else's.
>
> "[R.C.]: Right.
>
> "THE COURT: You can do that?
>
> "[R.C.]: I think I could, uh-huh.
>
> "....
>
> "THE COURT: Having considered all we've talked about the last few minutes, is there any reason you want to bring to our attention where, in your mind, you think you would be other than a fair and impartial juror in this case, fair to both sides?
>
> "[R.C.]: No. I could be fair."

(R. 2037-40.) Defense counsel subsequently challenged R.C. for cause, but the trial court denied the challenge after finding that R.C. "was sincere in

her responses" and "mean[t] it when she sa[id] that she [could] try this case based on what she hear[d] in this case." (R. 2041.)

The foregoing colloquy reflects that, after being reminded of the presumption of innocence and the State's burden of proof, R.C. stated that she "could start from ground zero" and could "[a]bsolutely" base her decision solely on the evidence presented at Keaton's trial. As noted, the trial court found R.C. to be sincere in that regard, and that court that was in the best position to observe R.C.'s demeanor and to gauge the veracity of her responses. Thompson, 153 So. 3d at 116. Thus, because there was a basis for concluding that R.C. had been rehabilitated as to her initial presumption that Keaton was guilty, we cannot say that the trial court abused its discretion by denying a challenge for cause that was based on that initial presumption. See Lockhart v. State, 163 So. 3d 1088, 1117 (Ala. Crim. App. 2013) (holding that there was no abuse of discretion in the trial court's denial of a challenge for cause as to a veniremember who initially expressed a belief that the defendant was guilty but subsequently indicated that she "could set aside everything she had heard or read about

the case and that she could render a fair and impartial verdict based solely on the evidence presented at trial").

Keaton also argues that the trial court erred by denying her challenge for cause because, Keaton says, R.C. indicated that she "would presume ... the appropriateness of a death sentence" if Keaton were convicted of capital murder. (Keaton's brief, p. 40.) To be clear, what R.C. actually indicated was that she would be "more inclined toward the death penalty" if Keaton were convicted of capital murder. (R. 2035.) However, R.C. confirmed that she could recommend a sentence of life imprisonment without the possibility of parole (R. 2030-31), and a veniremember's "tendency toward imposing the death penalty" does not justify a challenge for cause "where the potential juror indicates that he or she could nonetheless consider life imprisonment without parole." Price v. State, 725 So. 2d 1003, 1024 (Ala. Crim. App. 1997). See also Smith v. State, 698 So. 2d 189, 198 (Ala. Crim. App. 1996) ("[V]eniremembers who favor the death penalty should not be excused for cause where they indicate they can follow the court's instructions."). Thus, the trial court did not abuse

its discretion by denying a challenge for cause that was based on the fact that R.C. was "more inclined toward the death penalty."

E.

Keaton argues that the trial court erred by refusing to investigate an unidentified juror's allegation that she had been intimidated by another juror during the jury's guilt-phase deliberations. On the first day of the penalty phase of trial, the following colloquy occurred:

> "[DEFENSE COUNSEL]: ... [I]n a break, we were advised that one of the jurors is claiming that another juror had bullied her. We don't know if she meant she was bullied into the verdict yesterday. We don't know what she was talking about, but -- and there was some talk about bumping into her, whatever. I've not talked to any of them, obviously, but unless we know what happened, ... we submit that puts a cloud over the whole verdict because if the lady was bullied into consenting or agreeing to the verdicts that came out, then they're not valid verdicts. And we need to address that ever how Your Honor sees fit to see where that leads to. This is very unusual. I've never seen this happen, but it is what it is. But we have a juror that's claiming she was bullied. We don't know if she was bullied to do what or not to do.
>
> "THE COURT: Well, let me make it clear for the record that I have not spoken, except in open court, to the jurors either. That was a report and the words that were used -- I can't tell you if that's the word the juror used or whether that was a characterization of someone, one of the guards who

> brought that to my attention.[9] But I ... deny your request, at this time, to start interviewing jurors in the middle of the proceeding. We're just not going to do that."

(R. 5011-12.)

Rule 606(b), Ala. R. Evid., states, in pertinent part:

> "Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

(Emphasis added.)

Thus, Rule 606(b) expressly provides that a jury's verdict may not be impeached by testimony regarding the discussions that occurred among the jurors during their deliberations, except to the extent that those discussions included extraneous prejudicial information or outside

[9]The parties do not identify, and the record does not reflect, the substance of the allegedly intimidating statements.

influences. This is true even when the jury's deliberations are alleged to have included one juror's intimidation of another juror.

> "As this Court explained in Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011):
>
> > " 'It is well settled that "matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." Sharrief v. Gerlach, 798 So. 2d 646, 653 (Ala. 2001). "Rule 606(b), Ala. R. Evid., recognizes the important 'distinction, under Alabama law, between "extraneous facts," the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the "debates and discussions of the jury," which are protected from inquiry.' " Jackson v. State, 133 So. 3d 420, 431 (Ala. Crim. App. 2009) (quoting Sharrief, supra at 652). "[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts." Sharrief, 798 So. 2d at 653. Thus, "affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning 'the debates and discussions of the case by the jury while deliberating thereon' do not fall within this exception." CSX Transp., Inc. v. Dansby, 659 So. 2d 35, 41 (Ala. 1995) (quoting Alabama Power Co. v. Turner, 575 So. 2d 551, 557 (Ala. 1991)).'
>
> "181 So. 3d at 1126-27. To allow 'consideration of [a] claim [that one juror had made threatening statements to the other

> jurors] -- which is based entirely on the debate and deliberations of the jury -- "would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny." ' Bryant, 181 So. 3d at 1128 (quoting Jones v. State, 753 So. 2d 1174, 1204 (Ala. Crim. App. 1999))."

Reeves v. State, 226 So. 3d 711, 754-55 (Ala. Crim. App. 2016) (emphasis added). See also United States v. Briggs, 291 F.3d 958, 961, 964 (7th Cir. 2002) (citing Rule 606(b), Fed. R. Evid., which is similar to our own Rule 606(b), in holding that the trial court did not err by refusing to investigate a juror's allegation that she "had been 'intimidated' by other jurors into finding [the defendant] guilty" because such an allegation "only allege[d] 'intrajury influences on the verdict during the deliberative process' " (quoting United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988)); and United States v. McGhee, 532 F.3d 733, 740 (8th Cir. 2008) (citing Rule 606(b), Fed. R. Evid., in holding that there was no error in the trial court's refusal to investigate two jurors' claim of "alleged intimidation by other jurors"). Accordingly, the trial court did not err in this case by refusing to

investigate an allegation that one juror had been intimidated by another juror during the jury's guilt-phase deliberations.

F.

Keaton argues that the trial court erred by death-qualifying the jury because, she says, doing so violated both the United States Constitution and the Alabama Constitution. However, this Court has repeatedly held that " '[n]either the federal nor the state constitution prohibits ... death-qualifying jurors in capital cases.' " Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (quoting Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995)). See Graham v. State, 299 So. 3d 273, 293 (Ala. Crim. App. 2019) ("The United States Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), held that prospective jurors in a capital-murder case may be 'death-qualified.' Alabama has repeatedly upheld this practice."). Thus, Keaton is not entitled to relief on this claim.

IV.

Keaton argues that the trial court erred by denying her motion for a judgment of acquittal because, she says, the evidence was insufficient to support her convictions.

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

> "'"The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983)."'
>
> "Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004) (quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

Chambers, 181 So. 3d at 433-34.

In support of her sufficiency-of-the-evidence claim, Keaton relies on the fact that the evidence did not unequivocally establish the cause or causes of the children's deaths. Although Keaton concedes that "cause of

death is not an element of murder or manslaughter," she argues that the evidence indicated that the cause of death could have been "asphyxia by strangulation, one of the causes speculated to by the medical examiner and admitted to by DeBlase." (Keaton's brief, p. 74.) Thus, Keaton argues that, "without proving causation" in this particular case, the State could not prove beyond a reasonable doubt whether she or DeBlase killed the children and that, as a result, the trial court should have granted her motion for a judgment of acquittal. (Id.) For two reasons, we disagree with Keaton's contention that she was entitled to a judgment of acquittal based on the uncertainty regarding the cause or causes of the children's deaths.

First, we note that there is no question that there was sufficient evidence to support a finding that Keaton put antifreeze in the children's food and that the children's consumption of antifreeze could have directly caused their deaths. Keaton presumes, however, that feeding the children antifreeze could not subject her to liability for their deaths if the jury found that DeBlase subsequently asphyxiated the children, but that presumption is legally incorrect. As this Court has held:

> "The wound or wounds inflicted by a defendant need not be the sole cause of death, only a partial cause, or a contributing factor that accelerated death. The fact that there are other contributing causes of death does not prevent the wound or wounds inflicted by the defendant from being the legal cause of death -- the other contributing causes of death may precede, be synchronous with, or follow the commission of the offense charged. Greer v. State, 475 So. 2d 885 (Ala. Cr. App. 1985); Flanagan v. State, 369 So. 2d 46 (Ala. Cr. App. 1979); Smith v. State, 354 So. 2d 1167 (Ala. Cr. App. 1977), cert. denied, 354 So. 2d 1172 (Ala. 1978).
>
> "....
>
> "The State is not required to ... show that some other conceivable cause of death did not actually cause death. Finley v. State, 405 So. 2d 161 (Ala. Cr. App. 1981). All that is required is that there be evidence sufficient to convince the jury that the wounds inflicted by the accused were dangerous and contributed to or accelerated the death of the deceased -- it is not necessary to show that death inevitably would have followed from those wounds alone. Turner v. State, 409 So. 2d 922 (Ala. Cr. App. 1981)."

Carden v. State, 621 So. 2d 342, 350 (Ala. Crim. App. 1992) (emphasis added). See also Holsemback v. State, 443 So. 2d 1371, 1382 (Ala. Crim. App. 1983) ("[The defendants] could both be properly convicted of Coleman's murder, even though they acted independently, if each inflicted an injury that caused, contributed to, or accelerated Coleman's death. '(A)lthough a man cannot be killed twice, two persons acting

independently may so contribute to his death that each will be guilty of homicide.' " (quoting F. Wharton, The Law of Homicide § 31 (1907))).

Here, there was evidence indicating that the children's consumption of antifreeze would have significantly weakened their respiratory functions. (R. 4214.) Thus, even if the jury found that it was DeBlase who actually extinguished the children's lives by asphyxiating them, the jury could have also found that the children's consumption of antifreeze served to accelerate their deaths, which was sufficient to support a finding that Keaton legally caused their deaths. Carden, supra.

Second, Alabama's complicity statute provides, in pertinent part, that a person "is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense[,] ... [h]e procures, induces, or causes such other person to commit the offense." § 13A-2-23(a)(1), Ala. Code 1975. Thus, a defendant can be convicted as an accomplice to capital murder if he or she, with the "specific, or particularized, intent to kill," Smith v. State, 745 So. 2d 922, 933 (Ala. Crim. App. 1999), induces another person to commit the murder. See id. (holding that the appellant could be convicted of capital

murder under a complicity theory); and Travis v. State, 776 So. 2d 819, 845 (Ala. Crim. App. 1997) (holding that the trial court correctly instructed the jury that it could find the defendant guilty of capital murder if it found that he "intentionally ... induced ... another person to commit the murder"). Likewise, "where evidence establishes that a defendant intentionally rendered assistance or encouragement to a principal who recklessly caused the death of another person, the defendant can be convicted as an accomplice to reckless manslaughter or reckless murder." Grant v. State, 324 So. 3d 887, 895 (Ala. Crim. App. 2020) (emphasis omitted).

Even if the jury found that the children's consumption of antifreeze did not contribute to their deaths and that, instead, the sole cause of their deaths was asphyxiation by DeBlase, there was still ample evidence indicating that Keaton felt contempt for the children and did not want them to be part of her life with DeBlase. Consistent with that evidence, DeBlase's written statement indicated that he killed the children because Keaton "told [him] that [he] had to make a choice" between the children and her. Such evidence, when considered with the other evidence and

construed in a light most favorable to the State, supports a finding that, if DeBlase asphyxiated the children, he did so because Keaton "induce[d] ... [him] to commit the offense[s]," § 13A-2-23(1), i.e., that Keaton was an accomplice to those offenses.[10] See Harris v. State, 854 So. 2d 145, 151 (Ala. Crim. App. 2002) (noting that " ' "[a]ny word or act contributing to the commission of a felony, intended and calculated to incite or encourage its accomplishment, whether or not the one so contributing is present, brings the accused within [§ 13A-2-23]" ' " (quoting Payne v. State, 487 So. 2d 256, 261 (Ala. Crim. App. 1986), quoting in turn Scott v. State, 374 So. 2d 316, 318 (Ala. 1979))); and Atkinson v. State, 347 Ark. 336, 348, 64 S.W.3d 259, 267 (2002) (holding that there was sufficient evidence to convict the defendant as an accomplice to murder in a case where there was "testimony indicating [the defendant's] desire for [the victim] to be dead and her encouragement of [another person] to kill [the victim]").

In short, then, the evidence provided a sufficient basis upon which the jury could have found either that Keaton legally caused the children's

[10]The jury was instructed on accomplice liability as a theory of guilt. (R. 4860-62.)

deaths by feeding them antifreeze or that Keaton was an accomplice to DeBlase's asphyxiation of the children. "In Alabama, no distinction is made between principals and accomplices for purposes of criminal responsibility." Wingard v. State, 821 So. 2d 240, 245 (Ala. Crim. App. 2001). Thus, regardless of which theory of liability the jury accepted, the evidence was sufficient to sustain Keaton's convictions,[11] provided that there was sufficient evidence of the requisite intent, which " ' "is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence." ' " Morton v. State, 154 So. 3d 1065, 1080 (Ala. Crim. App. 2013) (quoting Seaton v. State, 645 So. 2d 341, 343 (Ala. Crim. App. 1994), quoting in turn McCord v. State, 501 So. 2d 520, 528-29 (Ala. Crim. App. 1986)). When construed in a light most favorable to the State, the evidence indicated that Keaton fed the children antifreeze, that she physically abused the children and generally treated them cruelly, that she felt contempt for the children and did not want them to be part

[11]We note that asphyxiation of a person can constitute a reckless offense. Jones v. State, 217 So. 3d 947, 957-58 (Ala. Crim. App. 2016).

of her life with DeBlase, and that she told DeBlase he "had to make a choice" between the children and her. We have no trouble concluding that such evidence provided a sufficient basis upon which the jury could have found that Keaton had the intent required to sustain her convictions. See Morton, 154 So. 3d at 1080 (noting that a defendant's criminal intent can be inferred from the circumstances of the case).

Based on the foregoing, the trial court did not err by denying Keaton's motion for a judgment of acquittal. Accordingly, Keaton is not entitled to relief on this claim.

In a related claim, Keaton argues that the trial court erred by refusing to submit special interrogatories to the jury regarding the cause or causes of the children's deaths. In support of that claim, Keaton suggests that such interrogatories were necessary because, otherwise, it would not be possible to determine whether the jury had reached a unanimous conclusion as to the cause or causes of death. However, Keaton cites no authority, nor are we aware of any, requiring that a jury that unanimously finds a defendant guilty of an unlawful killing must also reach a unanimous conclusion as to the cause of death. See State v.

Baker, 161 Idaho 289, 295, 385 P.3d 467, 473 (2016) (noting that "there is no requirement [that] jurors unanimously agree on the method by which the crime was committed"); and Sanchez v. State, 376 S.W.3d 767, 773-74 (Tex. Crim. App. 2012) ("[T]he jury must be unanimous on the gravamen of the offense of murder, which is causing the death of a person, but the jury need not be unanimous on the manner and means" (citing Ngo v. State, 175 S.W.3d 738 (Tex. Crim. App. 2005))). Cf. Schad v. Arizona, 501 U.S. 624, 630, 631-32 (1991) (rejecting the defendant's claim that the jury was required to reach a unanimous conclusion as to whether he had committed premeditated murder or felony murder because, under Arizona law, either theory constituted first-degree murder; "[w]e have never suggested that ... the jurors should be required to agree upon a single means of commission") (plurality opinion), abrogation on other grounds recognized by Edwards v. Vannoy, 593 U.S. ___, 141 S. Ct. 1547 (2021). In fact, we note that defense counsel conceded at trial that the use of special interrogatories regarding the cause or causes of death was discretionary with the trial court (R. 4697), which tends to undermine Keaton's claim that jury unanimity was required on that issue. Thus, we

find no error in the trial court's refusal to submit special interrogatories to the jury regarding the cause or causes of the children's deaths.[12]

V.

Keaton argues that the trial court erred by allowing the State to argue a theory of guilt at her trial that, she says, was inconsistent with the theory of guilt the State argued at DeBlase's trial. Specifically, Keaton contends that the State argued at her trial that she killed the children by poisoning them with antifreeze but that, at DeBlase's trial, the State "advanced [the] fundamentally different theory ... that [DeBlase] strangled the children to death." (Keaton's brief, pp. 23-24.) According to Keaton, the State is barred from "prosecuting multiple people for the same crime if doing so would produce inconsistency at the core of the State's case." (Id. at 23.) Having taken judicial notice of the record in DeBlase's

[12]We acknowledge Keaton's related argument that "there was no evidence that the children died of dehydration or starvation, yet those causes of death went to the jury." (Keaton's brief, p. 75.) Contrary to Keaton's contention, Dr. Turner testified that the cause or causes of the children's deaths could have been "poisoning, dehydration, starvation, asphyxia, ... and it could be a combination of one or more of those things." (Emphasis added.)

case, which we may do, Lynch v. State, 229 So. 3d 260, 262 n.2 (Ala. Crim. App. 2016), we disagree with Keaton's contention that the State argued inconsistent theories of guilt at the two trials.

At both DeBlase's trial and Keaton's trial, there was evidence indicating that the children could have died from asphyxiation at the hands of DeBlase or could have died from consuming antifreeze that Keaton fed them. See DeBlase, 294 So. 3d at 180. Consistent with that evidence, the State argued at both trials that the defendant on trial either killed the children or acted as the accomplice of the other defendant. Specifically, the State argued at DeBlase's trial that the evidence "proves that [DeBlase] smothered [the children]," but the State acknowledged that there was also evidence indicating that Keaton had "tortured and poisoned" the children with DeBlase's knowledge. (CR-14-0482, R. 2906.) Thus, the State argued to DeBlase's jury that "the law of aiding and abetting is very relevant ... because if, for some reason, you believe that Keaton killed the [children], [DeBlase] is as equally guilty under the theory of aiding and abetting." (Id.) Similarly, the State argued at Keaton's trial that she killed the children by poisoning them with

antifreeze, but the State acknowledged that there was also evidence indicating that DeBlase had asphyxiated the children because Keaton induced him to kill the children. (R. 4735.) Thus, the State argued to Keaton's jury that, "even if you don't believe Keaton did this with her own hands and did the final act, she's still guilty under aiding and abetting." (R. 4731.) Therefore, although the State primarily focused its argument at each trial on the evidence that more directly implicated the defendant on trial, the State's arguments were not inconsistent. See Spencer v. State, 201 So. 3d 573, 619-20 (Ala. Crim. App. 2015) (" ' " 'When it cannot be determined which of two defendants' [acts] caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial [caused the fatal wound] is not factually inconsistent.' " ' " (quoting Johnson v. State, [Ms. CR-05-1805, June 14, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (opinion on return to remand), quoting in turn United States v. Frye, 489 F.3d 201, 214 (5th Cir. 2007), quoting in turn United States v. Paul, 217 F.3d 989, 998-99 (8th Cir. 2000))). Moreover, to the extent there was any inconsistency in the State's arguments, this Court has

noted that other courts have found no error "'"stemming from inconsistent arguments as to who was the killer in the relatively common circumstance where each defendant can be held equally guilty as an aider and abettor upon the same inconclusive evidence."'" Id. at 619 (quoting Johnson, ___ So. 3d at ___, quoting in turn State v. Poe, 284 Neb. 750, 768, 822 N.W.2d 831, 845 (2012)). Accordingly, Keaton is not entitled to relief on this claim.

In a related claim, Keaton argues that the trial court violated her right to present a complete defense by prohibiting her from "questioning Sgt. Prine about [the allegedly] inconsistent assertions the State made at DeBlase's trial." (Keaton's brief, p. 26.) However, even if we assume that such testimony was admissible, the State conceded in its closing argument that DeBlase might have asphyxiated the children but argued that, even if he did, Keaton was nevertheless guilty under a complicity theory. Thus, we fail to see how Keaton could have been prejudiced by the fact that she was not allowed to ask Sgt. Prine if the State had argued at DeBlase's trial that DeBlase had asphyxiated the children. Accordingly, Keaton is not entitled to relief on this claim. See Rule 45, Ala. R. App. P. ("No

judgment may be reversed or set aside ... in any ... criminal case on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.").

VI.

Keaton argues that the trial court erred by admitting evidence that, she says, constituted inadmissible character or collateral-acts evidence under Rule 404, Ala. R. Evid., which states, in pertinent part:

> "(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> > "(1) Character of Accused. In a criminal case, evidence of character offered by an accused, or by the prosecution to rebut the same ....
> >
> > "....
>
> "(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof

> of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...."

According to Keaton, multiple witnesses testified to multiple examples of inadmissible character or collateral-acts evidence, (Keaton's brief, pp. 59-66), but that testimony can be grouped into four general categories: (1) evidence of Keaton's physical abuse of and generally cruel treatment of the children, (2) Keaton's statements reflecting her opinions of the children, (3) evidence of the children's physical appearances in the early months of 2010, and (4) evidence tending to establish Keaton's bad character. We address in turn the admissibility of each of those categories of evidence, keeping in mind that determinations regarding the admissibility of evidence, including character and collateral-acts evidence, are left to the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Windsor v. State, 110 So. 3d 876, 880 (Ala. Crim. App. 2012).

A.

As to the evidence of Keaton's physical abuse of and generally cruel treatment of the children,

" 'Alabama has long held that in a murder trial prior acts of violence or cruelty to the victim are admissible to show intent and motive.' Boyle v. State, 154 So. 3d 171, 211 (Ala. Crim. App. 2013).

> " ' "Domestic abuse often has a history highly relevant to the truth-finding process. When an accused has a close relationship with the victim, prior aggression, threats or abusive treatment of the same victim by the same perpetrator are admissible when offered on relevant issues under [state law]. Their rationale for admissibility is that an accused's past conduct in a familial context tends to explain later interactions between the same persons ...." '

"Baker v. State, 906 So. 2d 210, 258 (Ala. Crim. App. 2001), rev'd on other grounds, 906 So. 2d 277 (Ala. 2004) (quoting State v. Laible, 594 N.W.2d 328, 335 (S.D. 1999)).

> " ' " 'In a prosecution for murder, evidence of former acts of hostility between the accused and the victim are admissible as tending to show malice, intent, and ill will on the part of the accused.' White v. State, 587 So. 2d 1218, 1230 (Ala. Cr. App. 1990), affirmed, 587 So. 2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S. Ct. 979, 117 L. Ed. 2d 142 (1992)." Childers v. State, 607 So. 2d 350, 352 (Ala. Cr. App. 1992). "Acts of hostility, cruelty and abuse by the accused toward his homicide victim may be proved by the State for the purpose of showing motive and intent .... This is 'another of the primary exceptions to the general rule excluding evidence of other crimes.' " Phelps v. State, 435 So. 2d 158, 163 (Ala. Cr. App. 1983). See

> also Baker v. State, 441 So. 2d 1061, 1062 (Ala. Cr. App. 1983).'
>
> "Hunt v. State, 659 So. 2d 933, 939-40 (Ala. Crim. App. 1994), aff'd, 659 So. 2d 960 (Ala. 1995)."

Floyd, 289 So. 3d at 400. Of course, as a general rule,

> "evidence of collateral acts is not admissible to show intent when intent can be inferred from the criminal act itself, such as when intent to kill can be inferred from the use of a deadly weapon. See Horton [v. State], 217 So. 3d [27,] 52 [(Ala. Crim. App. 2016)]; Hinkle v. State, 67 So. 3d 161, 164 (Ala. Crim. App. 2010); and Brewer v. State, 440 So. 2d 1155, 1159 (Ala. Crim. App. 1983). But see Hudson v. State, 85 So. 3d 468 (Ala. Crim. App. 2011). However, that general rule does not preclude the admission of collateral acts in all cases in which intent can be inferred from the act itself. When the issue of intent is specifically disputed, ... evidence of collateral acts may be admissible as additional evidence of intent. See, e.g., Thompson v. State, 153 So. 3d 84, 134-37 (Ala. Crim. App. 2012) (upholding admission of collateral-acts evidence to establish intent despite the use of a deadly weapon when the defendant specifically disputed his intent). Moreover, 'testimony offered for the purpose of showing motive is always admissible. It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused which may have led or tempted him to commit the offense.' Towles v. State, 168 So. 3d 133, 143 (Ala. 2014) (citations omitted)."

Floyd, 289 So. 3d at 401.

Thus, as demonstrated by Floyd, the evidence of Keaton's physical abuse of and generally cruel treatment of the children was relevant to both her intent to murder the children, which Keaton expressly disputed at trial (R. 4775-76), and her motive to murder the children. However, the fact that such evidence was relevant does not end our inquiry regarding its admissibility; we must also determine whether its probative value was substantially outweighed by the danger of unfair prejudice. See Rule 403, Ala. R. Evid. (providing that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice"). As this Court explained in Floyd:

> " ' "[E]ven though evidence of collateral crimes or acts may be relevant to an issue other than the defendant's character, it should be excluded if 'it would serve comparatively little or no purpose except to arouse the passion, prejudice, or sympathy of the jury,' ... or put another way, 'unless its probative value is "substantially outweighed by its undue prejudice." ' " Bradley [v. State], 577 So. 2d [541,] 547-48 [(Ala. Crim. App. 1990)] (citations omitted)[.] "Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the [S]tate's case, and it must be plain and conclusive." Bush [v. State], 695

> So. 2d [70,] 85 [(Ala. Crim. App. 1995)]. See also Thompson v. State, 153 So. 3d 84, 136 (Ala. Crim. App. 2012) ("The [Alabama Supreme] Court [has] cautioned that Rule 404(b) evidence must be 'reasonably necessary to [the State's] case.' [Ex parte Jackson,] 33 So. 3d [1279,] 1286 [(Ala. 2009)]."). ' "

Floyd, 289 So. 3d at 397 (quoting Horton v. State, 217 So. 3d 27, 47-48 (Ala. Crim. App. 2016)).

Here, Keaton's defense was that she was an unwilling pawn in DeBlase's scheme to kill the children and that DeBlase's allegedly controlling and abusive behavior rendered her powerless to prevent or even to report the children's deaths. Evidence tending to establish Keaton's intent and motive to murder the children was therefore crucial to the State's case because it tended to rebut Keaton's defense. Thus, we cannot say that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice. See Thompson, 153 So. 3d at 137 (holding that collateral-acts evidence was "crucial to the State's case," and thus admissible, where the defendant's defense was that he did not have the specific intent to kill); and Russell v. State, 272 So. 3d 1134, 1187 (Ala. Crim. App. 2017) (same). Furthermore, the prejudicial effect

of such evidence was minimized by the trial court's two separate instructions to the jury that evidence of Keaton's collateral acts could be used only for the limited purposes of establishing her intent and motive to murder the children. (R. 3648, 4858.) See Floyd, 289 So. 3d at 402 (holding that "any potential prejudice in the admission of [collateral-acts] evidence 'was minimized by the circuit court's limiting instructions to the jury regarding its proper consideration of that evidence' " (quoting Trimble v. State, 157 So. 3d 1001, 1005 (Ala. Crim. App. 2014)).

In short, the evidence of Keaton's physical abuse of and generally cruel treatment of the children was relevant to her intent and motive to murder the children, and the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice, which was minimized by the trial court's limiting instructions. Accordingly, the trial court did not abuse its discretion by admitting such evidence.

B.

As to Keaton's statements reflecting her opinions of the children, Keaton points to testimony indicating that she had referred to the children as "demon spawns from hell" and the "spawn of Satan," that she

had referred to Natalie as "a discipline problem" who "thought she was a princess and ... needed to be taught that she wasn't," that she had stated that she "[did not] want to help [DeBlase] raise [the children]," and that she had stated that she "was concerned that [the children] were going to be jealous of" her then unborn child. Those statements tended to establish Keaton's disdain and contempt for the children and were therefore relevant to both her intent and motive to murder the children. See People v. Nitz, 143 Ill. 2d 82, 123, 572 N.E.2d 895, 913 (1991) (defendant's statement that he " 'hated' homosexuals" was relevant and probative evidence of his motive to murder the homosexual victim); and State v. Knox, 464 N.W.2d 445, 449, 450 (Iowa 1990) (defendant's statements tending to "demonstrate negative feelings toward [the victim's] race and sex" were relevant to the defendant's intent and motive to murder the victim). We have already concluded that evidence tending to establish Keaton's intent and motive to murder the children was crucial to the State's case and that its probative value was not substantially outweighed by the danger of unfair prejudice, which was minimized by the trial court's limiting instructions. Accordingly, the trial court did not abuse its

discretion by admitting Keaton's statements reflecting her opinions of the children.

C.

As to the evidence of the children's physical appearances in the early months of 2010, Keaton points to testimony indicating that the children appeared underfed and sickly during that time -- when Keaton, by her own admission, was primarily responsible for the children's "well being." (State's Exhibit 483 at 46:02-11). To the extent such evidence implicated Keaton at all, it tended to demonstrate that, despite her self-professed certification in child care (id. at 15:54, 46:13-17), Keaton refused to feed the children adequately or to seek necessary medical care for them, which can be construed as acts of abuse and cruelty that further tended to demonstrate Keaton's intent and motive to kill the children.[13] Floyd, 289

[13]We recognize that, in her statements to Sgt. Thompson and Sgt. Prine, Keaton claimed that she encouraged DeBlase to seek medical care for the children and that she was unable to seek medical care for the children because DeBlase prevented her from doing so. However, the jury was free to reject Keaton's self-serving and conflicting statements. See Frazier v. State, 258 So. 3d 369, 384 (Ala. Crim. App. 2017) (noting that credibility determinations are left to the jury).

So. 3d at 400. Cf. People v. Banks, 161 Ill. 2d 119, 133, 641 N.E.2d 331, 338 (1994) (holding that there was sufficient evidence of the defendant's intent to kill the infant victim where the defendant "prevented the victim from receiving adequate nourishment"). Once again, we have already concluded that evidence tending to establish Keaton's intent and motive to murder the children was crucial to the State's case and that its probative value was not substantially outweighed by the danger of unfair prejudice, which was minimized by the trial court's limiting instructions. Accordingly, the trial court did not abuse its discretion by admitting evidence of the children's physical appearances in the early months of 2010.

D.

As to the evidence tending to establish Keaton's bad character, Keaton points to testimony indicating that she "just didn't ... get along with anybody" and "was evil most of the time" (R. 3655), that she was "hateful and cruel" (R. 3936), that she was "not human" (R. 3488), that she had once said she "hope[d] [her then unborn] baby dies" (R. 3812), and that she had once referred to DeBlase's mother as a "bitch." (R. 3732.)

However, before any of that testimony occurred, defense counsel elicited testimony indicating that, while incarcerated, Keaton "reads her Bible faithfully," is "at every prayer service," and "steady goes to the church services" (R. 3392-93) -- testimony that tended to establish Keaton's good character. See United States v. Moore, 604 F. App'x 458, 462 (6th Cir. 2015) (noting that "routine religious activity is perceived as a positive character trait"); People v. Lopez, 5 Cal. 5th 339, 369, 235 Cal. Rptr. 3d 64, 90, 420 P.3d 878, 900 (2018) (holding that the defendant introduced evidence of his good character by "present[ing] testimony concerning his strong Christian beliefs, church attendance, and daily prayers"); and Cole v. State, 152 S.W.3d 267, 269 (Mo. 2004) (noting that the defendant "pursue[d] a strategy of presenting good character evidence" by introducing evidence of his "participation in church activities").

As noted, Rule 404(a)(1) provides that, in a criminal case, the State may present evidence tending to establish the defendant's bad character as a means of rebutting the defendant's evidence of his or her good character. See also Daniel v. State, 86 So. 3d 405, 419 (Ala. Crim. App. 2011) (" 'Once the accused introduces evidence of his good character, the

door is opened for the prosecution to rebut with proof of his bad character.' " (quoting C. Gamble, McElroy's Alabama Evidence § 26.01(4) (6th ed. 2009))). Thus, because Keaton first elicited testimony that tended to establish her good character, the trial court did not abuse its discretion by allowing the State to rebut that evidence with testimony that tended to establish Keaton's bad character.[14]

We acknowledge Keaton's argument that the admissibility of the State's character evidence "had already been litigated before the trial began" and that she therefore "cannot in fairness be penalized ... for attempting to mitigate the damage of the bad-character evidence that [she] knew would be admitted later in the trial." (Keaton's reply brief, p.

---

[14]We note that Keaton did not present her good-character evidence through the proper avenue, which is to present evidence of a defendant's general reputation in the community and not his or her specific acts. See Daniel, 86 So. 3d at 419 (" 'It is, of course, the right of the accused to introduce his good character but only by means of general reputation.' " (quoting Gamble, supra, § 26.01(4))). "It is well settled that '[w]hen one party opens the door to otherwise inadmissible evidence, the doctrine of "curative admissibility" provides the opposing party with "the right to rebut such evidence with other illegal evidence." ' " Minor v. State, 914 So. 2d 372, 397 (Ala. Crim. App. 2004) (quoting Ex parte D.L.H., 806 So. 2d 1190, 1193 (Ala. 2001), quoting in turn C. Gamble, McElroy's Alabama Evidence § 14.01 (5th ed. 1996)).

34.) Contrary to Keaton's contention, however, the trial court made a pretrial ruling on the admissibility of the State's Rule 404(b) evidence, i.e., its collateral-acts evidence, not the admissibility of any character evidence the State might proffer. In fact, the State conceded at a pretrial hearing that it was prohibited from presenting character evidence unless Keaton first presented character evidence, and the trial court agreed with the State's concession. (R. 619-20.) Thus, Keaton is not entitled to relief on this claim.

VII.

Keaton argues that the trial court erred by denying her motion to suppress the data collected from her cellular telephone, which reflected numerous telephone calls between Keaton and DeBlase. According to Keaton, that data was collected during an illegal warrantless search of the telephone and therefore should have been suppressed pursuant to the Fourth Amendment to the United States Constitution, which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." However, we need not decide whether the warrantless search of Keaton's cellular telephone was illegal

or, if it was, whether its data was due to be suppressed, because we conclude that any error in the admission of such evidence was harmless. See Rule 45, Ala. R. App. P.

Keaton does not allege that the data from her cellular telephone was in and of itself incriminating, and our own review of the data indicates that nothing therein even remotely implicates Keaton in the children's deaths. Rather, as Keaton notes, the State relied on her extensive use of her cellular telephone, particularly her telephone calls to DeBlase, to discredit her allegation that DeBlase was "controlling her." (R. 4841.) However, the State also presented other evidence tending to refute that allegation. Specifically, testimony from three of DeBlase's friends indicated that it was actually Keaton who "controlled [DeBlase] quite a bit" as if she "had some kind of hold over him" (R. 3654); that Keaton was "very controlling" of DeBlase and that, "pretty much, what was said by her, [DeBlase] did" (R. 3694-95); and that Keaton "was more of the dominant" person in the relationship. (R. 3801.) In fact, because that testimony was based on the witnesses' personal observations of DeBlase and Keaton's relationship, it provided stronger refutation of Keaton's

allegation than did the data from her cellular telephone, which at most only implicitly refuted her allegation. In addition, DeBlase alleged in his written statement that Keaton forced him to "make a choice" between the children and her and that he was unable to prevent Keaton from abusing the children, which further indicates that DeBlase was not "controlling" Keaton. Also, Keaton's own statement to Sgt. Thompson tended to undermine her allegation that DeBlase was "controlling her" because Keaton inadvertently admitted that DeBlase would sometimes leave her cellular telephone with her when he would leave their apartment.

Thus, because there was other, stronger evidence tending to refute Keaton's allegation that DeBlase was "controlling her," the data from Keaton's cellular telephone was merely cumulative evidence that also potentially refuted her allegation. Given the cumulative nature of that data and the fact that it was not inherently incriminating, we have no trouble concluding that any error in the admission of the data was harmless. Accordingly, Keaton is not entitled to relief on this claim. See Hinkle v. State, 67 So. 3d 161, 165 (Ala. Crim. App. 2010) (noting that the erroneous admission of evidence "can be rendered harmless by the

admission of lawful evidence that tends to demonstrate the same facts"); and Jackson v. State, 791 So. 2d 979, 1013 (Ala. Crim. App. 2000) (noting that evidence " 'that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred' " (quoting White v. State, 650 So. 2d 538, 541 (Ala. Crim. App. 1994))).

VIII.

Keaton argues that the trial court erred by allowing expert witnesses to state their opinions with "a reasonable degree of [medical or] scientific certainty." (Keaton's brief, p. 78.) Specifically, Keaton challenges the admissibility of the testimony of Dr. Turner, who performed the autopsies, in which Dr. Turner offered an opinion with "a reasonable degree of medical certainty" regarding the possible cause or causes of the children's deaths. (R. 4069, 4083.) Keaton also challenges the admissibility of the testimony of Montgomery, a forensic toxicologist who examined the children's remains, in which Montgomery offered an opinion with "a reasonable degree of scientific certainty" regarding the possible reasons why no traces of antifreeze were found in the children's

remains. (R. 4171.) According to Keaton, such opinions were inadmissible because, she says, "[t]he phrase 'to a reasonable degree of [medical or] scientific certainty' ... has no scientific meaning and may mislead fact finders about the level of objectivity involved in the analysis, its reliability and limitations, and the ability of the analysis to reach a conclusion." (Keaton's brief, p. 78.) However, Keaton did not make this specific argument when objecting to Dr. Turner's testimony, and she did not raise any objection to Montgomery's testimony. Thus, we review this claim for plain error only. See Smith v. State, 246 So. 3d 1086, 1100 (Ala. Crim. App. 2017) ("Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only."); and Largin v. State, 233 So. 3d 374, 399 (Ala. Crim. App. 2015) (reviewing for plain error a claim challenging the admissibility of testimony to which the appellant did not object).

As a threshold matter, we note that Keaton cites no authority that supports her claim; instead, she relies on an article purportedly published by the National Commission on Forensic Science. Furthermore, we note that, in Vrocher v. State, 813 So. 2d 799, 805 (Ala. Crim. App. 2001), this

Court affirmed a trial court's determination that an expert witness's testimony was not relevant, and thus was inadmissible, because the witness "could not state [his opinion] with a reasonable degree of scientific certainty or a reasonable degree of medical certainty." (Emphasis added.) Thus, Vrocher provides implicit support for the conclusion that it is proper for an expert witness to state an opinion in such terms. We also note that other jurisdictions have held that an expert witness must state a medical or scientific opinion with a reasonable degree of certainty. See Ewers v. Saunders Cnty., 298 Neb. 944, 959, 906 N.W.2d 653, 664 (2018) (noting the "necessity" that expert medical or scientific opinions be stated with a "reasonable degree of ... certainty" (citation omitted)); Thomas v. State, 249 So. 3d 331, 339, 341 (Miss. 2018) (noting that an expert witness's opinion "must be stated with reasonable certainty" and affirming the trial court's exclusion of an expert witness's testimony because the witness could not state his opinion with "a reasonable degree of medical certainty" (citations omitted)); and State v. Stewart, 228, W. Va. 406, 416, 719 S.E.2d 876, 886 (2011) (noting that "an expert must form his or her opinion to a reasonable degree of certainty"). For the foregoing reasons, we cannot say

that the trial court committed plain error by allowing the expert witnesses in this case to state their medical and scientific opinions with "a reasonable degree of certainty."[15]

IX.

Keaton argues that the trial court erred by admitting crime-scene photographs and video recordings that showed the children's partial skeletal remains in the wooded areas where they were discovered and showed the extensive searches required to locate those remains. Keaton also argues that the trial court erred by admitting photographs of the exhumation of the children's remains following their proper burial. Because Keaton did not object to the admission of the exhumation photographs, we review the admission of those photographs for plain error only. See Ray v. State, 809 So. 2d 875, 888 (Ala. Crim. App. 2001)

[15]To be clear, we are not concerned in this case with whether an expert witness must state his or her opinion with a reasonable degree of medical or scientific certainty, and nothing in our decision should be construed as a commentary on that issue. Rather, we merely hold that it did not constitute plain error for the trial court to admit expert opinions that were stated in such terms.

(reviewing the admission of photographs for plain error because the appellant did not object to the admission of the photographs at trial).

Keaton argues that the crime-scene photographs and video recordings were inadmissible because, she says, they were cumulative, irrelevant, and prejudicial. However, "'"Alabama courts have held on many occasions that photographs [and video recordings] of the crime scene and the victims are admissible, even though they might be gruesome and cumulative, if they shed light on an issue being tried,"'" i.e., if they are relevant. Jackson v. State, 305 So. 3d 440, 484 (Ala. Crim. App. 2019) (quoting Blackmon, 7 So. 3d at 449, quoting in turn McGahee v. State, 885 So. 2d 191, 214 (Ala. Crim. App. 2003)). See Lindsay, ___ So. 3d at ___; Petersen v. State, 326 So. 3d 535, 596-98 (Ala. Crim. App. 2019); Smith, 246 So. 3d at 1111; Woolf v. State, 220 So. 3d 338, 372-73 (Ala. Crim. App. 2014); and Brooks v. State, 973 So. 2d 380, 394 (Ala. Crim. App. 2007) (all finding no error in the admission of cumulative crime-scene photographs or video recordings). As to the issue of relevancy, the crime-scene photographs and video recordings were particularly relevant because they tended to establish the remoteness of the areas where DeBlase buried the

children and the difficulty in locating the children's remains, which tended to demonstrate the efforts to which Keaton and DeBlase went to conceal their crimes. See Brooks, 973 So. 2d at 394 (holding that crime-scene photographs were relevant because they "showed ... the remoteness of the crime scene, thus indicating the effort Brooks and Carruth made to cover up their crime"). As to the issue of prejudice, Keaton merely alleges that the crime-scene photographs and video recordings were prejudicial, but that fact standing alone did not render such evidence inadmissible; indeed, "all evidence against a defendant" is prejudicial. Wilson, 142 So. 3d at 812. The question is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Rule 403, Ala. R. Evid. Although Keaton makes no argument in that regard, we conclude that the probative value of the crime-scene photographs and video recordings was not substantially outweighed by the danger of unfair prejudice, especially given that, contrary to Keaton's contention, the photographs and recordings were not particularly gruesome. See Smith, 246 So. 3d 1086, 1111 (holding that the probative value of crime-scene photographs that were not "unduly gruesome" was not substantially

outweighed by the danger of unfair prejudice). Based on the foregoing, the trial court did not abuse its discretion by admitting the crime-scene photographs and video recordings.[16]

As to the exhumation photographs, those photographs showed the children's headstones; the process of exhuming the children's caskets; the contents of the caskets, which included the children's partial skeletal remains and various ornamental items; and the process of extracting DNA samples from the children's remains. (C. 1852-66.) According to Keaton, those photographs were inadmissible because, she says, they had no probative value. However, Keaton makes no attempt to demonstrate how she was prejudiced by the exhumation photographs, and her failure to object to the photographs weighs against a finding that she was prejudiced by their admission. Towles, 263 So. 3d at 1081. See also Wilson, 142 So. 3d at 751 (noting that "the appellant has the burden to establish prejudice

[16]Keaton suggests that, by refusing to exclude at least some of the crime-scene photographs and video recordings, the trial court "failed to exercise any discretion whatsoever." (Keaton's brief, p. 81.) However, the trial court's ruling that all of those photographs and recordings were admissible was an exercise of discretion.

relating to an issue being reviewed for plain error"). Moreover, we note that the exhumation photographs were largely innocuous in that they primarily depicted nothing more than that the exhumation and collection of DNA samples had occurred, which are not particularly prejudicial facts. The only exhumation photographs that were arguably not innocuous were the photographs depicting the children's partial skeletal remains, but those photographs were cumulative to some of the crime-scene photographs, which were properly admitted. Thus, even if the exhumation photographs had no probative value, we see no basis for concluding that their admission "seriously affect[ed] [Keaton's] 'substantial rights' " or had "an unfair prejudicial impact on the jury's deliberations." Towles, 263 So. 3d at 1081 (citations omitted). Accordingly, we cannot say that the trial court committed plain error by admitting the exhumation photographs.

X.

Keaton argues that the trial court erred by admitting the statements she made to Sgt. Thompson and Sgt. Prine and by admitting testimony

relating other out-of-court statements she made. We address each of those claims in turn.

A.

Keaton argues that the trial court erred by denying her motion to suppress the statement she made to Sgt. Thompson at the Louisville Police Department shortly after law enforcement officers conducted the welfare check at DeBlase and Keaton's apartment. According to Keaton, the trial court should have suppressed that statement because Sgt. Thompson did not provide her with Miranda[17] warnings. Regarding the circumstances under which Keaton made her statement, Sgt. Thompson testified:

> "Q. And ... Keaton voluntarily came to the police station, right?
>
> "A. Yes.
>
> "Q. You didn't ask her to come to the police station, did you?
>
> "A. I asked, I believe, the officer to see if she's willing to come down.

[17]Miranda v. Arizona, 384 U.S. 436 (1966).

"Q. Uh-huh. And, when she came down, she was brought by her family members?

"A. Yes.

"....

"Q. Okay. And, when she was brought in, was she handcuffed?

"A. No.

"Q. Was she forced in anyway to come in and make a statement?

"A. No.

"Q. Was she free to leave?

"A. Yes.

"Q. Was she under arrest for anything?

"A. No.

"Q. Was her statement freely and voluntarily given?

"A. Yes.

"Q. And she was not even a suspect at that time, was she?

"A. No.

"Q. So, she volunteered to give you a statement?

"A. Yes."

(R. 2784-86.) We also note that Sgt. Thompson did not confront Keaton with an accusation of guilt during the course of her statement. In fact, when Keaton asked "how much trouble [she was] going to be in," Sgt. Thompson replied: "Unless you've lied to me about something, I don't see that you should be in any trouble." (State's Exhibit 481 at 1:16:42-54.)

It is well settled that "Miranda warnings are required only before a custodial interrogation." Creque v. State, 272 So. 3d 659, 767 (Ala. Crim. App. 2018) (emphasis added). On appeal, Keaton concedes that she was "not formally in custody" when she made her statement to Sgt. Thompson -- a concession supported by his testimony -- but she argues that Sgt. Thompson's investigative interrogation "was in material respects custodial." (Keaton's brief, p. 89.) In support of that claim, Keaton points to the facts that she "was suspected of having information about missing or deceased children" and that she "was interrogated in a closed room." (Id.) However, those facts did not transform what was clearly a voluntary encounter into a custodial interrogation. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding that the defendant was not in custody and

that Miranda warnings were therefore not required in a case where the defendant had voluntarily gone to the police station to make a statement, even though the interrogation occurred in a closed room and even though the defendant was informed that he was a suspect). Thus, because Keaton was not in custody when she made her statement to Sgt. Thompson, he was not required to provide her with Miranda warnings. Creque, 272 So. 3d at 767. Accordingly, the trial court did not err by denying Keaton's motion to suppress that statement.

Keaton also makes a cursory argument that the trial court should have suppressed her statement to Sgt. Thompson because, she says, "her mental health issues and emotional state rendered her vulnerable to police pressure, making her statement involuntary." (Keaton's brief, pp. 89-90.) Because Keaton did not argue below that her statement was involuntary, we review this claim for plain error only. Yeomans, 898 So. 2d at 892.

Although Keaton alleges that she was susceptible to "police pressure," she does not point to any allegedly coercive conduct by Sgt. Thompson, and our review of the audiovisual recording of Keaton's

statement confirms that nothing about Sgt. Thompson's conduct even arguably constituted "police pressure." In fact, Keaton's statement is largely a series of rambling narratives that are often unresponsive to any prompt from Sgt. Thompson, and throughout the statement Keaton is calm and does not appear to be under any stress. Thus, there is no basis for concluding that Keaton's statement was involuntary, and, as a result, the trial court did not commit error, plain or otherwise, by admitting the statement. See Townes v. State, 253 So. 3d 447, 499 (Ala. Crim. App. 2015) (finding no abuse of discretion in the trial court's determination that the defendant's statement was voluntary because the statement "was not the product of any threats, inducements, or promises" and because the defendant "was fairly calm and did not appear to be under undue stress").

B.

Keaton argues that the trial court erred by denying her motion to suppress the statement she made to Sgt. Prine following her arrest. In support of that claim, Keaton contends that she "expressed interest in a lawyer" during the interrogation and that, as a result, Sgt. Prine "had a duty to clarify whether she intended to invoke her right to counsel."

(Keaton's brief, p. 90.) Because Keaton did not make that specific argument in support of her motion to suppress, we review this claim for plain error only. Clark, 896 So. 2d at 650.

Before Sgt. Prine interrogated Keaton, the following colloquy occurred:

> "SGT. PRINE: I need to go over your rights with you. I have to inform you of what they are, okay?
>
> "KEATON: Is it the right to -- that I answer certain things, right to an attorney?
>
> "SGT. PRINE: Right. Okay, I have to go over them with you. If you don't understand them, let me know that you don't understand it, okay? And if you do understand it, then we can go from there, alright?
>
> "KEATON: I took law for two years in college before I met [DeBlase].
>
> "SGT. PRINE: Okay, awesome. Alright, you have the right to remain silent. Anything you say can be used against you in court.
>
> "KEATON: And will be.
>
> "SGT. PRINE: You have the right to talk to a lawyer before questioning or making any statements, and you have the right to have him present with you, okay?
>
> "KEATON: And will y'all assign one since I don't have one?

> "SGT. PRINE: Okay, hold on. Let me go through this, okay? If you cannot afford a lawyer, one will be appointed for you, okay? You can stop the questioning ... or you may stop making any statements at any time by refusing to answer further questions --
>
> "KEATON: Will I look guilty for doing that?
>
> "SGT. PRINE: Ma'am?
>
> "KEATON: Will I look guilty if I don't answer questions?
>
> "SGT. PRINE: That's your right. That's your right. You have the right to stop it at any time, okay?
>
> "-- until you consult a lawyer prior to continuing with the questioning or making any statements. Do you understand those? That you have --
>
> "KEATON: Yeah.
>
> "SGT. PRINE: -- the right to remain silent, okay?
>
> "KEATON: I understand.
>
> "SGT. PRINE: Alright. You have the right to have a lawyer, and you also have the right to, if you decide to answer questions, to stop the questioning at any time that you want to."

(State's Exhibit 483 at 5:20-6:55) Thereafter, Keaton immediately began attempting to explain why her statement to Sgt. Thompson did not "look

good" (id. at 7:00) and proceeded to answer Sgt. Prine's questions without requesting an attorney.

> "During a custodial interrogation, if the suspect unequivocally requests counsel at any time before or after the suspect waives his Miranda rights, 'the interrogation must cease until an attorney is present.' Miranda, 384 U.S. at 474. If the suspect makes an equivocal reference to an attorney after waiving his Miranda rights, the interrogating officer has no obligation to stop questioning the suspect and the officer is not required to ask questions to clarify whether the suspect actually wants an attorney. Davis v. United States, 512 U.S. 452, 459-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). However, if a suspect makes an equivocal reference to an attorney before waiving his Miranda rights, the interrogating officer is required to ask questions to clarify the reference until the suspect either clearly invokes his right to counsel or waives it. See State v. Collins, 937 So. 2d 86, 93 (Ala. Crim. App. 2005) (holding that '[b]ecause [the defendant] did not waive her Miranda rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity')."

Thompson v. State, 97 So. 3d 800, 806-07 (Ala. Crim. App. 2011).

Here, when Sgt. Prine first informed Keaton that she had the right to an attorney, Keaton asked: "Will y'all assign one since I don't have one?" That inquiry did not constitute an unequivocal assertion of the right to an attorney but, rather, was merely an inquiry into the logistics

of obtaining an attorney if Keaton decided to invoke that right. See United States v. Shabaz, 579 F.3d 815, 819 (7th Cir. 2009) (holding that the question "am I going to be able to get an attorney?" was not an unequivocal request for an attorney); Lord v. Duckworth, 29 F.3d 1216, 1219 (7th Cir. 1994) (holding that the question "I can't afford a lawyer but is there anyway I can get one?" was not an unequivocal request for an attorney); and Soffar v. Cockrell, 300 F.3d 588, 595 (5th Cir. 2002) ("[A] suspect's question about how to obtain an attorney does not constitute an unambiguous assertion of his right [to counsel]."). This much is apparent from the fact that Keaton subsequently asked if she would "look guilty" if she requested an attorney, which indicates that she was undecided about making such a request. Indeed, Keaton essentially concedes that she made at most an equivocal reference to an attorney in that she argues that Sgt. Prine had a duty to clarify whether she desired to invoke that right -- an obligation that is required only for equivocal references that occur before a Miranda waiver. Thompson, 97 So. 3d at 806.

After Keaton made an equivocal reference to an attorney, Sgt. Prine explained that Keaton had the right to have an attorney present during

the interrogation, that she would be provided with an attorney if she could not afford one, and that she could stop the interrogation at any point and confer with an attorney before the interrogation continued. Sgt. Prine then asked Keaton if she understood her rights, and Keaton indicated that she did. However, rather than invoking her right to an attorney, Keaton willingly and even eagerly answered Sgt. Prine's questions and, in doing so, waived that right. See United States v. Adams, 583 F.3d 457, 467 (6th Cir. 2009) (noting that "a Miranda 'waiver may be clearly inferred ... when a defendant, after being properly informed of his rights and indicating that he understands them, nevertheless does nothing to invoke those rights' and speaks" (quoting United States v. Nichols, 512 F.3d 789, 798 (6th Cir. 2008))). Thus, the record indicates that, before Keaton waived her Miranda rights, Sgt. Prine fulfilled her duty of ensuring that Keaton understood that she had the right to an attorney and the right to have an attorney appointed if she could not afford one. See Thompson, 97 So. 3d at 810 (holding that a law enforcement officer "fulfilled his duty to clarify any ambiguity that resulted from [the defendant's] earlier equivocal reference to an attorney" by explaining that the defendant had the right

to have an attorney present during the interrogation, explaining that an attorney would be appointed for the defendant if he could not afford one, and ensuring that the defendant understood those rights). Accordingly, the trial court did not commit plain error by denying Keaton's motion to suppress her statement to Sgt. Prine.

As she did with respect to her statement to Sgt. Thompson, Keaton makes the cursory argument that the trial court should have suppressed her statement to Sgt. Prine because, she says, her "mental health issues and emotional state rendered her vulnerable to police pressure, making her statement involuntary." (Keaton's brief, p. 91.) Because Keaton did not argue below that her statement was involuntary, we review this claim for plain error only. Yeomans, 898 So. 2d at 892.

Our analysis of this claim is no different than our analysis of the same claim that Keaton directed at Sgt. Thompson. That is to say, although Keaton alleges that she was susceptible to "police pressure," she does not point to any allegedly coercive conduct by Sgt. Prine, and our review of the audiovisual recording of Keaton's statement confirms that the statement was not coerced by "police pressure." To the contrary,

Keaton willingly and eagerly talks at length about the circumstances surrounding the children's deaths and, as she did with Sgt. Thompson, often does so in rambling narratives that are unresponsive to any prompt from Sgt. Prine. In addition, throughout the interrogation Keaton is calm and does not appear to be under any undue stress; at most, she becomes mildly frustrated near the end of the interrogation when Sgt. Prine indicates that she does not believe Keaton has been truthful and accuses Keaton of abusing the children. Thus, there is no basis for concluding that Keaton's statement was involuntary, and, as a result, the trial court did not commit error, plain or otherwise, by admitting the statement. Townes, 253 So. 3d at 499.

Keaton also makes a cursory argument that the trial court erred by denying her motion to redact "many irrelevant, inadmissible, and prejudicial assertions" by Sgt. Prine during the course of Keaton's statement.[18] (Keaton's brief, p. 93.) However, Keaton does not identify

[18]Keaton also filed a motion to redact comments made by Sgt. Thompson during the course of her statement to him, but Keaton abandoned that claim at trial. (R. 415.)

Sgt. Prine's allegedly inadmissible comments, nor does she cite any authority that supports her claim that the comments should have been redacted. Thus, with respect to this claim, Keaton has failed to comply with Rule 28(a)(10), Ala. R. App. P., which requires her to cite the "parts of the record relied on," i.e., to identify Sgt. Prine's allegedly inadmissible comments, and to cite authority that supports her claim. See Hart v. State, 852 So. 2d 839, 848 (Ala. Crim. App. 2002) (holding that the appellant failed to comply with Rule 28(a)(10) by failing "to provide this Court with any citations to the part of the record relied on in support of [his] claim"); and Mashburn v. State, 148 So. 3d 1094, 1113 (Ala. Crim. App. 2013) (holding that the appellant failed to comply with Rule 28(a)(10) by failing to cite any authority in support of his claim). Because this case involves the death penalty, Keaton's failure to comply with Rule 28(a)(10) does not preclude appellate review of this claim; it does, however, render the claim subject to review for plain error only. See Henderson, 248 So. 3d at 1030 (reviewing for plain error a claim that did not comply with Rule 28(a)(10)); and Shanklin, 187 So. 3d at 778 n.25 (same).

In Broadnax v. State, 825 So. 2d 134 (Ala. Crim. App. 2005), this Court addressed whether the trial court committed plain error by admitting certain items into evidence. According to the appellant, the trial court erred by admitting those items because, he said, the State had failed to establish a proper chain of custody. In concluding that the appellant was not entitled to relief on that claim, this Court stated:

> "Because of the way this issue is presented in his brief to this Court, we seriously question Broadnax's sincerity in making this argument. ... Broadnax does not specifically state in his brief to this Court which items of evidence should not have been admitted. In addition, Broadnax does not explain how he was prejudiced by the introduction of this evidence. ... [A]bsent a showing by Broadnax regarding which evidence should not have been admitted, the reasons why that evidence was inadmissible, and the prejudice he suffered because of its admission, we refuse to conclude that plain error occurred."

Id. at 170.

Similarly, we question Keaton's sincerity in arguing that the trial court should have redacted some of Sgt. Prine's comments from Keaton's recorded statement. This is so because, as noted, Keaton does not bother to identify the allegedly inadmissible comments, nor does she make any attempt to demonstrate how she was prejudiced by those comments. See

Wilson, 142 So. 3d at 751 (noting that "the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error"). Also, Keaton makes no serious attempt to demonstrate why those comments were inadmissible; instead, she merely makes the cursory argument that the comments were irrelevant without providing any rationale in support of that argument. Thus, as we did under similar circumstances in Broadnax, we refuse to hold that the trial court committed plain error by refusing to redact some of Sgt. Prine's comments from Keaton's recorded statement. Accordingly, Keaton is not entitled to relief on this claim.

C.

Keaton argues that the trial court erred by denying her motion to suppress the testimony of Cynthia Howard, the social worker who spoke with Keaton at the Louisville Police Department following Keaton's arrest and who testified to statements Keaton made at that time. According to Keaton, Howard was acting as an agent of the State when she spoke with Keaton. Thus, Keaton argues that Howard was required to provide her with Miranda warnings, which Howard did not provide. However, even

if we assume that Howard was acting as an agent of the State, the specific facts of this case did not require Howard to provide Keaton with Miranda warnings.

In Floyd, supra, this Court addressed the admissibility of a second statement that Cedric Jerome Floyd made to law enforcement officers shortly after his first statement. Before he made the first statement, Floyd was advised of his Miranda rights, which he waived, but he was not provided with Miranda warnings before he made the second statement -- an omission that, Floyd argued, rendered his second statement inadmissible. In rejecting that claim, this Court stated:

> "'"It is well settled that once Miranda warnings have been given and a waiver made, a failure to repeat the warnings before a subsequent interrogation will not automatically preclude the admission of the inculpatory response. Fagan v. State, 412 So. 2d 1282 (Ala. Crim. App. 1982); Smoot v. State, 383 So. 2d 605 (Ala. Crim. App. 1980)."
>
> "'Hollander v. State, 418 So. 2d 970, 972 (Ala. Crim. App. 1982). "Whether Miranda warnings should be given before each interrogation must depend upon the circumstances of each case. The

length of time and the events which occur between interrogations are relevant matters to consider." Jones v. State, 47 Ala. App. 568, 570, 258 So. 2d 910, 912 (1972).

> " ' " 'Once the mandate of Miranda has been complied with at the threshold of the questioning it is not necessary to repeat the warnings at the beginning of each successive interview.' Gibson v. State, 347 So. 2d 576, 582 (Ala. Cr. App. 1977). See also Cleckler v. State, 570 So. 2d 796 (Ala. Cr. App. 1990).
>
> > " ' " 'An accused may be read the Miranda rights prior to one interrogation but not confess until a later interrogation during which there was no rereading of the Miranda warning. As a general rule, it has been held that Miranda warnings are not required to be given before each separate interrogation of a defendant after an original waiver of the accused's rights has been made. However, if such a long period of time has elapsed between the original Miranda warning and the subsequent confession that it can be said that, under the

> circumstances, the accused was not impressed with the original reading of his rights in making the ultimate confession, then the confession should be held inadmissible.'
>
> "'"C. Gamble, McElroy's Alabama Evidence, 201.09 (5th ed. 1997) (footnotes omitted). See Phillips v. State, 668 So. 2d 881, 883 (Ala. Cr. App. 1995)."
>
> "'Powell v. State, 796 So. 2d 404, 414 (Ala. Crim. App. 1999).'

"[Ex parte Landrum], 57 So. 3d [77,] 81-82 [(Ala. 2010)].

"The record reflects that Floyd was advised of his Miranda rights before he gave his first statement at 2:20 a.m. After the first statement concluded at 2:40 a.m., Floyd was placed in a holding cell at the Atmore Police Department. At approximately 3:45 a.m., Floyd gave his second statement. Less than an hour and a half passed from the time Floyd was advised of his Miranda rights and the time he gave his second statement to police; the only event that occurred during that time was Floyd's being placed in a holding cell. Under the circumstances in this case, there was no need to readvise Floyd of his Miranda rights before he gave his second statement. See, e.g., Hollander v. State, 418 So. 2d 970, 972 (Ala. Crim. App. 1982) (holding that between one and one-and-three-quarters-hour time lapse did not render Miranda warnings stale); and Fagan v. State, 412 So. 2d 1282, 1283 [(Ala. Crim. App. 1982)] (holding that

> three-and-a-half-hour time lapse did not render Miranda warnings stale). Therefore, the trial court properly denied Floyd's motion to suppress his second statement to police."

Floyd, 289 So. 3d at 394.

The facts of this case are similar to those of Floyd. The record indicates that Sgt. Prine's interrogation of Keaton began at 10:30 p.m. (C. 872), and we have already concluded that Keaton knowingly, intelligently, and voluntarily waived her Miranda rights at that time. Sgt. Prine's interrogation lasted approximately one hour, and Howard testified that she arrived at the Louisville Police Department "around 11:30ish" that night. (R. 3009.) Thus, the record indicates that Keaton's statement to Howard occurred approximately one hour, or perhaps slightly more than one hour, after Keaton was advised of and waived her Miranda rights, which is similar to the approximately 90-minute span in Floyd. In addition, the only "event" that occurred between Keaton's two statements was that Keaton remained in a detective's office while she waited to be "booked" on child-abuse charges. Thus, as we held under similar circumstances in Floyd, we hold that Howard was not required to provide Keaton with Miranda warnings even if Howard was acting as an agent of

the State. Accordingly, the trial court did not err by denying Keaton's motion to suppress Howard's testimony.

For the third and final time, Keaton makes the cursory argument that her "mental health issues and emotional state rendered her vulnerable to police pressure, making her statement involuntary" (Keaton's brief, pp. 91-92) -- a claim we once again review only for plain error because it was not raised below. Yeomans, 898 So. 2d at 892. However, although Keaton alleges that she was susceptible to "police pressure," she does not point to any allegedly coercive conduct by Howard, and Keaton's statement to Howard was not recorded. Thus, even if Howard was acting as an agent of the State, there is no basis in the record for concluding that Keaton's statement to Howard was involuntary, and there is therefore no basis for concluding that the trial court committed plain error by admitting Howard's testimony. Townes, 253 So. 3d at 499.

D.

Keaton argues that the trial court erred by denying her motion to suppress statements she made to Taylor while they were incarcerated together in the Mobile County jail. In support of her motion, Keaton

alleged that Taylor "was directed by Sheriff's Deputy Kelvin Patterson to get information from Keaton" (C. 225) and that, as a result, Taylor was acting as an agent of the State when Keaton made incriminating statements to her. Thus, Keaton argued, Taylor was required to provide her with Miranda warnings, which Taylor did not provide.

At a hearing on Keaton's motion, the trial court heard testimony from Taylor and Deputy Patterson. Taylor testified that she was assigned to serve as "a buddy watch" (R. 682) for Keaton and that Keaton would "talk to [her] about [Keaton's] case" "[e]veryday." (R. 683.) Taylor testified, however, that she did not ask Keaton about the case and that, instead, Keaton voluntarily discussed her case even after Taylor warned her "not to talk" about the case. (R. 694.) At that time, Deputy Patterson was the "contact person" for inmates who had information regarding a pending case (R. 684), so after Keaton provided her with incriminating information, Taylor contacted Deputy Patterson on the jail "hotline" and arranged to meet with him. (R. 688.) However, Taylor testified that she had never met or spoken to Deputy Patterson before that meeting, and when asked if Deputy Patterson had "at anytime ... [told her] to go and

gather information for the State or for him," Taylor testified: "Not at all." (R. 686.) Deputy Patterson corroborated Taylor's testimony that she had initiated their lone meeting, that he had not told Taylor before the meeting "to go get information for the State" (R. 701), that he did not tell Taylor "to go back in the cell and gather what information that she could" following the meeting (R. 702), and that he never saw Taylor again after the meeting. On cross-examination, Deputy Patterson conceded that his written report of the meeting reflected that he "told Taylor to go back to the cell and gather what information she could." (R. 704.) However, Deputy Patterson testified that he was "interviewing probably 20 to 25 people a day" at that time (R. 705) and that his report, which was "typed ... from memory ... close to a month" after he met with Taylor, contained "an error" insofar as it indicated that he had told Taylor to "go back to the cell and gather what information she could." (R. 704-05.)

On appeal, Keaton reiterates her claim that Taylor was acting as an agent of the State while incarcerated in the Mobile County jail and that, as a result, Taylor was required to provide her with Miranda warnings prior to her incriminating statements. However, "finding that [Taylor]

was acting as an agent of the police 'require[s] proof of some affirmative action by a police officer or other governmental official that preceded the interrogation and can reasonably be seen to have induced [Taylor] to conduct the interrogation that took place.' " Smith v. State, 838 So. 2d 413, 442 (Ala. Crim. App. 2002) (quoting Gilchrist v. State, 585 So. 2d 165, 175 (Ala. Crim. App. 1991)). Here, both Taylor and Deputy Patterson testified that Deputy Patterson never requested that Taylor obtain information from Keaton, which supports the conclusion that Taylor was not acting as an agent of the State when Keaton made incriminating statements to her. Although Keaton notes that Deputy Patterson's written report indicates that he instructed Taylor to "go back to the cell and gather what information she could," Deputy Patterson testified that the statement in his report was incorrect, and the trial court could have found Deputy Patterson's testimony to be credible. See State v. Hargett, 935 So. 2d 1200, 1203 (Ala. Crim. App. 2005) (noting that, in a suppression hearing, conflicts in the testimony and the credibility of witnesses are matters for the trial court to resolve). Furthermore, Taylor unequivocally testified that she never elicited any statements from Keaton

and that, instead, Keaton voluntarily and openly talked about her case, without any prompting from Taylor, even after Taylor warned her not to discuss the case. In other words, there is no indication that Taylor interrogated Keaton in order to obtain incriminating information. Thus, the testimony at the suppression hearing supports the trial court's conclusion that Taylor was not acting as an agent of the State when Keaton made incriminating statements to her. Accordingly, the trial court did not abuse its discretion by denying Keaton's motion to suppress Taylor's testimony. See Hargett, 935 So. 2d at 1203 (noting that, when a trial court receives ore tenus evidence at a suppression hearing, this Court reviews the court's ruling on the motion to suppress for an abuse of discretion).

Keaton also argues that the trial court should have suppressed Taylor's testimony on the grounds that "jail informant testimony" is "highly unreliable" and that the "probative value [of Taylor's testimony] was substantially outweighed by the danger of unfair prejudice." (Keaton's brief, pp. 67, 69.) Because Keaton did not raise those specific

grounds in support of her motion to suppress, we review these claims for plain error only. Clark, 896 So. 2d at 650.

As to Keaton's claim that Taylor's testimony was unreliable, that claim challenges the credibility of Taylor's testimony and thus challenges the weight of the testimony, not its admissibility. See Ritchie v. State, 808 So. 2d 71, 75 (Ala. Crim. App. 2001) (holding that a claim alleging that testimony was unreliable "went to the weight and credibility the jury would assign to [the] testimony rather than its admissibility"). As to whether the probative value of Taylor's testimony was substantially outweighed by the danger of unfair prejudice, Keaton's own statements regarding the circumstances of the children's deaths were clearly probative of a material issue, and Keaton was not unfairly prejudiced by the admission of statements that she voluntarily made without any prompting from Taylor. See Petersen, 326 So. 3d at 587 (holding that the probative value of the defendant's statements that "show[ed] his culpability for killing the victims" was not substantially outweighed by undue prejudice). Thus, the trial court did not abuse its discretion, much less commit plain error, by admitting Taylor's testimony.

In a related claim, Keaton argues that the trial court erred by refusing "to admit news articles predating Keaton's arrival in the Mobile County jail," which, according to Keaton, "would have shown that Taylor had a source other than Keaton for the details in her statements and testimony." (Keaton's brief, p. 69.) Specifically, Keaton suggests that those articles would have undermined the credibility of Taylor's testimony because, Keaton says, the articles "would have shown that Taylor had access to specific allegations, including the State's theory that Keaton poisoned the children, prior to coming forward to the authorities." (Keaton's reply brief, p. 36.) However, Taylor specifically testified that Keaton had admitted to poisoning the children by mixing antifreeze into their food, and none of the articles Keaton proffered mention antifreeze or indicate that the poison was mixed into the children's food (C. 2555-65), which tends to indicate that Taylor obtained such facts from Keaton and not from the articles. Thus, contrary to Keaton's contention, the admission of those articles would not have undermined the credibility of Taylor's testimony; as a result, we cannot say that the trial court abused its discretion by refusing to admit the articles into evidence. See Windsor,

110 So. 3d at 880 (" 'The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion.' " (quoting Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000)).

E.

Keaton argues that the trial court erred by denying her motion to suppress the testimony of Officer Jones, who testified to incriminating statements she overheard Keaton make while Keaton was incarcerated in the Mobile County jail. At trial, Keaton argued that the trial court should have suppressed Officer Jones's testimony because Officer Jones did not provide Keaton with Miranda warnings. On appeal, however, Keaton argues that the trial court should have suppressed Officer Jones's testimony "given its unreliability, low probative value, and high potential for unfair prejudice." (Keaton's brief, p. 93.) Because Keaton did not make those specific arguments in support of her motion to suppress, we review these claims for plain error only. Clark, 896 So. 2d at 650.

As to Keaton's claim that Officer Jones's testimony was not reliable, we have already noted that such a claim challenges the weight of Officer Jones's testimony, not its admissibility. Ritchie, 808 So. 2d at 75. Likewise, as to whether the probative value of Officer Jones's testimony was substantially outweighed by the danger of unfair prejudice, we have already concluded that Keaton's own incriminating statements were clearly probative of a material issue and that Keaton was not unfairly prejudiced by the admission of unsolicited statements that she voluntarily made. Petersen, 326 So. 3d at 587. Thus, the trial court did not abuse its discretion, much less commit plain error, by admitting Officer Jones's testimony. Although Keaton has abandoned on appeal her claim that Officer Jones should have provided her with Miranda warnings, we note that Officer Jones did not interrogate Keaton but, instead, merely overheard Keaton's statement to another inmate. Such circumstances do not require Miranda warnings. See Hodges v. State, 926 So. 2d 1060, 1071-72 (Ala. Crim. App. 2005) (" 'An unsolicited remark, not in response to any interrogation, does not fall within the scope of the Miranda rule.' " (quoting Ray, 809 So. 2d at 888)).

XI.

Keaton argues that the trial court erred by admitting documentary evidence and testimony that, she says, violated her right to confrontation guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 6, of the Alabama Constitution, which both protect a criminal defendant's right to "confront[ ] ... the witnesses against him." We address each of those claims in turn.

A.

Keaton argues that the trial court erred in the guilt phase of trial by admitting into evidence records from the Mobile Municipal Court. Those records indicated that DeBlase had previously pleaded guilty to filing a false police report but also indicated that he had "no domestic violence charges" (R. 4257) -- records the State presented to impeach Keaton's allegations regarding DeBlase's behavior toward her. Although Keaton objected to the admission of the municipal-court records, she did not argue below that their admission violated her right to confrontation, which is the specific argument she now makes on appeal. Thus, we review this claim for plain error only. Smith, 246 So. 3d at 1100.

"In Crawford [v. Washington, 541 U.S. 36 (2004)], the United States Supreme Court noted that generally business records are not testimonial for Confrontation Clause purposes. See Crawford, 541 U.S. at 56 (stating that '[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy'). In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the Court clarified that merely because a document may fit within the business-records exception did not mean that it was always nontestimonial for Confrontation Clause purposes. In that case, the Court held that forensic analysts' affidavits, attesting that the substance they had analyzed was cocaine, were not removed from coverage of the Confrontation Clause, even if they qualified as business records, because they were produced for use at trial. Specifically, the Court explained:

> " 'Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.'

"Melendez–Diaz, 557 U.S. at 2539-40."

Craft v. State, 90 So. 3d 197, 215-16 (Ala. Crim. App. 2011).

Here, the municipal-court records were prepared in the ordinary course of business for the purpose of administering the affairs of law enforcement in Mobile, not for the purpose of proving some fact at Keaton's trial. Indeed, those records were created in 2007 and 2008 (C. 1741-70), long before the children were killed. Thus, because the municipal-court records were business records that were not prepared for use at Keaton's trial, the records were not testimonial and therefore did not violate Keaton's right to confrontation. See Craft, 90 So. 3d at 216 (holding that a "traditional business record" that was "not [prepared] specifically for the purpose of proving a fact at a criminal trial" was "nontestimonial evidence" and that its admission therefore did not violate the defendant's right to confrontation). Accordingly, the trial court did not abuse its discretion, much less commit plain error, by admitting the municipal-court records.

B.

Keaton argues that the trial court erred in the penalty phase of trial by admitting testimony from Mark Lasko, who was the director of mental health at the Mobile County jail at the time Keaton was incarcerated

there. Specifically, Keaton argues that the trial court erred by allowing Lasko to testify that Dr. Charles Smith, a psychiatrist, had evaluated Keaton and had reported that he had not observed any symptoms of bipolar disorder in Keaton.[19] Although Keaton objected to Lasko's testimony, she did not argue below that Lasko's testimony violated her right to confrontation, which is the specific argument she now makes on appeal. Thus, we review this claim for plain error only. Smith, 246 So. 3d at 1100. Keaton also argues that the trial court erred by admitting testimony from Dr. David Sandefer, a clinical psychologist, who testified that he had evaluated Keaton in October 2011 and that people "on [his] treatment team" had concluded that Keaton was malingering during the evaluation. (R. 5485.) Because Keaton did not object to Dr. Sandefer's testimony, we also review this claim for plain error only. Largin, 233 So. 3d at 399.

As the State notes, this Court has "express[ed] doubt that the Confrontation Clause applies at sentencing, even in capital cases,"

[19]Dr. Smith was unable to testify at trial because of a medical condition. (R. 5530.)

Lockhart, 163 So. 3d at 1133, and some federal appellate courts have unequivocally concluded that a defendant's right to confrontation does not apply at the penalty phase of a capital trial. See, e.g., Muhammad v. Secretary, Florida Dep't of Corr., 733 F.3d 1065, 1074 (11th Cir. 2013) (holding that the United States Supreme Court's decisions in Williams v. New York, 337 U.S. 241 (1949), and Gardner v. Florida, 430 U.S. 349 (1977), "together stand for the proposition that a defendant does not have a right to confront hearsay declarants at a capital sentencing hearing"); and Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002) ("[T]he Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty." (citing Williams v. New York, supra)). Thus, we cannot say that the trial court committed plain error by admitting, in the penalty phase of trial, testimony that related the conclusions of people who had evaluated Keaton's mental health but who did not testify at trial. See Townes, 253 So. 3d at 494 (noting that "appellate courts cannot find plain error unless 'the [alleged] legal error

[is] clear or obvious' " (quoting Puckett v. United States, 556 U.S. 129, 135 (2009))).

Moreover, we note that the testimony Keaton challenges was cumulative of other testimony presented in the penalty phase of trial. Specifically, Dr. Sandefer testified that he, like Dr. Smith, had not diagnosed Keaton with bipolar disorder and that he, like the members of his treatment team, had concluded that Keaton was malingering while being evaluated. (R. 5490, 5492.) That fact further supports the conclusion that the trial court did not commit plain error by allowing Lasko and Dr. Sandefer to testify that other people had evaluated Keaton and had reached the same conclusions. See Whatley v. State, 146 So. 3d 437, 464 (Ala. Crim. App. 2010) (finding no plain error in the admission of evidence that was cumulative to other evidence).

For the foregoing reasons, Keaton is not entitled to relief on this claim.

XII.

Keaton argues that the trial court committed multiple errors during the course of its jury instructions. We address each of those claims in

turn, keeping in mind that a trial court has broad discretion in formulating its jury instructions and that " ' " 'the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.' " ' " Baird v. State, 849 So. 2d 223, 247 (Ala. Crim. App. 2002) (quoting Maples v. State, 758 So. 2d 1, 65 (Ala. Crim. App. 1999), quoting in turn Self v. State, 620 So. 2d 110, 113 (Ala. Crim. App.1992), quoting in turn Porter v. State, 520 So. 2d 235, 237 (Ala. Crim. App. 1987)).

A.

Keaton argues that the trial court erred by "read[ing] only a portion of the accomplice liability instruction, as opposed to the entire charge," when the jury twice asked to be reinstructed on the law regarding accomplice liability. (Keaton's brief, p. 87.) However, contrary to Keaton's contention, each time the jury asked to be reinstructed on accomplice liability, the trial court recited its initial accomplice-liability instruction verbatim. (R.4860-62, 4897-4900, 4912-15.) Thus, Keaton is not entitled to relief on this claim.

B.

Keaton challenges the propriety of the trial court's circumstantial-evidence instruction, which defined direct and circumstantial evidence, explained that circumstantial evidence is not inferior to direct evidence, and informed the jury that it could draw reasonable inferences from any circumstantial evidence. (R. 4859-60.) Keaton does not argue that the trial court's circumstantial-evidence instruction contained an incorrect statement of law; rather, she argues that the instruction was "woefully insufficient" in that it failed to inform the jury that "circumstantial evidence suffices for conviction only if 'inconsistent with every other rational hypothesis except' guilt." (Keaton's brief, pp. 87, 88 (quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990)).) Because Keaton did not object to the trial court's circumstantial-evidence instruction, we review this claim for plain error only. See Hosch v. State, 155 So. 3d 1048, 1107 (Ala. Crim. App. 2015) ("Hosch did not object to this jury instruction at trial, so our review is for plain error.").

In Ex parte Carter, 889 So. 2d 528, 533 (Ala. 2004), the Alabama Supreme Court held that a trial court is not required to give a circumstantial-evidence instruction, even in a case in which all the State's

evidence is circumstantial, and that a jury instruction is proper if it "instructs the jury that it can convict the defendant only if the jury finds that the State has proved each element of the crime beyond a reasonable doubt and the State has disproved the defendant's presumption of innocence beyond a reasonable doubt." See also id. at 533 n.3 ("Both Holland [v. United States, 348 U.S. 121 (1954),] and Jackson [v. Virginia, 443 U.S. 307 (1979),] provide support for the proposition that in a circumstantial-evidence case, a defendant's rights are protected when the trial court properly instructs the jury on reasonable doubt."). In this case, the trial court's circumstantial-evidence instruction did not contain an incorrect statement of law, and the court repeatedly instructed the jury that Keaton was presumed innocent and that the State had the burden of rebutting that presumption with evidence that proved Keaton's guilt beyond a reasonable doubt. (R. 4853-72.) Thus, we find no abuse of discretion, much less plain error, in the trial court's circumstantial-evidence instruction. See Chambers, 181 So. 3d at 444 (citing Ex parte Carter, supra, in holding that the trial court did not err by denying the defendant's request for an instruction that circumstantial evidence must

exclude every reasonable hypothesis but that of guilt because the court "did charge the jury on circumstantial evidence, the presumption of innocence, and reasonable doubt").

C.

Keaton argues that the trial court erred by concluding its jury charge with an instruction that, if the jury found Keaton "guilty of either [capital murder of] Chase or [capital murder of] Natalie ..., but not a unanimous verdict as to the other ... victim, then and only then would the jury start going down the list ... of the lesser included offenses." (R. 4884.) Because Keaton did not object to that instruction, we review this claim for plain error only. Hosch, 155 So. 3d at 1107.

It is unclear exactly what Keaton finds problematic about the trial court's closing instruction, but she appears to suggest that the court implied that the jury was required to find her guilty of at least one count of capital murder before it could consider the lesser-included offenses. (Keaton's brief, pp. 88-89.) However, that allegation is clearly refuted by the record. The trial court began its jury charge by instructing the jury that it must first consider whether Keaton was guilty of capital murder as

to each individual victim and that it should find Keaton not guilty of capital murder as to each victim if it found that the State's evidence did not establish Keaton's guilt beyond a reasonable doubt. (R. 4854-56.) In other words, the trial court expressly instructed the jury that it could find Keaton not guilty of capital murder as to each victim. The trial court also instructed the jury that it must first consider the capital-murder charges and that it could consider the lesser-included offenses only if it found that Keaton was not guilty of capital murder. (R. 4863.) Thus, the trial court's closing instruction merely informed the jury that it could find Keaton guilty of capital murder as to one of the children and not the other and reiterated that the jury was not to consider the lesser-included offenses unless it first determined that Keaton was not guilty of capital murder as to either or both of the children. There was no error, plain or otherwise, in such an instruction.

D.

Keaton argues that the trial court erred by "denying her request for a cautionary instruction concerning jail informant testimony" --

specifically, Taylor's testimony. (Keaton's brief, p. 70.) According to Keaton, the trial court should have given the following instruction:

> "I charge you, members of the jury, that some witnesses must be considered with more caution than the testimony of other witnesses. For example, ... a witness who has been promised that they will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in their own case, may have a reason to make false statements because they want to strike a good bargain with the government. So, while a witness of that kind may be entirely truthful, you should consider that testimony with more caution than the testimony of other witnesses."

(C. 537.) However, Keaton cites no authority requiring, or even approving, the use of such an instruction. Furthermore, Taylor expressly testified that she did not "get anything from the State" in exchange for her testimony (R. 3490), which tended to negate any basis for Keaton's requested instruction. See Rubenstein v. State, 941 So. 2d 735, 767 (Miss. 2006) (holding that there was no error in the denial of a "cautionary instruction" regarding the testimony of "jail house informant[s]" in a case where the informants "testified that they neither received nor were promised any favorable treatment in exchange for their testimony"). In addition, Keaton's requested instruction was essentially covered by the

trial court's instruction that the jury "may take into consideration any natural interest or bias that a witness has." (R. 4871.) See Knight v. State, 300 So. 3d 76, 117 (Ala. Crim. App 2018) ("There is no error in refusing a requested instruction that is adequately covered by the trial court's oral charge."). For the foregoing reasons, we cannot say that the trial court abused its discretion by refusing to give Keaton's requested instruction regarding "jail informant testimony."

XIII.

Keaton argues that the evidence was insufficient to prove the sole aggravating circumstance upon which the State relied, i.e., that Chase's murder was especially heinous, atrocious, or cruel as compared to other capital offenses. § 13A-5-49(8). In support of that claim, Keaton argues that, because the State failed to prove the cause of Chase's death, "no reasonable juror could have found beyond a reasonable doubt that Chase died in a heinous, atrocious, or cruel manner." (Keaton's brief, p. 77.) At trial, however, Keaton's sufficiency-of-the-evidence argument was that, "[b]y all accounts, [Chase] died from strangulation" and that, although "choking [a] child ... [is] horrible, ... it's still not heinous, atrocious, and

cruel." (R. 5315.) Because Keaton did not raise at trial the specific sufficiency-of-the-evidence claim she raises on appeal, we review this claim for plain error only. See Reynolds v. State, 114 So. 3d 61, 121 (Ala. Crim. App. 2010) (reviewing a sufficiency-of-the-evidence claim for plain error because the appellant's argument in support of that claim on appeal was different from the argument he raised at trial).

Keaton correctly notes that the State's evidence did not unequivocally establish the cause of Chase's death. However, contrary to Keaton's apparent belief, whether a murder is especially heinous, atrocious, or cruel as compared to other capital offenses does not hinge solely on the cause of death. Rather,

> " '[t]o determine whether [a] murder was especially heinous, atrocious, or cruel as compared to other capital murders, we must consider the entire chain of events that led to [the victim's] death. "[A] murder is not rendered especially heinous, atrocious, or cruel merely by the specific method in which a victim is killed, but by the entire set of circumstances surrounding the killing." State v. Tirado, 358 N.C. 551, 595, 599 S.E.2d 515, 544 (2004). "In evaluating the brutality and heinousness of a defendant's conduct, the entire spectrum of facts surrounding the given incident must be analyzed and evaluated." People v. McGee, 121 Ill. App. 3d 1086, 1089, 77 Ill. Dec. 539, 542, 460 N.E.2d 843, 846 (1984).' "

Floyd, 289 So. 3d at 455 (quoting Russell v. State, 261 So. 3d 397, 440 (Ala. Crim. App. 2015)). In fact, a murder can be characterized as especially heinous, atrocious, or cruel in one case and not another, even though the cause of death is the same in both cases. Compare Floyd, 289 So. 3d at 456 (murder of victim who died as the result of multiple gunshot wounds was especially heinous, atrocious, or cruel); with Ex parte Clark, 728 So. 2d 1126, 1140-41 (Ala. 1998) (murder of victim who died as the result of multiple gunshot wounds was not especially heinous, atrocious, or cruel). Thus, we look to more than simply the cause of Chase's death in determining whether there was sufficient evidence to support a finding that his murder was especially heinous, atrocious, or cruel.

Regarding the proof required to establish that a murder was especially heinous, atrocious, or cruel, this Court has stated:

> " 'The aggravating circumstance that the murder was especially heinous, atrocious, or cruel "appl[ies] to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981), abrogated on other grounds by Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). In Norris v. State, 793 So. 2d 847, 854-62 (Ala. Crim. App. 1999), this Court recognized three factors that are particularly indicative that a capital offense was especially heinous, atrocious, or cruel: (1) the infliction on

> the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after the assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim. This Court noted that under all three factors, "the critical inquiry" is whether the victim was "conscious or aware" for "an appreciable lapse of time, sufficient enough to cause prolonged suffering." Norris, 793 So. 2d at 854-61.' "

Lindsay v. State, ___ So. 3d at ___ (quoting Floyd, 289 So. 3d at 440).

Here, when construed in a light most favorable to the State, the evidence indicated that, after Chase was poisoned with antifreeze, which caused him to "throw up black stuff," the final moments of his life occurred while he was either (1) duct-taped to a broomstick, gagged with a sock that was duct-taped over his mouth, and made to stand in that position until he ultimately died or (2) asphyxiated by the hands of his own father. In either scenario, three-year-old Chase certainly endured a death marked by significant fear and "appreciable suffering." Lindsay, ___ So. 3d at ___ (citation omitted). We also have no trouble concluding that the infliction of such horrific acts on a three-year-old child was sufficient to demonstrate the "conscienceless or pitiless" nature of those acts. Id. at ___ (citation omitted). Thus, regardless of what ultimately caused Chase's

death, the evidence was sufficient to support a finding that his murder was especially heinous, atrocious, or cruel as compared to other capital offenses. See Saunders v. State, 10 So. 3d 53, 109 (Ala. Crim. App. 2007) (noting that "'"the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel"'" (quoting Norris v. State, 793 So. 2d 847, 860 (Ala. Crim. App. 1999), quoting in turn Ex parte Rieber, 663 So. 2d 999, 1003 (Ala. 1995))); Norris, 793 So. 2d at 861 (citing Henderson v. State, 463 So. 2d 196, 201 (Fla. 1985), a case in which the Florida Supreme Court held that the appellant's argument that the victims' deaths were not especially heinous, atrocious, or cruel "'overlooks the fact that the victims were previously bound and gagged' and that the victims 'could see what was happening and obviously experienced extreme fear and panic while anticipating their fate'"); and Brown v. State, 11 So. 3d 866, 928 (Ala. Crim. App. 2007) (holding that there was no plain error in the trial court's finding that the murder of a victim who had been "asphyxiated to death" was especially

heinous, atrocious, or cruel). Accordingly, Keaton is not entitled to relief on this claim.

XIV.

Keaton argues that the prosecutor committed misconduct during both the guilt-phase and penalty-phase closing arguments. Because Keaton did not object to the prosecutor's closing arguments, we review these claims for plain error only. See Shanklin, 187 So. 3d at 787 ("Shanklin did not object to the prosecutor's comments in the circuit court; thus, we review Shanklin's arguments on appeal for plain error.").

> "'"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). See also Henderson v. State, 583 So. 2d 276, 304 (Ala. Crim. App. 1990), aff'd, 583 So. 2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 496 (1992). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due

> process.' " Bankhead, 585 So. 2d at 107, quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). "A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala.), cert. denied, 5[2]8 U.S. 939, 120 S. Ct. 346, 145 L. Ed. 2d 271 (1999). Moreover, "statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict." Bankhead, 585 So. 2d at 106. ....'

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

> "Furthermore, ...
>
> " ' " '[t]his 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.' " Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala. 1991) (quoting Johnson v. Wainwright, 778 F.2d 623, 629 n.6 (11th Cir. 1985)).'

"Wilson v. State, 142 So. 3d 732, 776 (Ala. Crim. App. 2010)."

Jackson, 305 So. 3d at 484-85. With these principles in mind, we address each of Keaton's prosecutorial-misconduct claims.

A.

Keaton argues that, by virtue of multiple arguments, the prosecutor "deliberately roused" and "exploited" the jurors' emotions during closing arguments. (Keaton's brief, pp. 47, 52.)

First, Keaton points to the fact that the prosecutor argued that this case was "about babies" (R. 2627), made references to Natalie's "dead little body" (R. 4733) and to "two babies dead in the woods" (R. 4742), and argued that Keaton "tortured and poisoned those babies" (R. 4742) and "hated those babies." (R. 4721.) However, the prosecutor's references to the children as "babies," her references to their dead bodies, and her argument that Keaton tortured and poisoned the children were all supported by the evidence and were no more emotionally charged than the evidence itself. See McNair v. State, 653 So. 2d 320, 335 (Ala. Crim. App. 1992) (holding that the prosecutor's closing argument was not improper because, although the argument was "emotionally charged," it "legitimately arose from the evidence itself"); and Ballard v. State, 767 So.

2d 1123, 1135 (Ala. Crim. App. 1999) (" 'The test of a prosecutor's legitimate argument is that whatever is based on facts and evidence is within the scope of proper comment and argument.' " (quoting Watson v. State, 398 So. 2d 320, 328 (Ala. Crim. App. 1980))). As to the prosecutor's argument that Keaton hated the children, that argument was a legitimate inference drawn from the evidence -- particularly the evidence indicating that Keaton had treated the children cruelly and had referred to them as "demon spawns from hell" and the "spawn of Satan" -- and it is well settled that a prosecutor " ' "has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference." ' " McCray v. State, 88 So. 3d 1, 50 (Ala. Crim. App. 2010) (quoting Reeves v. State, 807 So. 2d 18, 45 (Ala. Crim. App. 2000), quoting in turn Rutledge v. State, 523 So. 2d 1087, 1100 (Ala. Crim. App. 1987)). Accordingly, we find no error, plain or otherwise, in these parts of the prosecutor's arguments.

Second, Keaton contends that the prosecutor compared the children's deaths to "horror movies" and contrasted their deaths with "images of

children being comforted and loved." (Keaton's brief, p. 48.) In support of that claim, Keaton points to the following arguments:

> "And Chase, ... he knew, in this world, there was a real thing as pirates and bad guys and villains and evil. It wasn't something in the story books, wasn't something he saw on cartoons, wasn't something in make-believe. He knew, in his world, there was real, true evil because he saw it firsthand, because he saw [Keaton] torture his big sister and he watched it and he heard it. And then, he saw [Keaton] dump her body. And then, after that, she moved on to him next because he was just a liability, the spawn of Satan. That little boy, he was the spawn of Satan. That little girl, she was the spawn of Satan. Those two, at three and at four years old, knew about true, pure evil in this world, not something in a book, not something on a movie because, you know, they lived it. They saw it and they lived it."

(R. 4745.)

> "All four and three-year-olds ... want to do is play and be loved. That's it. And they need somebody to love them back and comfort them when they're unhappy. What we have here in this case is not that. What we have here in this case is Keaton and her hatred for these kids and DeBlase and his love for Keaton in that he would do anything for her, and, together, that deadly combination killed both of these children."

(R. 4847-48.)

> "We've all had the experience, I know, of either your grandchild or your child or someone you know, when they're little, believing in monsters. And, for me, my little girl one night was in her room and she saw a shadow on her wall from

> the night light from one of her dolls. And you know how it can reflect on the wall. And she screams, 'mommy, you've got to get in here; there's a monster in my room.' So, I go in there and I say, 'no, baby, look.' I turn the lights on. 'There's no such thing as monsters. See, it's just the light from your baby doll and how she reflects on the wall. There's nobody in your room and there's no such thing as monsters.'
>
> "Well, there was no one in this world to tell Chase there was no such thing as monsters and there was no one in the world to comfort that little boy when he was duct taped to that broomstick for hours on end to say monsters don't exist because he knew they did. He lived with one. He lived with her. He knew there were monsters. He knew."

(R. 5582-83.) In DeBlase's appeal, this Court held that similar arguments did not constitute error, plain or otherwise, because the prosecutor was not attempting " 'to lead the jury to convict for an improper reason' " but, instead, "was merely attempting to describe what Natalie and Chase must have been feeling when their own father either failed to protect them from being abused and killed or killed them himself." DeBlase, 294 So. 3d at 250 (quoting Williams v. State, 710 So. 2d 1276, 1304 (Ala. Crim. App. 1996)). For that same reason, we find no error, plain or otherwise, in the prosecutor's similar arguments in this case. See also State v. Warren, 348 N.C. 80, 109, 499 S.E.2d 431, 447 (1998) (noting, in a death-penalty case,

that the North Carolina Supreme Court "has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim").

Third, Keaton points to the prosecutor's reference to the "tooth fairy." (Keaton's brief, p. 48.) Specifically, after noting that defense counsel had discussed the lack of forensic evidence connecting Keaton to the children's deaths, the prosecutor argued:

> "[W]hat really came out about all of the scientific testing was that no one, not DeBlase, not Keaton, cared enough about these two babies to even keep something of theirs other than a stuffed animal in their van. A stuffed animal that had their scent of death on it is all there was. They didn't keep a hair brush of these babies. They didn't keep a lock of hair for a baby book. They didn't keep the tooth, the first baby tooth that fell out and they didn't put it underneath the pillow in hopes that the tooth fairy would come. And they didn't get it out from underneath the pillow and leave a dollar so that little girls and little boys could believe in the tooth fairy. And they didn't save that tooth to show them later in their life how much fun they had being the tooth fairy. Nothing was left of these kids to even confirm who they were, and we had to do mitochondrial DNA from their mother and their father to even tell you who the bones of these were."

(R. 4845-46.) Taken in context, it is evident that the prosecutor's argument was designed to emphasize Keaton's contempt and lack of

regard for the children, which, as we have already noted, was a legitimate inference drawn from the evidence. Furthermore, a prosecutor's arguments "delivered in the heat of debate" are "usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict," Jackson, 305 So. 3d at 485 (citations omitted), and we have no hesitation in concluding that the prosecutor's brief reference to the "tooth fairy" was not a factor in the jury's verdict. Thus, we cannot say that this part of the prosecutor's argument rose to the level of plain error, and we reiterate that Keaton's failure to object to the argument tends to indicate that she "did not consider the comments in question to be particularly harmful." Id. (citations omitted).

Based on the foregoing, there is no merit to Keaton's allegation that the prosecutor improperly "roused" and "exploited" the jurors' emotions during closing arguments. Accordingly, Keaton is not entitled to relief on this claim.

B.

Keaton argues that, in three respects, the prosecutor improperly injected her own opinions during closing arguments.

First, Keaton points to the prosecutor's argument to the jury that Keaton "doesn't care what you believe" and "[does not] want you to follow the evidence and the facts in this case." (R. 4742.) In making that argument, the prosecutor first discussed the various lesser-included offenses that would be submitted to the jury and then argued:

> "The [defense], basically, doesn't care what you believe. Believe it's John DeBlase's fault. Believe it's criminally negligent or maybe she was reckless or ... maybe it was just child abuse. She just took it too far with abusing the kids. Maybe it's just aggravated child abuse. They don't care which one you believe. Just don't -- they don't want you to follow the evidence and the facts in this case and the truth. And the truth is she wanted those kids dead. She was the ring leader and she made sure it happened, and she tortured and poisoned those babies. This is nothing but capital murder.
>
> "It's not reckless behavior because, when you want someone dead and make it happen, it's intentional. It's not negligent behavior because, when you want someone dead and you make sure it happens, that's intentional. And it's not abuse. It's not child abuse. It's not aggravated child abuse. It's not. She wanted them dead. She made it happen. This is nothing more than intentional, an intentional act, capital murder, capital murder."

(R. 4742-43.) Taken in context, it is evident that the prosecutor's argument merely portrayed her belief that the evidence supported a capital-murder conviction and did not support a conviction for a lesser-

included offense, which is a proper argument for a prosecutor to make. See Calhoun, 932 So. 2d at 965 (noting that a prosecutor is allowed to argue that the evidence "did not support a conviction on any lesser offenses"). Thus, we find no error, plain or otherwise, in this part of the prosecutor's argument.

Second, Keaton points to the prosecutor's repeated characterization of Keaton as a liar. However, this Court has held that such argument is not improper when it is based on the evidence. Morris v. State, 60 So. 3d 326, 369 (Ala. Crim. App. 2010). Here, the prosecutor's characterization of Keaton as a liar was based on contradictions in Keaton's statements to law enforcement officers and conflicts between Keaton's statements and the evidence presented at trial. (R. 4722-36.) Thus, we find no error, plain or otherwise, in this part of the prosecutor's argument. See Morris, 60 So. 3d at 370 ("The prosecutors' references to Morris as being a liar were based on the evidence and were thus a proper argument to the jury.").

Third, Keaton contends that the prosecutor "opined that defense counsel's theory of the case was 'ridiculous.' " (Keaton's brief, p. 49.)

However, Keaton misrepresents the prosecutor's argument. In discussing the lesser-included offenses, the prosecutor argued:

> "We submit to you [that Keaton] is guilty on all counts of capital murder. But the Defense wants you to believe, oh, maybe she's guilty of something a little less. So, let's go over those and show you how those don't apply.
>
> "First of all, maybe it's just manslaughter, that [Keaton] acted recklessly. And, in this case, all they'd have to say is Natalie and Chase are dead and [Keaton] acted reckless[ly], that she didn't have any intent. Well, I submit to you that's ridiculous because, when you put antifreeze in a pot of spaghetti and force feed kids, that's intent. That's intent, intent to kill. There's no reckless act in force feeding children poison."

(R. 4738.) Taken in context, it is clear that, by arguing that Keaton did not act recklessly, the prosecutor was not arguing that defense counsel's theory was "ridiculous." In fact, as the State notes, Keaton's defense was not that she acted recklessly but, rather, was that she was not guilty of any crime whatsoever. (R. 4809.) Instead, the prosecutor was merely arguing that there was clear evidence of Keaton's intent to kill the children and that, as a result, it would be "ridiculous" to conclude that Keaton acted recklessly. There is no error, plain or otherwise, in such an argument. See Calhoun, 932 So. 2d at 965 (noting that a prosecutor is

allowed to argue that the evidence "did not support a conviction on any lesser offenses").

Based on the foregoing, there is no merit to Keaton's allegation that the prosecutor improperly injected her own opinions during closing arguments. Accordingly, Keaton is not entitled to relief on this claim.

C.

Keaton argues that there were several instances in which the prosecutor "misled the jury about critical factual and legal issues." (Keaton's brief, p. 49.) We address in turn each of those claims -- none of which entitle Keaton to relief.

1.

Keaton argues that the prosecutor misrepresented the testimony of Donna Frazier, who had been incarcerated with Keaton. Specifically, Keaton challenges the prosecutor's argument that Frazier had testified that Keaton had admitted that she and DeBlase "poisoned [a] dog with antifreeze to see how long it would take" for the dog to die and that "they killed the kids the same way they did the dog." (R. 4711.) According to Keaton, that argument misrepresented Frazier's testimony because,

Keaton says, "Frazier said no such thing." (Keaton's brief, p. 50.) However, as noted above, Frazier testified as follows:

> "Q. ... Did [Keaton] ever talk to you about the family dog or a dog?
>
> "A. Yeah. She told me that ... her aunt's dog, that it had been poisoned to see how long it took for it to kill it.
>
> "Q. And did she tell you what they poisoned the dog with?
>
> "A. She said antifreeze."

(R. 3534.) A reasonable inference to draw from Frazier's testimony was that Keaton had admitted to taking part in poisoning a dog with antifreeze, and, as noted, a prosecutor is allowed to argue all reasonable inferences from the evidence. McCray, 88 So. 3d at 50. It is true that the prosecutor incorrectly argued that Frazier had testified that Keaton had admitted to poisoning the children in a similar manner, but there was ample testimony at trial to support that conclusion. Thus, we cannot say that the prosecutor's partial misstatement of Frazier's testimony "seriously affect[ed] [Keaton's] 'substantial rights' " or had "an unfair prejudicial impact on the jury's deliberations." Towles, 263 So. 3d at 1081 (citations omitted). Accordingly, this part of the prosecutor's argument

did not rise to the level of plain error. See Whatley, 146 So. 3d at 492 (holding that there was no plain error in the prosecutor's argument, which misstated a witness's testimony, because the argument was supported by other evidence).

2.

Keaton argues that, in two respects, the prosecutor drew improper inferences from the testimony of Joann Curtin, the anthropologist who examined the children's skeletal remains. According to Keaton, the prosecutor's inferences were improper because, she says, they were not consistent with Curtin's testimony.

First, Keaton points to the prosecutor's argument that the "Harris lines" in Natalie's bones were consistent with the evidence indicating that Natalie had been poisoned by Keaton or was malnourished. Keaton argues, however, that, although Curtin had testified that "Harris lines" can result from poisoning and malnutrition, Curtin had also estimated that the "Harris lines" in Natalie's bones "had probably formed 'a year or two' before Natalie's death." (Keaton's brief, p. 50 (citations to record omitted).) Thus, Keaton argues, the "Harris lines" in Natalie's bones did

not tend to implicate Keaton in Natalie's death as the prosecutor argued they did.

As a threshold matter, we reiterate that Keaton did not object to any of the prosecutor's closing arguments and thus failed to preserve this claim for appellate review. See Buford v. State, 891 So. 2d 423, 434 (Ala. Crim. App. 2004) (noting that a challenge to an allegedly improper closing argument is not preserved for appellate review in the absence of a proper objection at trial). Of course, Keaton's failure to object to the prosecutor's argument does not preclude appellate review of this claim if the claim is subject to plain-error review. Shanklin, 187 So. 3d at 787. However, this specific claim is related only to Natalie's death, i.e., to Keaton's reckless-manslaughter conviction, and therefore is not subject to plain-error review. See Hicks, ___ So. 3d at ___ (noting that plain-error review "does not apply to convictions in which the death penalty has not been imposed"). Consequently, because Keaton did not preserve this specific claim below, she cannot obtain relief on the claim on appeal.

Moreover, there is no merit to Keaton's claim. Although Keaton correctly notes that Curtin testified that the "Harris lines" in Natalie's

bones "had probably formed 'a year or two' before Natalie's death," Curtin also testified that she was "ball parking" her estimate (R. 4344), that she could not determine with certainty "how long before [Natalie] died that these lines were formed" (R. 4344), and that she was "really not confident in saying exactly what age [Natalie's] growth disruption occurred." (R. 4357.) Therefore, it was not unreasonable for the prosecutor to argue that the "Harris lines" in Natalie's bones were consistent with the evidence indicating that Natalie had been poisoned or malnourished by Keaton. Accordingly, we find no error in this part of the prosecutor's argument. See Russell, 261 So. 3d at 421 (holding that there was no error, plain or otherwise, in an argument that was based on a "reasonable inference that could have been drawn from the forensic evidence presented at trial"), judgment vacated on other grounds by Russell v. Alabama, 580 U.S. ___, 137 S. Ct. 158 (2016)).

Second, Keaton points to the prosecutor's argument that Curtin "said there were small holes in the roof orbit of [Chase's]" skull and "said you don't see those out of normal children without anemia, malnutrition, or starvation of some type." (R. 4712.) Contrary to Keaton's contention,

the prosecutor's argument was not inconsistent with Curtin's testimony. Although it is true that Curtin testified that "eye-orbit porosity" can result from "a number of conditions" (R. 4357), she also testified that she "generally assume[s] it's indicating a nutritional deficiency" (R. 4351) and that she "would not expect to see it in a well-nourished modern child." (R. 4358.) Thus, a reasonable inference to draw from Curtin's testimony was that the "eye-orbit porosity" in Chase's skull occurred as a result of malnutrition. Accordingly, we find no error, plain or otherwise, in this part of the prosecutor's argument. See Russell, 261 So. 3d at 421 (holding that there was no error, plain or otherwise, in an argument that was based on a "reasonable inference that could have been drawn from the forensic evidence presented at trial").

3.

Keaton argues that the prosecutor "misrepresented the law concerning accomplice liability." (Keaton's brief, p. 50.) However, this Court has "explained that no plain error occurs if a prosecutor misstates the law and, thereafter, the trial court properly ... provides complete instructions to the jury as to the complained-of misstatements of law."

Phillips, 287 So. 3d at 1142. Here, even if the prosecutor did misstate the law regarding accomplice liability, we find no error -- and Keaton does not allege that there was any error -- in the trial court's subsequent instructions regarding accomplice liability. Thus, Keaton is not entitled to relief on this claim.

4.

Keaton argues that, during the penalty phase of trial, the prosecutor misrepresented the testimony regarding her mental health. Specifically, Keaton argues that no expert witness had "diagnosed her as having antisocial personality disorder" but that the prosecutor nevertheless "falsely stated as fact that Keaton had antisocial personality disorder." (Keaton's brief, p. 52.) Then, Keaton argues, the prosecutor

> "inaccurately linked [that] misstatement to a State's expert testimony [by arguing]:
>
> > " '[Dr. Doug McKeown] believed that [Keaton] had borderline personality antisocial disorder and that means I want what I want and I want it now -- that's exactly what he said -- with no consideration for others.'
>
> "(R. 5575-76.)"

(Keaton's brief, p. 52-53.) Keaton also notes that the prosecutor made a similar argument later, arguing that Keaton "wants what she wants and ... wants it now without regard for other people." (R. 5630.) According to Keaton, however, Dr. McKeown's testimony to that effect "discussed antisocial personality disorder generally, not Keaton's actual diagnosis." (Keaton's brief, p. 53.)

Dr. McKeown, a court-appointed psychologist who had evaluated Keaton's competency to stand trial, testified that, "based on [Keaton's] performance in th[at] evaluation," he had diagnosed her with "borderline and antisocial traits and a personality disorder." (R. 5395.) Thus, it is true that, by arguing that Dr. McKeown had diagnosed Keaton with "borderline personality antisocial disorder," the prosecutor did not precisely recite Dr. McKeown's testimony regarding Keaton's mental-health diagnosis. However, Keaton's primary complaint with the prosecutor's argument is not that the prosecutor misstated Keaton's actual diagnosis. Rather, Keaton's primary complaint is that the prosecutor relied on that misstatement to argue that Keaton "want[s] what [she] want[s] and ... want[s] it now ... with no consideration for

others" -- a characteristic that, according to Dr. McKeown, is common in people with antisocial personality disorder. We conclude, however, that the prosecutor's argument was a reasonable inference drawn from the evidence.

When asked about the characteristics of antisocial personality disorder, Dr. McKeown testified that a person with such disorder "want[s] what they want and ... want[s] it now and, if it hurts somebody else, that's not considered." (R. 5399.) Granted, Keaton correctly notes that no expert witness testified that she had been diagnosed with antisocial personality disorder. However, there was testimony indicating that Keaton has "antisocial personality features" (R. 5487 (emphasis added)), and Dr. McKeown testified that Keaton "interpret[s] her environment in a self-serving manner" and that she can act "with impulsivity." (R. 5401.) In addition, the evidence at the guilt phase of trial, when construed in a light most favorable to the State, indicated that Keaton either killed the children herself or induced DeBlase to kill the children simply because she did not want the children to be part of her life with DeBlase and her then unborn child. Thus, regardless of Keaton's actual mental-health

diagnosis, there was evidence to support a reasonable inference that Keaton "want[s] what [she] want[s] and ... want[s] it now ... with no consideration for others," and, as noted, a prosecutor "has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference." McCray, 88 So. 3d at 50 (citations omitted). Therefore, we find no error, plain or otherwise, in this part of the prosecutor's argument. As to the prosecutor's misstatement of Keaton's actual mental-health diagnosis, we have already noted that it is not the misstatement of the diagnosis that Keaton finds particularly problematic, and, moreover, that misstatement made up an incredibly minor portion of the prosecutor's closing argument that did not constitute the type of "particularly egregious error[ ]" for which the plain-error rule is reserved. Towles, 263 So. 3d at 1081 (citations omitted). Indeed, we reiterate that Keaton's failure to object to that misstatement indicates that she "did not consider the [misstatement] to be particularly harmful." Jackson, 305 So. 3d at 485 (citations omitted). Accordingly, Keaton is not entitled to relief on this claim.

D.

Keaton argues that, during closing arguments, the prosecutor improperly displayed items that had not been admitted into evidence -- namely, a jug of antifreeze and a broomstick. Regarding the use of demonstrations during closing arguments, this Court has stated:

> " 'There is no rule of law which limits counsel in debate to mere articulation. Argument by means of illustration, such as exhibiting to the jury models, tools, weapons, implements, and the like, is a matter of every day practice, and the abuse of the utilization of such illustration is a matter for the trial court's discretion, not to be interfered with unless there has been an abuse of discretion. Accordingly, it has been recognized that an attorney may employ demonstrations during his or her argument if they are reasonably sustained by the evidence, and in a number of cases a demonstration by counsel during closing argument has been held proper.' "

Wilson, 142 So. 3d at 772 (quoting J. Stein, Stein Closing Arguments § 1:68 (2011-2012 ed.)). Here, there was evidence indicating that Keaton poisoned the children with antifreeze and that she duct-taped Chase to a broomstick. Thus, we find no error, plain or otherwise, in the display of a jug of antifreeze and a broomstick during closing arguments. See Wilson, 142 So. 3d at 772 (holding that it was not improper for the prosecutor to swing a baseball bat during closing arguments in a case

where the evidence indicated that the defendant had attacked the victim with a baseball bat).

E.

Keaton argues that the prosecutor improperly "drew attention to the details about what happened to Chase's body after his death to support [the State's] claim that the manner of death was heinous, atrocious, or cruel." (Keaton's brief, p. 53.) Specifically, the prosecutor argued:

> "So, how have we proven heinous, atrocious, or cruel for Chase? What has the testimony been? Three-year-old little boy, three-year-old little boy, poisoned ... with antifreeze. And you heard from Dr. Turner the horrible effects that would have on your body over a 72-hour period of time, torturous. Beating with a belt, three-year-old little boy. There was testimony about three-year-old little boy was duct taped up and duct taped to a broomstick. He was a three-year-old little boy. They put him in a corner, put a dresser up against him, put him on a tarp, the testimony was, in his training pants so he wouldn't fall over and duct taped to that broomstick to stand up for hours on end, three-year-old little boy. And then, gagged him with a sock you'll see over here and duct taped his mouth, three-year-old little boy. That's heinous, atrocious, or cruel, morally despicable, morally despicable.
>
> "And then, as if that weren't enough, [Keaton] put his body in a trash bag wearing nothing but his little training pants and took him out to the dark woods of Mississippi and dumped him out like trash in the woods like you'd take out your common trash at the end of the day so that his little body

> laid out there and was eaten away and ripped away and torn up by animals. And that's the truth of it, the sad, sick truth of it to where there were little to no bones left of that sweet, precious three-year-old little boy because he was eaten away by animals. That's heinous, atrocious, and cruel, and morally despicable."

(R. 5580-82.) According to Keaton, "the 'heinous, atrocious, or cruel' aggravating circumstance applies to murder inflicting unnecessary violence or suffering on a living victim." (Keaton's brief, p. 53.) Thus, Keaton argues, the prosecutor's extension of that aggravating circumstance to include the "posthumous handling of a corpse swept in activity that was not 'unnecessarily torturous.' " (Id.)

In Hicks, supra, the appellant, Dennis Morgan Hicks, raised a similar argument in challenging the trial court's finding that the victim's murder was especially heinous, atrocious, or cruel. Specifically, Hicks argued that the trial court had erroneously relied on " 'an unlawfully broad definition' of the 'heinous, atrocious, or cruel' aggravating circumstance" by noting, in support of that finding, that Hicks had "dismembered and disemboweled" the victim "in the presence of two small children." Id. at ___ (citation to Hicks's brief omitted). According to

Hicks, "to be especially heinous, atrocious, and cruel the homicide must have been torturous to the victim, not to other people." Id. Thus, Hicks argued, the fact that the murder had been committed in the presence of children was not relevant to a determination of whether the murder was especially heinous, atrocious, or cruel. In rejecting that argument, this Court stated:

> "Under the proper definition of the 'heinous, atrocious, or cruel' aggravating circumstance, the circumstance includes only those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981). Hicks correctly asserts that, under the proper definition, the homicide must have been unnecessarily torturous to the victim -- Duncan -- not to the children. However, in addition to being unnecessarily torturous to the victim, the homicide must be 'conscienceless or pitiless.' We hold that the presence of the children could be one circumstance the trial court could consider in determining whether the homicide was 'conscienceless or pitiless.' See Clark v. State, 896 So. 2d 584, 648-49 (Ala. Crim. App. 2000) (holding that the fact that the victim was mentally and physically handicapped was 'of no consequence in determining whether the crime was unnecessarily torturous to the victim[;] [h]owever, it is relevant and probative of whether the crime was conscienceless or pitiless'). Thus, contrary to Hicks's argument, the trial court did not necessarily broaden the definition of this aggravating circumstance when it considered the presence of the children in determining that this aggravating circumstance existed."

Id. at ___ (emphasis added).

Here, Keaton correctly argues that the posthumous disposal of Chase's body was not relevant to whether Chase's murder was "unnecessarily torturous" to Chase because Chase was not alive at that time. Hicks, ___ So. 3d at ___ (citation omitted). However, Hicks makes it clear that there can be facts that demonstrate the "conscienceless or pitiless" nature of a murder, even though those facts do not demonstrate that the murder was "unnecessarily torturous" to the victim. Id. (citation omitted). Consistent with that principle, we hold that the fact that three-year-old Chase's lifeless body was placed in a plastic garbage bag and was dumped in a secluded area and left to rot or to be devoured by wild animals could be one circumstance that further tended to demonstrate the "conscienceless or pitiless" nature of Keaton's crime. Id. (citation omitted). See Part XIII, supra (concluding that the circumstances of Chase's murder were sufficient to demonstrate the conscienceless and pitiless nature of the crime). This is especially true given that Chase had a close personal relationship with the two people who so callously discarded his body. Thus, the prosecutor did not commit error, plain or otherwise, by

referencing the posthumous disposal of Chase's body during closing arguments. Cf. Lindsay, ___ So. 3d at ___ (affirming a trial court's finding that a murder was especially heinous, atrocious, or cruel when that finding was based on both the fact that the victim suffered considerably before her death and the fact that, following the victim's death, the defendant "wrapped his daughter's body in a trash bag, placed it inside a duffel bag, and dumped her on the side of the road").

F.

Keaton argues that the prosecutor improperly "portrayed [her] as a 'monster.' " (Keaton's brief, p. 53 (citation to record omitted).) However,

> " '[t]his Court has repeatedly held that the prosecutor may refer to an accused in unfavorable terms, so long as the evidence warrants the use of such terms. E.g., Nicks v. State, 521 So. 2d 1018, 1022-23 (Ala. Cr. App. 1987), affirmed, 521 So. 2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S. Ct. 2916, 101 L. Ed. 2d 948 (1988); Barbee v. State, 395 So. 2d 1128, 1134-35 (Ala. Cr. App. 1981), and cases cited therein. See also State v. Wilson-Bey, 21 Conn. App. 162, 572 A.2d 372, cert. denied, 215 Conn. 806, 576 A.2d 537 (1990) (characterization of accused as "peddling death" borne out by the evidence); State v. Wiles, 59 Ohio St. 3d 71, 571 N.E.2d 97, 117 (1991) (reference to the accused as an "ogre," a "man-eating monster," a "hideous

> brutish person," and an "animal" were supported by the evidence).' "

Wilson, 142 So. 3d at 771 (quoting McNair, 653 So. 2d at 341).

Here, there was evidence to support findings that Keaton poisoned the children by mixing antifreeze into their food, that she locked four-year-old Natalie in a closet for multiple hours while Natalie was ill and screaming for her father, and that she gagged three-year-old Chase with a sock while he was duct-taped to a broomstick and was made to stand in that position until he died. Such conduct can be fairly characterized as "monstrous," and, thus, we cannot say that it constituted plain error for the prosecutor to refer to Keaton as a "monster." See Wilson, 142 So. 3d at 772 (noting that characterizations of defendant as an "ogre" and a "monster" do not constitute reversible error when supported by the evidence (citations omitted)).

G.

Keaton argues that the prosecutor improperly "incorporated into her closing argument an audio[visual] recording of children playing," "asked jurors to recreate in their minds the sounds of [Chase's] death," and

"argued that Chase must have been screaming 'daddy, daddy, help me, daddy' as he died." (Keaton's brief, pp. 53-54 (citations to record omitted).) However, the audiovisual recording that Keaton references was a recording of Natalie and Chase playing together that had already been admitted into evidence and played for the jury. (R. 5009.) Thus, there was no impropriety in playing the recording again during closing arguments, and Keaton was not prejudiced by the fact that the jury saw a recording during closing arguments that it had already seen during the trial. See State v. Jefferson, 922 So. 2d 577, 598 n.15 (La. Ct. App. 2005) (noting that, during closing arguments, the State may play recordings that have been admitted into evidence); and Commonwealth v. Harris, 464 Mass. 425, 432, 983 N.E.2d 695, 702 (2013) (same). After playing the recording, the prosecutor asked the jury to contrast the sounds of Chase playing in the recording with the "last sounds for Chase" (R. 5583), which, the prosecutor argued, included "crying, muffling sounds of anyone to help him" (R. 5584), and Chase "screaming 'daddy, daddy, help me, daddy, daddy.' " (R. 5627.) Given the evidence indicating that Keaton duct-taped three-year-old Chase to a broomstick and gagged him with a sock, the

prosecutor's argument that Chase was crying and making muffled screams for help was a reasonable and legitimate inference drawn from the evidence. See McCray, 88 So. 3d at 50 ("During closing argument, the prosecutor ... has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference." (citations omitted)). Thus, we find no plain error in this part of the prosecutor's argument.

H.

Keaton argues that the prosecutor improperly urged the jury to "find an aggravating circumstance to send a message to Keaton." (Keaton's brief, p. 54.) Specifically, the prosecutor argued that the evidence proved that Chase's murder was especially heinous, atrocious, or cruel as compared to other capital offenses and argued that the jury's "vote that the State has proven heinous, atrocious, and cruel will say ... to Keaton ... that she cannot shirk her responsibilities any longer. She can't blame other people any longer." (R. 5615.)

" ' "There is no impropriety in a prosecutor's appeal to the jury for justice and to properly perform its duty." ' " Simmons v. State, 797 So. 2d

1134, 1168, 1169 (Ala. Crim. App. 1999) (quoting Freeman v. State, 776 So. 2d 160, 186 (Ala. Crim. App. 1999), quoting in turn Price, 725 So. 2d at 1033). See also Harris v. State, 2 So. 3d 880, 924 (Ala. Crim. App. 2007) (noting that this Court "has consistently held that urging the jury to return a verdict so as to punish crime ... is not improper argument"). Thus, we find no error, plain or otherwise, in the fact that the prosecutor urged the jury to "send a message" to Keaton by finding the existence of an aggravating circumstance that, as discussed in Part XIII, supra, was supported by the evidence. See Simmons, 797 So. 2d at 1168, 1169 (holding, in a case where the prosecutor urged the jury to return a particular verdict in order to "send a message," that there was "nothing improper about the prosecutor's comments"). Indeed, urging a jury to make findings based on the evidence "is exactly what a prosecutor is supposed to do during closing argument." Minor, 914 So. 3d at 420.

I.

Finally, relying on Caldwell v. Mississippi, 472 U.S. 320 (1985), Keaton argues that the prosecutor improperly argued that "Keaton's life was not 'in [the jury's] hands.' " (Keaton's brief, p. 54. (citation to record

omitted).) However, Caldwell held that it was improper for a prosecutor to urge the jury "not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." Caldwell, 472 U.S. at 323. That is not what occurred here. Rather, the prosecutor argued:

> "The Defense ... wants you to believe that Heather Keaton's life is in your hands, but that is not the case, ladies and gentlemen of the jury. Heather Keaton forfeited her life when she committed capital murder. Heather Keaton forfeited her life when she wrapped Chase in duct tape and fed him antifreeze. ... Don't feel sorry for Heather Keaton. She chose to do what she did. She chose to do what she did. There has been nothing presented that is sufficient to mitigate what she did. Heather Keaton should get the death penalty. Don't let her, once again, shirk her personal responsibilities any longer and don't let her blame everyone else again."

(R. 5630.) Although the prosecutor's argument included a comment that Keaton's life was not "in [the jury's] hands," the prosecutor did not suggest that the jury should not view itself as determining whether Keaton would die because an appellate court would ultimately review her sentence. Rather, taken in context, it is clear that the prosecutor was merely arguing that the jury should recommend the death penalty because she believed Keaton's actions warranted that penalty. There is no error, plain

or otherwise, in such an argument. See Minor, 914 So. 3d at 428 ("It is not improper for a prosecutor to urge the jury to return a recommendation for the death penalty.").

XV.

Keaton argues that the trial court erred during the penalty phase of trial by admitting two recorded telephone calls she made to her mother while incarcerated in the Mobile County jail -- one of which included Keaton's statement that she believed she was "going to get the death penalty." (R. 5456.) According to Keaton, the admission of a defendant's jail calls violates the defendant's right to privacy, violates equal-protection principles by "unfairly discriminat[ing] against those unable to be released on bail," and violates due-process principles because "defendants have no equivalent right of access to the calls of prosecutors, police, and similar persons." (Keaton's brief, p. 95.) In addition, Keaton argues that "allowing the jury to hear a defendant's statement that she believes she will get the death penalty injects an irrelevant and highly prejudicial factor into the jury's consideration." (Id. at 95-96.) Because Keaton did

not raise these specific claims at trial, we review the claims for plain error only. Clark, 896 So. 2d at 650.

As to Keaton's claim that the admission of her jail calls violated her right to privacy, this Court has held that "'there is no reasonable expectation of privacy in the telephone conversation of inmates at penal institutions.'" Mitchell v. State, 84 So. 3d 968, 1011 (Ala. Crim. App. 2010) (quoting Teat v. State, 636 So. 2d 697, 699 (Ala. Crim. App. 1993)). Moreover, we note that the recording of each jail call included an audio warning that the calls were being recorded and monitored (State's Exhibits 2080 and 2083) -- a fact that completely undermines Keaton's claim that she had an expectation of privacy in those calls. As to Keaton's equal-protection and due-process claims, Keaton cites no authority, and we are aware of none, that supports the specific nature of those claims -- a fact that precludes a finding of plain error.[20] See Townes, 253 So. 3d at 494 (noting that a trial court's ruling cannot constitute plain error "if

[20]We note that at least one court has rejected Keaton's equal-protection claim in an unpublished opinion. See State v. Young, (Ms. No. 80907-5-1, April 12, 2021) (Wash. Ct. App. 2021) (unpublished opinion).

there is no precedent directly resolving [the] issue" (quoting United States v. Magluta, 198 F.3d 1265, 1280 (11th Cir. 1999))); and Lane, ___ So. 3d at ___ (holding that "plain-error review is an inappropriate mechanism to decide issues of first impression" (citations omitted)). As noted, Keaton also challenges the admissibility of one of her jail calls on the basis that "allowing the jury to hear a defendant's statement that she believes she will get the death penalty injects an irrelevant and highly prejudicial factor into the jury's consideration."[21] However, even if Keaton's relevancy argument is correct, she makes no attempt to demonstrate how she was prejudiced by the admission of that isolated statement -- an omission that precludes a finding of plain error. See Broadnax, 825 So. 2d at 170 (refusing to find plain error in the admission of evidence when the appellant failed to "explain how he was prejudiced by the introduction of [the] evidence"). Furthermore, we fail to see how Keaton could have been prejudiced by the admission of that isolated statement. At most, Keaton's

[21]Keaton does not argue that the remainder of that jail call was irrelevant and "highly prejudicial," nor does she make that argument with respect to the other jail call.

statement that she believed she was "going to get the death penalty" could arguably be interpreted as an admission of guilt, but Keaton's jail calls were admitted at the penalty phase of trial, after Keaton's guilt had already been established. For the foregoing reasons, we cannot say that the trial court committed plain error by admitting Keaton's jail calls.

XVI.

Keaton argues that the trial court erred by admitting victim-impact testimony in the guilt phase of trial.[22] In her brief, Keaton does not identify the specific testimony that she contends constituted victim-impact evidence but, instead, merely provides citations to the record. (Keaton's brief, p. 84.) First, Keaton cites to two pages of testimony from Corrine Heathcock -- the children's mother -- in which Heathcock testified that the children were "[l]oving, sweet, [and] playful"; that they "were not bad children"; that they "couldn't go without each other"; and that Chase "was

[22]Keaton also argues that the trial court erred by admitting victim-impact testimony in the penalty phase of trial. However, this Court has "repeatedly held that victim-impact evidence is admissible at the penalty phase of a capital trial." Lee v. State, 44 So. 3d 1145, 1174 (Ala. Crim. App. 2009).

[Natalie's] baby." (R. 3602-03.) Next, Keaton cites to three pages of testimony from Ann DeBlase -- the children's paternal grandmother -- in which Ann testified that Natalie was a "beautiful," "kind," "normal little girl," who would "mind ... fairly well"; that Natalie "liked to help make cookies at Christmastime" and "liked to sing"; that she and Natalie would "read the Bible together and ... say a little prayer"; and that the children were "close." (R. 3719-21.) The State concedes that Heathcock's and Ann's testimony was inadmissible in the guilt phase of trial but argues that the admission of that testimony did not constitute reversible error. (State's brief, p. 78.)

As a threshold matter, we disagree with Keaton's and the State's characterization of Heathcock's and Ann's testimony as victim-impact evidence.

> "This Court has explained that, to be victim-impact evidence, the evidence must ' " 'typically "describe the effect of the crime on the victim and his family." ' " ' Russell v. State, 272 So. 3d 1134, 1162 (Ala. Crim. App. 2017) (quoting Townes v. State, 253 So. 3d 447, 474 (Ala. Crim. App. 2015) (opinion on return to remand), quoting in turn Turner v. State, 924 So. 2d 737, 770 (Ala. Crim. App. 2002), quoting in turn Payne v. Tennessee, 501 U.S. 808, 821, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)) (emphasis added). If it does not describe the effect

> of the crime on the victim or the victim's family, then it is not victim-impact evidence."

Brooks v. State, [Ms. CR-16-1219, July 10, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020). Here, Heathcock's and Ann's testimony did not describe the effect that the children's deaths had on them; rather, their testimony merely indicated that Natalie and Chase were good children who shared a close relationship and that Natalie enjoyed activities most four-year-old children enjoy. Because such testimony did not describe the effect of the children's deaths on Heathcock and Ann, it was not victim-impact evidence. See Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (holding that testimony that indicated that the victim had a close relationship with his daughter and that identified the victim's interests was not victim-impact evidence); Jackson, 305 So. 3d at 483 (holding that testimony from the victim's daughter in which the daughter testified to memories of "outings with her mother" was not victim-impact evidence); and Russell, 272 So. 3d at 1165 (holding that testimony from the victim's mother that the victim was "just so full of life" was not victim-impact evidence). Furthermore, Heathcock's and Ann's

testimony was relevant in that it tended to rebut Keaton's allegation that the children were "discipline problem[s]," and their testimony regarding the children's close relationship tended to reinforce the evidence indicating that Keaton and DeBlase had killed Chase because he had begun questioning Natalie's disappearance. See Stanley v. State, 143 So. 3d 230, 273 (Ala. Crim. App. 2011) (holding that there was no error in the admission of the victim's daughter's testimony because the testimony did not describe the impact of the victim's death on the daughter and because the testimony tended "to explain the events" relevant to the victim's murder). Accordingly, Keaton is not entitled to relief on this claim.

Moreover, even if Heathcock's and Ann's testimony could arguably be characterized as irrelevant victim-impact evidence, the Alabama Supreme Court held in Ex parte Rieber, 663 So. 2d 999 (Ala. 1995), that the erroneous admission of such evidence can constitute harmless error. Here, we have already noted that Heathcock's and Ann's testimony merely indicated that Natalie and Chase were good children who shared a close relationship and that Natalie enjoyed activities most four-year-old children enjoy. As the Alabama Supreme Court noted in Ex parte Rieber,

"jurors do not leave their common sense at the courthouse door," and it "would elevate form over substance for us to hold, based on the record before us, that [Keaton] did not receive a fair trial simply" based on Heathcock's and Ann's brief testimony. Rieber, 663 So. 2d at 1006. We also note that the emotional impact of Heathcock's and Ann's testimony, if any, was negated by the trial court's instruction to the jury that its verdict was not to be influenced by sympathy or emotion (R. 4874) -- an instruction we presume the jurors followed. Campbell, 241 So. 3d at 753. See Ex parte Rieber, 663 So. 2d at 1006 (noting, in concluding that the erroneous admission of victim-impact evidence did not constitute reversible error, that the trial court had instructed the jury not to allow sympathy to influence its verdict). Thus, any error in the admission of Heathcock's and Ann's testimony was harmless because we have no trouble concluding that their testimony "did not affect the outcome of the trial or otherwise prejudice a substantial right of [Keaton]." Id. at 1005. For this reason as well, Keaton is not entitled to relief on this claim.

XVII.

Keaton argues that the trial court erred in the penalty phase of trial by refusing to admit allegedly mitigating evidence and by refusing to consider certain nonstatutory mitigating evidence that she proffered. We address each of these claims in turn.

A.

Keaton argues that the trial court erred by excluding allegedly mitigating testimony from Helen Gore, Keaton's maternal grandmother. Specifically, Keaton argues that the trial court erred by prohibiting defense counsel from asking Gore the following question: "[I]f [Keaton] were to be put to death, how would that impact you?" (R. 5308.) However, this Court has "joined the majority of courts and held that execution-impact evidence does not support a valid mitigating circumstance and is irrelevant in the penalty-phase of a capital-murder trial 'because it does not relate to a defendant's character or record or the circumstances of the crime.' " Albarran, 96 So. 3d at 205 (quoting Woods v. State, 13 So. 3d 1, 34 (Ala. Crim. App. 2007)), cert. denied, 568 U.S. 1032 (2012). Although Keaton argues that this rule conflicts with Skipper v. South Carolina, 476 U.S. 1 (1986), Skipper held only that evidence of a

defendant's "good behavior" while "in jail awaiting trial" was relevant mitigating evidence, id. at 4, which does not support Keaton's claim that the trial court erred by excluding execution-impact evidence. Thus, Keaton is not entitled to relief on this claim.

B.

Keaton argues that the trial court erred by refusing to consider evidence of a nonstatutory mitigating circumstance -- namely, her "significant mental-health-related issues." (Keaton's brief, p. 86.) In support of that claim, Keaton points to the fact that the trial court's sentencing order does not reference her mental health in that part of the order that addresses the nonstatutory mitigating circumstances. However, in rejecting a similar claim, this Court has stated:

> "... [T]here is nothing to suggest that the trial court did not consider [the defendant's] mental impairment as nonstatutory mitigation. Although the court did not enumerate each piece of evidence submitted by [the defendant] regarding his mental impairment in the portion of its order addressing nonstatutory mitigating circumstances, such is not required, and does not mean that the court failed to consider the evidence. Roberts v. State, 735 So. 2d 1244, 1267 (Ala. Cr. App. 1997). In Rutledge [v. State, 523 So. 2d 1087 (Ala. Crim. App. 1987)], we stated:

> > " ' "The fact that the sentencing order does not refer to the specific types of nonstatutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered .... What one person may view as mitigation, another may not." '
>
> "523 So.2d at 1103-04, quoting Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984). Further, in Bush [v. State, 695 So. 2d 70 (Ala. Crim. App. 1995)], we stated:
>
> > " 'Thus, the trial court's failure to list and to make findings in its sentencing order as to all of the alleged nonstatutory mitigating circumstances offered by the appellant indicates only that it found the evidence not mentioned to be not mitigating, not that the evidence was not considered.'
>
> "695 So. 2d at 89."

Jackson, 791 So. 2d at 1038 (emphasis added).

As evidenced by Jackson, the fact that the trial court's sentencing order does not reference Keaton's mental health in that part of the order that addresses the nonstatutory mitigating circumstances does not mean the court did not consider Keaton's evidence regarding her mental health. Rather, such omission indicates only that the trial court found the evidence not to be mitigating -- a finding the court was authorized to

make. See Phillips, 287 So. 3d at 1171 (noting that the trial court was not required to reference nonstatutory mitigating evidence in its sentencing order and "was not required to 'find' this evidence to be mitigating" but, rather, "was required only to 'consider' the evidence"); and Ex parte Borden, 769 So. 2d at 958 ("There is no requirement that a sentencing authority must find the evidence offered by the defendant as a mitigating factor."). Furthermore, we note that the trial court stated in another part of its sentencing order that there had been "substantial evidence ... presented regarding Keaton's overall mental health." (C. 56.) Thus, although the trial court did not find Keaton's mental health to be mitigating, it is clear that the court considered the evidence regarding her mental health, which is all the court was required to do. Phillips, 287 So. 3d at 1171. Accordingly, Keaton is not entitled to relief on this claim.

XVIII.

Keaton argues that, for multiple reasons, her death sentence is unconstitutional because of the manner in which it was imposed.

First, Keaton argues that her death sentence is unconstitutional because the jury was not instructed that it had to find that the State had

proven beyond a reasonable doubt that the sole aggravating circumstance outweighed the mitigating circumstances. However, although the State "'is required to prove beyond a reasonable doubt the existence of aggravating circumstances, ... the State is not required to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.' " Thompson, 153 So. 3d at 167 (quoting Brown v. State, 686 So. 2d 385, 401 (Ala. Crim. App. 1995) (emphasis added)), cert. denied, 574 U.S. 894 (2014). Indeed, "'[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.' " Id. (quoting Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990)).

Next, citing Hurst v. Florida, 577 U.S. 92 (2016), Keaton argues that her death sentence is unconstitutional because, in her case, the jury's sentencing recommendation was not binding on the trial court. See note 1, supra. In Hurst, however, the United States Supreme Court held only "that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible" -- "the plain language in [Hurst]

requires nothing more and nothing less." Ex parte Bohannon, 222 So. 3d 525, 532 (Ala. 2016), cert. denied, 580 U.S. ___, 137 S. Ct. 831 (2017). As the Alabama Supreme Court has noted, "the existence of the aggravating factor that makes a defendant death-eligible is indeed made by the jury, not the judge, in Alabama," and "[n]othing in ... Hurst suggests that, once the jury finds the existence of the aggravating circumstance ..., the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence." Id. at 534.

Finally, Keaton argues that her death sentence is unconstitutional because the jury did not unanimously recommend the death penalty. However, " 'Alabama law does not require that the jury's advisory verdict be unanimous before it can recommend death,' " Thompson, 153 So. 3d at 179 (quoting Miller v. State, 913 So. 2d 1148, 1169 n.4 (Ala. Crim. App. 2004)), and Keaton cites no case from the United States Supreme Court that requires such unanimity. See State v. Poole, 297 So. 3d 487, 504 (Fla. 2020), cert. denied 592 U.S. ___, 141 S. Ct. 1051 (2021) (holding that the "requirement of a unanimous jury" for the imposition of the death penalty "finds no support in" caselaw from the United States Supreme

Court). See also Lane, ___ So. 3d at ___ (noting that " 'both this Court and the Alabama Supreme Court have upheld death sentences imposed after the jury made a less-than-unanimous recommendation that the defendant be sentenced to death' " (quoting Brownfield v. State, 44 So. 3d 1, 39 (Ala. Crim. App. 2007))). Keaton's reliance on Ramos v. Louisiana, 590 U.S. ___, 140 S. Ct. 1390 (2020), is misplaced because Ramos held only that the United States Constitution requires a unanimous verdict to support a conviction, not a sentence. See Ruiz v. Davis, 819 F. App'x 238, 246 n.9 (5th Cir. 2020) (noting that the United States Supreme Court held in Ramos that " 'the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction,' not a sentence" (quoting Ramos, 590 U.S. at ___, 140 S. Ct. at 1397)).

Based on the foregoing, Keaton is not entitled to relief on her claim that her death sentence is unconstitutional because of the manner in which it was imposed.

XIX.

Keaton argues that "the death penalty is unconstitutional as applied to people who are mentally ill." (Keaton's brief, p. 99.) In support of that

claim, Keaton cites Atkins v. Virginia, 536 U.S. 304, 321 (2002), and Ford v. Wainwright, 477 U.S. 399, 410 (1986) -- cases in which the United States Supreme Court respectively held that the Eighth Amendment to the United States Constitution prohibits the death penalty "for [an intellectually disabled] criminal"[23] and "a prisoner who is insane." However, Keaton does not claim that she is intellectually disabled or that she is insane, nor is there any evidence to support such conclusions. To the contrary, the court-appointed psychologist who evaluated Keaton's competency to stand trial concluded that Keaton is "an intelligent young lady with fully reasonable judgment and insight" (R. 5387), and Keaton's own expert witness testified that Keaton has above-average intelligence (R. 5106-07), that she is not "mentally retarded" (R. 5115), and that the witness "didn't have anything to support that [Keaton] was legally insane." (R. 5084.) Nevertheless, Keaton notes that there was evidence

[23]" 'The Court in Atkins v. Virginia used the term "mentally retarded." That term has since been replaced with "intellectually disabled." See Brumfield v. Cain, 576 U.S. 305, 308 n.1, 135 S. Ct. 2269, 2274 n.1, 192 L. Ed. 2d 356 (2015).' Ex parte Lane, 286 So. 3d 61, 63 n.1 (Ala. 2018)." Graham, 299 So. 3d at 330 n.20.

indicating that she has been diagnosed with "bipolar disorder and post-traumatic stress disorder." (R. 5038.) Thus, Keaton appears to suggest that Atkins and Ford encompass defendants who are diagnosed with such mental illnesses. Because Keaton did not raise this specific claim below, we review the claim for plain error only. See Flowers v. State, 922 So. 2d 938, 958 (Ala. Crim. App. 2005) (reviewing for plain error the appellant's constitutional challenges to the death penalty because the specific claims the appellant raised on appeal were not presented to the trial court).

To date, the United States Supreme Court has not held that either Atkins or Ford prohibits the imposition of the death penalty for defendants who, though competent, are diagnosed with bipolar disorder, post-traumatic stress disorder, or other mental illnesses. See Hicks, ___ So. 3d at ___ (noting that Atkins did not " 'create[ ] a new rule of constitutional law ... making the execution of mentally ill persons unconstitutional' " (quoting In re Neville, 440 F.3d 220, 221 (5th Cir. 2006); Lindsay, ___ So. 3d at ___ (holding that Ford did not prohibit the imposition of a death sentence for a mentally ill defendant who was nevertheless competent); and State v. Dunlap, 155 Idaho 345, 380, 313

P.3d 1, 36 (Idaho 2013) (rejecting the appellant's claim that Atkins and Ford should be applied to mentally ill defendants and noting that "every court that has considered this issue have refused to ... hold that the Eighth Amendment categorically prohibits execution of the mentally ill"), cert. denied, 574 U.S. 932 (2014). See also State v. Grate, 164 Ohio St. 3d 9, 55, 172 N.E.3d 8, 59 (Ohio 2020) (affirming a death sentence for a defendant who was diagnosed with "bipolar and related disorders"); and State v. Johnson, 207 S.W.3d 24, 51 (Mo. 2006) (noting that "[b]oth federal and state courts have refused to extend Atkins to mental illness situations" and noting that the Missouri Supreme Court has affirmed a death sentence for a defendant who was diagnosed with post-traumatic stress disorder), cert. denied, 550 U.S. 971 (2007). Thus, absent clear authority from the United States Supreme Court that extends Atkins and Ford to mentally ill defendants who are nevertheless competent, we will not hold that those cases render Keaton's death sentence unconstitutional. See State v. B.T.D., 296 So. 3d 343, 361 (Ala. Crim. App. 2019) ("[S]tate courts should 'be very careful when considering new constitutional interests and remain reluctant to deviate from United States Supreme

Court determinations of what are, and what are not, fundamental constitutional rights.' (quoting Morris v. Brandenburg, 356 P.3d 564, 578 (N.M. Ct. App. 2015))). Accordingly, Keaton is not entitled to relief on this claim.

XX.

In supplemental briefs filed on return to remand, Keaton argues that her death sentence must be reversed based on alleged errors in the resentencing proceedings. We address each of those claims in turn.

A.

Keaton argues that Judge Stout erred by refusing to recuse himself from the resentencing hearing. According to Keaton, Judge Stout's recusal was required because he had engaged in ex parte communications with the State before the resentencing hearing occurred.[24] In addressing this claim, we are guided by the principles that a judge's ruling on a

[24]Keaton also argues that Judge Stout should have recused himself from the resentencing hearing based on the same facts that, she says, required his recusal from the trial. See Part I, supra. We have already concluded that those facts did not require Judge Stout's recusal from the trial, and they likewise did not require his recusal from the resentencing hearing.

recusal motion is reviewed for an abuse of discretion and that whether recusal is required is based on an objective standard and the totality of the circumstances. Arnold v. State, 278 So. 3d 1, 10 (Ala. Crim. App. 2017). A brief procedural history is necessary to our resolution of this claim.

Keaton's resentencing hearing was originally scheduled for November 17, 2020, at 9:30 a.m. On November 6, defense counsel filed a motion to continue the hearing because counsel had not had an opportunity to meet with Keaton, and Judge Stout granted the motion on November 16. Thereafter, defense counsel filed multiple motions seeking Judge Stout's recusal because counsel had learned that both the lead prosecutor and the assistant prosecutor had initiated ex parte communications with Judge Stout before he granted the motion to continue.

In response, the State did not dispute that the prosecutors had initiated ex parte communications with Judge Stout, but the State argued that those communications did not require Judge Stout's recusal. In support of that argument, each prosecutor filed an affidavit detailing the

substance of her communications with Judge Stout. The lead prosecutor stated in her affidavit that, because Judge Stout "is retired and does not have a staff or access to [electronic court filings]," she telephoned him on November 9 to inform him that Keaton had filed a motion to continue. (Second supplemental record on return to first remand, C. 374.) The lead prosecutor also stated that "[t]his was the extent of [her] conversation with Judge Stout," that "[t]he call lasted less than a minute," and that she "had no other communication with Judge Stout since his reassignment to this case." (Id.) The assistant prosecutor stated in her affidavit that she telephoned Judge Stout on November 13, a Friday, to inform him that she had a scheduling conflict with the 9:30 a.m. hearing on November 17; that Judge Stout informed her that he could hold the hearing at 2:30 p.m. on November 17 and asked her to contact local defense counsel to see if that time was agreeable; that she contacted local defense counsel and that local defense counsel "did not have a problem with the start time but would have to confer with lead counsel," who is based in Georgia; that she "did not hear back from [local counsel] on ... November 13 or over the weekend" and that she telephoned Judge Stout on November 16 to inform him of

that fact; that she told Judge Stout that "the State was ready to proceed on November 17 but could not proceed at the 9:30 a.m. start time"; and that "[t]his was the extent of [her] conversation with Judge Stout ... about the scheduling conflict." (Id., C. 378-81.)

At the beginning of the resentencing hearing, Judge Stout orally addressed Keaton's recusal motions, stating that he had "read [the prosecutors'] affidavits and [that] they [were] consistent with [his] recollection of those conversations." (Supplemental record on return to first remand, R. 65.) In addition, Judge Stout stated that he and the assistant prosecutor "did not discuss the substance of the motion [to continue]," that they "did not discuss whether it should be granted or shouldn't be granted," and that the assistant prosecutor "did not encourage [him] to grant or deny the motion." (Id., R. 68.) Thus, Judge Stout concluded, he "did not feel there was a basis ... to question [his] impartiality or bias." (Id.)

Canon 3.A.(4), Ala. Canons of Jud. Ethics, expressly states that a judge shall "neither initiate nor consider ex parte communications concerning a pending or impending proceeding." Similarly, Rule 3.5(b),

Ala. R. Prof. Cond., expressly states that a lawyer "shall not ... communicate ex parte with a [judge] except as permitted by law." However, the mere fact that a judge engages in ex parte communications with a party does not in and of itself warrant the judge's recusal. As the Alabama Court of Civil Appeals has concluded, although a judge's ex parte communication with a party

> " 'could be deemed an impropriety and worthy of criticism,' Stewart v. Stewart, 354 So. 2d 816, 820 (Ala. Civ. App. 1977), a showing that such an ex parte communication has occurred, without more, might not be sufficient to require a trial judge's disqualification. The party seeking the trial judge's recusal must present sufficient evidence showing that the trial judge has been biased or prejudiced by the ex parte communication 'such that "a reasonable person knowing everything that the [trial] judge knows would have a 'reasonable basis for questioning the [trial] judge's impartiality.' " ' S.J.R. v. F.M.R., 984 So. 2d 468, 472 (Ala. Civ. App. 2007) (quoting Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996), quoting in turn Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994))."

Ex parte Crawford, 221 So. 3d 1110, 1116 (Ala. Civ. App. 2016).

Here, the problem for Keaton is that the record undermines her allegation that the ex parte communications resulted in Judge Stout's bias or prejudice against her. In short, Keaton argues that, because Judge Stout did not grant her motion to continue until after his ex parte

communications with the prosecutors, it is evident that he intended to deny the motion until "he decided he could grant the prosecution what [it] wanted." (Keaton's brief on return to first remand, p. 27). However, as evidenced by the assistant prosecutor's affidavit, the State was ready to proceed with the resentencing hearing on November 17 if Judge Stout decided to reschedule the hearing for 2:30 p.m., which he had offered to do. Thus, by granting Keaton's motion to continue the hearing, Judge Stout did not "grant the prosecution what [it] wanted." At the risk of stating the obvious, a ruling that was favorable to Keaton and was not in accord with the State's desire does not provide a basis upon which a reasonable person could conclude that Judge Stout was biased or prejudiced against Keaton.

To be clear, ex parte communications between any party and the judge are expressly forbidden by Canon 3.A.(4) and Rule 3.5(b), and we do not condone any such communications, even if made for a generally "innocent" purpose such as scheduling. Indeed, we caution all lawyers in Alabama to be mindful of Canon 3.A.(4) and Rule 3.5(b), and we note that the better practice, even for so-called "innocent" purposes, is for the

prosecutor or defense counsel to initiate a three-way communication with the trial court, which will serve to negate even the appearance of impropriety. However, the ex parte communications in this case concerned only a scheduling issue, and, as noted, there is no basis for concluding that those communications resulted in Judge Stout's bias or prejudice against Keaton. Thus, Judge Stout did not abuse his discretion by denying Keaton's recusal motion. See Lebron v. State, 799 So. 2d 997, 1019 (Fla. 2001) (holding, in a factually similar case, that the trial judge did not err by refusing to recuse himself based on ex parte communications in which the prosecutor "advised the judge that defense counsel had a request for a continuance"); Woodham v. Atlanta Dev. Auth., 335 Ga. App. 126, 120, 779 S.E.2d 116, 120 (2015) (noting that "ex parte communications regarding the scheduling of hearings ... do not warrant recusal"); and Montgomery v. Uchtman, 426 F.3d 905, 911 (7th Cir. 2005) (holding that recusal was not required where the judge's ex parte communications with counsel were "limited to scheduling").

In a related claim, Keaton argues that Judge Stout erred by prohibiting defense counsel from providing oral arguments in support of

the recusal motion. However, this Court has held that a judge is not required to hold a hearing on a recusal motion. See Ex parte Knotts, 716 So. 2d 262, 265 (Ala. Crim. App. 1998) (holding that a trial judge was "free to reject" a recusal motion without holding a hearing and noting that "[f]orcing a judge to hold a hearing on every motion that is filed would unduly burden trial judges"). See also McKinney v. State, 583 S.W.3d 399, 402 (Ark. Ct. App. 2019) ("There is no requirement that a hearing be held every time a party files a recusal motion and requests a hearing."). Furthermore, in two written motions filed before the resentencing hearing, defense counsel painstakingly set forth the argument in support of recusal, which we have already concluded was not meritorious, and counsel does not contend on appeal that he intended to advance additional arguments at the resentencing hearing. Counsel does contend that he should have been afforded an opportunity to address alleged inconsistencies between Judge Stout's recollection of the ex parte communications and the prosecutors' affidavits. However, Judge Stout unequivocally stated that his recollection of those communications was consistent with the prosecutors' affidavits. (Supplemental record on

return to first remand, R. 65-68.) Accordingly, Keaton is not entitled to relief on this claim.

B.

Keaton argues that the trial court erred by prohibiting her from presenting new mitigating evidence at the resentencing hearing. Specifically, Keaton argues that she was entitled to present evidence of her good behavior while incarcerated during the approximately five-year period between the original sentencing hearing and the resentencing hearing. According to Keaton, "the trial court was constitutionally required to consider such evidence prior to [re]sentencing Keaton to death." (Keaton's brief on return to first remand, pp. 19-20.)

In response, the State argues that the trial court did not have jurisdiction to receive mitigating evidence at the resentencing hearing because, the State says, doing so would have exceeded the scope of this Court's first remand order, which instructed the trial court only to afford Keaton an opportunity to allocute before resentencing her. See Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) ("[A]ny act by a trial court beyond the scope of an appellate court's remand order is void for lack

of jurisdiction."); and State v. Hurst, 223 So. 3d 941, 949 (Ala. Crim. App. 2015) (holding that an evidentiary hearing that occurred on remand was void because it exceeded the scope of this Court's remand order, which had instructed the trial court only to make specific findings of fact from an earlier proceeding).

Keaton counters with the argument that a trial court has the implicit authority to exceed the express scope of a remand order if doing so is necessary to ensure that a death sentence is constitutionally imposed. Thus, Keaton argues that, because a defendant is constitutionally entitled to present mitigating evidence in a death-penalty case -- see Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) -- the trial court was authorized and required to receive mitigating evidence at the resentencing hearing, regardless of the express scope of this Court's remand order.

There is no question that, if the trial court had received evidence at Keaton's resentencing hearing, the court would have exceeded the express scope of this Court's first remand order; that is to say, the trial court would have exceeded the scope of its jurisdiction on remand. Anderson,

796 So. 2d at 1156; Hurst, 223 So. 3d at 949. However, we recognize that the exclusion of mitigating evidence from the resentencing hearing raises potential constitutional concerns with Keaton's death sentence. We further recognize that, if we were to dispose of this claim by holding that the trial court did not have jurisdiction to receive evidence on remand, that holding would raise the question whether this Court had violated Keaton's constitutional rights by vacating her death sentence and then restricting the trial court from receiving mitigating evidence at the resentencing hearing. Thus, given that Keaton's death sentence will be subjected to many levels of intense judicial scrutiny in the coming years, we think it prudent to address now, in this initial stage of judicial review, whether Keaton was entitled to present mitigating evidence at the resentencing hearing.

Keaton relies on Skipper, supra, in support of her claim that she was entitled to present evidence of her good behavior while incarcerated during the approximately five-year period between the original sentencing hearing and the resentencing hearing. As we have already noted, the United States Supreme Court held in Skipper that evidence of a

defendant's "good behavior during the [time] he spent in jail awaiting trial" is "relevant evidence in mitigation of punishment" and therefore cannot be excluded from the defendant's sentencing hearing in a capital trial. Skipper, 476 U.S. at 4 (emphasis added). However, Skipper did not expressly address, nor has the Court since addressed, whether a defendant is entitled to present evidence of his or her good behavior in jail during the time between the original sentencing hearing and a resentencing hearing that occurs after an appellate court remands the case to correct an error in the original sentencing hearing. In the absence of guidance from the United States Supreme Court, other courts have been unable to reach a consensus as to whether Skipper implicitly answers that question.

In Davis v. Coyle, 475 F.3d 761 (6th Cir. 2007), a three-judge panel of state judges had improperly relied upon nonstatutory aggravating circumstances in sentencing the defendant to death for his aggravated-murder conviction. On remand from the Ohio Supreme Court, the same panel again sentenced the defendant to death after considering the only proper aggravating circumstance from the original sentencing hearing

and, in doing so, prohibited him from presenting evidence of his "exemplary behavior on death row in the time between the two sentencing hearings." Davis, 475 F.3d at 770. The Ohio Supreme Court subsequently affirmed the defendant's sentence after concluding that "Skipper has no applicability to post-trial prison behavior." Id. at 771.

On appeal from the denial of the defendant's petition for a writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit held that Skipper mandated that the defendant be allowed to present evidence of his good behavior while incarcerated between the original sentencing hearing and the resentencing hearing. In support of its holding, the Sixth Circuit noted that "the right to produce such evidence [in Skipper] was triggered specifically 'by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison.' " Davis, 475 F.3d at 771 (quoting Skipper, 476 U.S. at 5 n.1). Thus, because the prosecutor in Davis had argued at the resentencing hearing that the defendant was "too dangerous for anything other than a death sentence," id. at 772, the Sixth Circuit held that the

defendant could not be forced to rebut that argument with only the mitigating evidence from the first sentencing hearing. See also Creech v. Arave, 947 F.2d 873, 881-82 (9th Cir. 1991) (holding that there was "no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal"). However, the Sixth Circuit was careful to note that "there could conceivably be some question about the relevance of" evidence of a defendant's good behavior while incarcerated between sentencing hearings in cases where the State does not argue that "future dangerousness should keep [the defendant] on death row." Davis, 475 F.3d at 773.

More recently, courts have concluded that Skipper does not mandate that a defendant be allowed to present mitigating evidence at a resentencing hearing ordered by an appellate court for a limited purpose. In State v. Roberts, 137 Ohio St. 3d 230, 998 N.E.2d 1100 (2013), the defendant had been sentenced to death and had validly waived her right to present any mitigating evidence other than an unsworn statement to the jury. On appeal, the Ohio Supreme Court remanded the case for

resentencing because the trial court had improperly allowed the prosecutor to participate in drafting the sentencing order. On remand, the trial court was to afford the defendant an opportunity to allocute and was to personally weigh the aggravating circumstances against any mitigating circumstances before resentencing the defendant. At the resentencing hearing, the defendant sought to present mitigating evidence, but the trial court prohibited her from presenting such evidence and subsequently resentenced her to death. On return to remand, the Ohio Supreme Court rejected the defendant's claim that the trial court erred by prohibiting her from presenting mitigating evidence at the resentencing hearing. In reaching that holding, the Court acknowledged the Sixth Circuit's analysis in Davis but found Davis unpersuasive:

> "We begin by noting ... that Lockett [v. Ohio, 438 U.S. 586 (1978)], Eddings [v. Oklahoma, 455 U.S. 104 (1982)], Skipper [v. South Carolina, 476 U.S. 1 (1986)], and Hitchcock [v. Dugger, 481 U.S. 393 (1987),] are all distinguishable from this case. Each case in the Lockett-Eddings-Skipper-Hitchcock tetralogy involved the trial court's exclusion of, or refusal to consider, evidence in the original sentencing proceeding. None of these cases involved a proceeding on remand. This case ... involves a proceeding on remand for the limited purpose of correcting an error that occurred after the defendant had had

a full, unlimited opportunity to present mitigating evidence to the sentencer.

"In other words, neither Lockett nor any of its progeny required the trial court to reopen the evidence after an error-free evidentiary hearing had already taken place. '[T]he issue in this case is whether the presentation of evidence of mitigating ... factors must be reopened when a death sentence is reversed for a reason unrelated to the presentation of evidence. None of the Supreme Court cases cited by the majority supports that premise.' [Davis], 475 F.3d at 782 (Gibbons, J., concurring).

"In a case in which the defendant was not deprived of any constitutional right -- including her Eighth Amendment right to present mitigation -- at the time of her mitigation hearing, there seems to be no basis for requiring the trial court to reopen or supplement that evidence in a later proceeding. To hold, as [Davis] does, that a new mitigation hearing must be held, even though no constitutional error infected the original one, would transform the right to present relevant mitigation into a right to update one's mitigation. Such a right has no clear basis in Lockett or its progeny.

"Establishing a right to update mitigation could result in arbitrary distinctions between similarly situated capital defendants. A defendant who had an error-free mitigation hearing could not update his mitigation -- no matter how compelling the new mitigation that might be available to him -- if the trial judge committed no error after the mitigation hearing that called for the case to be remanded. But another defendant, whose mitigation hearing was equally free of error, would have the right to update his mitigation in the event that a posthearing sentencing error took place that required a remand."

Roberts, 137 Ohio St. 3d at 236-37, 998 N.E.2d at 1108 (second emphasis added; internal citation omitted).

Five years later, in State v. Goff, 154 Ohio St. 3d 218, 113 N.E.3d 490 (2018), the Ohio Supreme Court again considered this claim in a case involving the same sentencing error that occurred here, i.e., the trial court's failure to afford the defendant an opportunity to allocute. In Goff, as in this case, the defendant was sentenced to death following a resentencing hearing for which the sole purpose was to afford him an opportunity to allocute. On appeal, the defendant relied on Davis in arguing that the trial court erred at the resentencing hearing "by excluding testimony that he sought to present as additional mitigating evidence, including evidence of [his] good behavior in prison since the first sentencing hearing." Goff, 154 Ohio St. 3d at 221, 113 N.E.3d at 494. In rejecting that claim, the Ohio Supreme Court stated:

> "We have previously rejected claims similar to Goff's argument, and we find the argument unpersuasive in the current procedural context of this case.
>
> "We have held that when 'the errors requiring resentencing occur[ ] after the close of the mitigation phase of the trial' -- after the jury has returned its verdict and made a

> sentencing recommendation -- 'the trial court is to proceed on remand from the point at which the error occurred.' State v. Chinn, 85 Ohio St. 3d 548, 565, 709 N.E.2d 1166 (1999). We reaffirmed this holding in State v. Roberts, 137 Ohio St. 3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, ¶ 25, 35-36, in rejecting a capital defendant's argument that she was entitled to a full presentation of mitigation at her resentencing hearing. In Roberts, we ... concluded that the Lockett line of cases did not 'require[ ] the trial court to reopen the evidence after an error-free evidentiary hearing had already taken place.' Roberts at ¶ 35, citing Chinn at 564-565, 709 N.E.2d 1166. And we recently stated that '[n]o binding authority holds that the Eighth Amendment requires a resentencing judge to accept and consider new mitigation evidence at a limited resentencing when the defendant had the unrestricted opportunity to present mitigating evidence during his original mitigation hearing.' State v. Jackson, 149 Ohio St. 3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 73.
>
> "The underlying error currently at issue is the trial court's failure to provide Goff an opportunity to allocute at his initial sentencing hearing. Crim. R. 32(A)(1) requires a trial court to ask the defendant whether he 'wishes to make a statement in his ... own behalf' '[a]t the time of imposing sentence.' (Emphasis added.) This cannot occur until after the defendant has had an opportunity to present mitigation evidence and the factfinder has made its sentencing recommendation. On remand for Goff's resentencing, the trial court had to proceed from the point of providing Goff an opportunity to allocute, which occurred after his opportunity to present mitigation evidence. Therefore, the trial court did not err in excluding testimony that Goff sought to present as additional mitigation evidence."

Id. at 222-23, 494-95 (first and last emphasis added).

Consistent with Roberts and Goff, the South Dakota Supreme Court noted in State v. Berget, 853 N.W.2d 45 (S.D. 2014), that the United States Supreme Court "has not determined, in Skipper or otherwise, that a capital defendant has a categorical constitutional right to introduce new mitigation evidence discovered after a sentencing hearing in which the defendant was given the opportunity to present all mitigation evidence he desired." Berget, 853 N.W.2d at 59. In determining whether the United States Supreme Court has implicitly acknowledged such a right, the Berget Court noted that both Davis and Roberts "provide reasoning for whether or not Supreme Court precedent gives indirect authority that a court, on limited resentencing, must consider new mitigation evidence," but the Berget Court concluded that "key factors ... point to Roberts being the persuasive authority." Id. at 61.

First, the Berget Court noted that "the Sixth Circuit based its decision in [Davis] on the salient aggravating circumstance shared in both Davis and Skipper" -- namely, "that the right of a defendant to present evidence of good behavior in prison is particularly relevant when a prediction of future dangerousness figures centrally in a prosecutor's plea

for imposition of the death penalty.' " Berget, 853 N.W.2d at 61 (quoting Davis, 475 F.3d at 771). In Berget, however, "the two statutory aggravating circumstances under which the court sentenced [the defendant] to death did not relate to his future dangerousness per se, but to the nature of the murder he committed." Id. Thus, the Berget Court concluded, the defendant's reliance on Davis was "questionable," id. -- a conclusion that the Sixth Circuit itself might not dispute given its acknowledgment that its holding in Davis was not absolute. In addition, the Berget Court noted that

> "the Roberts Court's finding of arbitrary discrepancies that may manifest between similarly situated capital defendants ... is clearly applicable in this case. No sentencing error existed in the case of Berget's co-defendant, Eric Robert. Had Robert proceeded with his case and tried to raise a similar argument of post-sentencing discovery of evidence he deemed to be mitigating, under the rationale now advanced by Berget, Berget could obtain a second sentencing hearing while Robert could not."

Id. at 62. According to the Berget Court, such inconsistency

> "strikes at the heart of Lockett's holding that the death penalty should be imposed 'in a more consistent and rational manner[,]' based on an analysis of the fundamental concerns of sentencing. See Lockett, 438 U.S. at 601, 605, 98 S. Ct. at 2963, 2965.

> "It is that very interest in achieving a 'more rational and equitable administration of the death penalty' that the [United States] Supreme Court found to be the basis for allowing states the 'authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted[,]' including mitigation evidence, in capital cases. See Oregon v. Guzek, 546 U.S. 517, 526, 126 S. Ct. 1226, 1232, 163 L. Ed. 2d 1112 (2006). A reasonable limit is one that we impose today that avoids the arbitrary outcomes and judicial inefficiency noted in Roberts and reinforces an appellate court's authority to instruct a limited remand."

Id. Thus, the Berget Court concluded that Skipper was "clearly distinguishable" from the case then before it, and the Court reiterated that there was no binding authority that requires a trial court to "consider newly discovered, otherwise-admissible mitigation evidence, when the defendant had a full and unrestricted opportunity to present mitigation evidence at the initial sentencing." Id. at 63.

Like the Ohio Supreme Court and the South Dakota Supreme Court, we conclude that Keaton's reliance on Skipper and Davis is questionable. Unlike the defendants in those cases, Keaton was not attempting to defend herself at the resentencing hearing against an allegation that she represented a future danger to others. In fact, the State provided no arguments at the resentencing hearing regarding the appropriate

sentence.[25] Rather, we find Roberts and Goff more applicable to the specific circumstances of this case.

As we conclude in this opinion, there were no errors in the evidentiary part of the penalty phase of Keaton's trial, and Keaton's opportunity to present mitigating evidence at that time was unrestricted. The only error that occurred in the penalty phase was the trial court's failure to afford Keaton an opportunity to allocute, but that error occurred after Keaton's full and unfettered opportunity to present mitigating evidence.[26] Thus, to afford Keaton an opportunity to present new mitigating evidence at her resentencing hearing would be to afford her the right to "update" her mitigating evidence following an error-free

[25]We also note that the State did not argue at the original sentencing hearing that Keaton's future dangerousness warranted a death sentence. (R. 5670-71.)

[26]Although allocution provides a defendant with an opportunity to attempt to mitigate his or her sentence, Newton v. State, 673 So. 2d 799, 801 (Ala. Crim. App. 1995), it is not an avenue by which a defendant presents mitigating evidence. See State v. Curtis, 108 P.3d 1233, 1236 (Wash. Ct. App. 2005) ("[A]llocution is a plea for mercy; it is not intended to advance or dispute facts." (citation omitted); and State v. Colon, 864 A.2d 666, 789 (Conn. 2004) (noting that most jurisdictions "limit the right of allocution to pleas for mercy or leniency and expressions of future hope").

evidentiary part of the original sentencing proceedings. We agree with the conclusion of the Ohio Supreme Court and the South Dakota Supreme Court that "such a right has no clear basis in Lockett or its progeny," which includes Skipper. Roberts, 998 N.E.2d at 1108.

Furthermore, to allow Keaton to present new mitigating evidence at her resentencing hearing would result in the "arbitrary distinctions between similarly situated capital defendants" that the Roberts and Berget Courts recognized could occur. Roberts, 998 N.E.2d at 1108. This is so because the evidentiary part of the penalty phase in both Keaton's trial and DeBlase's trial was free from error. Thus, to accept Keaton's argument would result in an opportunity for her to "update" her mitigating evidence because she was not afforded an opportunity to allocute at her original sentencing hearing, while DeBlase could not receive such opportunity because he was afforded an opportunity to allocute at his sentencing hearing. (CR-14-0482, R. 3372-73). As the Berget Court noted, to allow such inconsistency based solely on a post-evidentiary sentencing error would "strike[ ] at the heart of Lockett's holding that the death penalty should be imposed 'in a more consistent

and rational manner.' " Berget, 853 N.W.2d at 62 (quoting Lockett, 438 U.S. at 601).

Given the foregoing, we hold that when a new sentencing hearing is required in a capital trial for the limited purpose of affording the defendant an opportunity to allocute, the trial court is "to proceed on remand from the point at which the error occurred," i.e., the point at which the defendant should have been afforded an opportunity to allocute. Goff, 154 Ohio St. 3d at 222, 113 N.E.3d at 494 (citation omitted). Because such an error occurs after the close of evidence, the defendant is not entitled to "update" his or her mitigating evidence at the resentencing hearing when his or her future dangerousness is not at issue. Accordingly, because we remanded this case solely for the trial court to afford Keaton an opportunity to allocute and because Keaton's future dangerousness was not at issue at the resentencing hearing, the trial court did not err by prohibiting Keaton from presenting new mitigating evidence at the resentencing hearing. Nothing in Skipper requires a different conclusion, and the rule we announce today is consistent with the principle that " 'States are free to structure and shape consideration

of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." ' " Oregon v. Guzek, 546 U.S. 517, 526 (2006) (quoting Boyde v. California, 494 U.S. 370, 377 (1990), quoting in turn Franklin v. Lynaugh, 487 U.S. 164, 181 (1988)).

C.

Keaton argues that the trial court erred by refusing to consider the substance of her allocution as a potential mitigating circumstance. However, this claim is expressly refuted by the trial court's resentencing order issued on second remand, which states, in pertinent part: "The court has considered the content of Keaton's allocution but finds it is not a mitigating factor under § 13A-5-52[, Ala. Code 1975]. Thus, it is not a factor considered in this Court's weighing of the aggravating and mitigating circumstances." (Record on return to second remand, C. 62.) Clearly, the trial court considered the substance of Keaton's allocution as a potential mitigating circumstance but did not find the statement to be mitigating. Although Keaton repeatedly suggests that the court was required to find the substance of her allocution to be mitigating, we have already noted the lack of merit in that argument. See Phillips, 287 So. 3d

at 1171; and Ex parte Borden, 769 So. 2d at 958. Accordingly, Keaton is not entitled to relief on this claim.[27]

We acknowledge Keaton's argument that there is "no evidence that the trial court reweighed aggravation and mitigation in light of the statements at allocution." (Keaton's brief on return to first remand, p. 12.) However, because the trial court did not find the substance of Keaton's allocution to be mitigating, the only aggravating and mitigating circumstances were those that had been established at the penalty phase of trial. As evidenced by its original sentencing order, the trial court "carefully considered and weighed" those aggravating and mitigating circumstances during the original sentencing proceedings (C. 63), and

[27]Keaton contends that the trial court "arbitrarily" found her allocution not to be mitigating (Keaton's brief on return to second remand, p. 7) -- an alleged fact that, she says, entitles her to relief under Parker v. Dugger, 498 U.S. 308 (1991). However, Parker held that the Florida Supreme Court's review of the appellant's death sentence had been arbitrary because the Court had not considered the evidence of nonstatutory mitigating circumstances, despite the fact that the trial court had found the existence of some nonstatutory mitigating circumstances. Thus, Parker is wholly inapplicable here.

there was no need for the trial court to reweigh the same aggravating and mitigating circumstances on remand.

D.

Keaton argues that "proceeding with sentencing in this case during the COVID-19 pandemic was unconstitutional." (Keaton's brief on return to first remand, p. 54.) However, although Keaton suggests that she was "fundamentally disadvantage[d]" by the fact that her allocution occurred during a pandemic, she makes no attempt to demonstrate how she was prejudiced by that procedure. (Id.) Furthermore, we note that Keaton was afforded an opportunity to meet with her counsel before the resentencing hearing, to be supported at that hearing by the attendance of people who love her, and to address the trial court and make a statement on her own behalf, which was the sole purpose of the hearing. (Record on return to first remand, R. 79.) Thus, Keaton is not entitled to relief on this claim.

E.

Keaton argues that her death sentence is unconstitutional because, she says, it (1) was imposed "the morning after armed insurrectionists

waving confederate flags infiltrated the United States Capitol"[28] and (2) "constituted gender discrimination." (Keaton's brief on return to first remand, p. 55.) Keaton's first claim borders on the absurd and warrants no further discussion. We do acknowledge here Keaton's argument that the trial court "unconstitutionally cut off [defense] counsel's argument" as to why Keaton should not be sentenced to death. (Id. at 17.) However, the trial court did not "cut off" counsel's argument until counsel began making the wholly irrelevant argument he makes here, i.e., that it was unconstitutional to sentence Keaton to death because "[t]here were Confederate flags flying inside of our nation's capitol yesterday." (Record on return to first remand, R. 81.) Thus, Keaton is not entitled to relief on this claim.

As to Keaton's claim that her death sentence constitutes gender discrimination, Keaton cites United States v. Maples, 501 F.2d 985, 985 (4th Cir. 1974), in which the United States Court of Appeals for the

[28]On January 6, 2021, civil unrest ensued at the United States Capitol when the United States Congress convened to count electoral votes in the 2020 presidential election.

Fourth Circuit held that "sex, alone, is an impermissible basis for a disparity" in the sentences imposed on male and female co-defendants. Maples does not help Keaton, however, because she and DeBlase were both sentenced to death. Furthermore, there is no evidence indicating that gender played any role whatsoever in the trial court's decision to sentence Keaton to death. Thus, Keaton is not entitled to relief on this claim.

F.

Keaton argues that the trial court erred by concluding that it had no jurisdiction to rule on seven motions she filed after this Court remanded the case for the trial court to afford her an opportunity to allocute. Keaton acknowledges that a trial court generally does not have jurisdiction to exceed the scope of an appellate court's remand order -- see Anderson, 796 So. 2d at 1156 -- but, as noted, she argues that a trial court has the implicit authority to exceed the express scope of a remand order if doing so is necessary to ensure that a death sentence is constitutionally imposed. Thus, Keaton seeks to have this Court remand the case once

again for the trial court to address the merits of what, she says, are constitutional claims raised in those seven motions.

Initially, we note that, with one exception, Keaton's motions raised claims that we have addressed in Parts I, II, III.E, V, VI, X.D, XII.E, XIV, XVIII, and XX.D of this opinion. (Second supplemental record on return to first remand, C. 176-222, 227-54, 298-307.) Therefore, remanding the case for the trial court to rule on those motions is unnecessary and would result in a waste of judicial resources because we have already concluded that Keaton is not entitled to relief on those claims.

The only claim in Keaton's seven motions that we have not addressed is Keaton's claim that the delay between her trial and her allocution renders her death sentence unconstitutional -- a claim she does not raise on appeal. However, the right to allocution is not a constitutional right. See Hill v. United States, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant ... whether he has anything to say before sentence is imposed is ... an error which is neither jurisdictional nor constitutional." (emphasis added)). Also, we have reviewed every case Keaton cited in support of this claim, and nothing in

those cases provides that a delay between trial and allocution renders a death sentence unconstitutional; in fact, the right to allocution is not even at issue in many of those cases. (Second supplemental record on return to first remand, C. 298-305.) Thus, even if we assume that a trial court may exceed the scope of remand in order to address constitutional challenges to a death sentence, that fact does not help Keaton because her claim regarding the delay in allocution did not raise a constitutional issue. Accordingly, the trial court did not err by concluding that it did not have jurisdiction to consider a motion raising that claim. See Calloway v. State, 860 So. 2d 900, 905 (Ala. Crim. App. 2002) (holding that the circuit court correctly recognized that, given the limited scope of this Court's remand order, the court did not have jurisdiction to rule on a motion the defendant filed on remand).

G.

Keaton argues that the trial court violated Rule 26, Ala. R. Crim. P., on second remand. As noted earlier, on May 28, 2021, this Court remanded the case to the trial court a second time because that court's resentencing order issued on first remand did not contain the findings of

fact required by § 13A-5-47. According to Keaton, this Court's May 28, 2021, remand order operated to vacate the death sentence the trial court imposed on first remand; thus, Keaton argues, the trial court was required on second remand to comply with Rules 26.7 and 26.9, which respectively provide that a defendant "has the right to be present at the sentence hearing and at sentencing" and that "[j]udgment shall be pronounced in open court."

However, although this Court's May 28, 2021, remand order did vacate the trial court's resentencing order issued on first remand, it did not vacate the sentences imposed on first remand, which were pronounced in Keaton's presence in open court. (Supplemental record on return to first remand, R. 83.) Rather, that remand order merely instructed the trial court to issue a new order setting forth the findings of fact the court had made in support of Keaton's death sentence so that this Court could properly review the propriety of that sentence. Thus, because this Court's May 28, 2021, remand order did not vacate Keaton's sentences, there was no need for the trial court to hold a hearing on second remand so that it could again pronounce Keaton's sentences in her presence in open court.

H.

Keaton argues that Judge Stout relied on "non-record evidence" in sentencing her to death. (Keaton's brief on return to second remand, p. 25.) However, it is evident from her supplemental briefs that Keaton's argument is more in the nature of an allegation that Judge Stout sentenced her to death because, she says, he was negatively predisposed toward her as a result of having presided over DeBlase's trial. Regardless, Keaton's sentencing order indicates that Judge Stout based Keaton's death sentence solely on the aggravating circumstance that Chase's murder was especially heinous, atrocious, or cruel as compared to other capital offenses (C. 54-55, 63), and, as we have already concluded in Part XIII, supra, that aggravating circumstance was supported by the evidence presented at Keaton's trial. Thus, Keaton is not entitled to relief on this claim.[29]

[29]As noted in Part I, supra, it is true that Keaton's sentencing order states that her "cell phone was traced" after a warrant was issued for her arrest, and it is true that no such evidence was presented at her trial. However, we reiterate that this finding of fact was a peripheral fact wholly irrelevant to Keaton's convictions and sentences.

XXI.

Finally,

> "[p]ursuant to § 13A-5-53(a), Ala. Code 1975, this Court must review [Keaton's] death sentence to determine whether any error adversely affecting [Keaton's] rights occurred during the sentencing proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence, and whether death is the proper sentence in this case. In determining whether death is the proper sentence, this Court must determine
>
> > " '(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
> >
> > " '(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
> >
> > " '(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."
>
> "§ 13A-5-53(b), Ala. Code 1975. The determinations required by § 13A-5-53(b) must be 'explicitly address[ed]' by this Court in all cases in which the death penalty has been imposed. § 13A-5-53(c), Ala. Code 1975."

Lane, ___ So. 3d at ___.

We have thoroughly reviewed the entirety of the penalty phase in this case, and now that Keaton has been afforded an opportunity to allocute, we conclude that no error adversely affecting Keaton's rights occurred and that the trial court's findings regarding the aggravating and mitigating circumstances are supported by the evidence. Thus, we proceed to determine whether the death penalty is the proper sentence in this case.

First, we must consider whether Keaton's death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 13A-5-53(b)(1), Ala. Code 1975. As to the jury's sentencing recommendation, the trial court noted that the jurors "took their responsibilities very seriously," which included the trial court's instruction to the jurors that they "not allow sympathy, prejudice, or emotion to influence" their verdicts, and the trial court noted that "no juror exhibited an undue emotional response" during the trial. (C. 62.) In addition, nothing in the trial court's sentencing order indicates that the trial court imposed Keaton's death sentence on an improper basis. To the contrary, it is apparent from the trial court's sentencing order that the court based

Keaton's sentence on the court's careful and thorough weighing of the aggravating and mitigating circumstances. Thus, we find no basis for concluding that Keaton's death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 13A-5-53(b)(1).

Second, we must independently weigh the aggravating and mitigating circumstances. § 13A-5-53(b)(2), Ala. Code 1975. As noted, the sole aggravating circumstance was that Chase's murder was especially heinous, atrocious, or cruel as compared to other capital offenses. See § 13A-5-49(8). As for statutory mitigating circumstances, the trial court found that Keaton's lack of prior criminal history and her age constituted mitigating circumstances. See § 13A-5-51(1) and (7), Ala. Code 1975. As for nonstatutory mitigating circumstances, the trial court found that "the circumstances of Keaton's childhood were affected by a lack of family stability and the effects of her visual impairment"and that Keaton "has been compliant with jail orders and not significantly disruptive to jail routine." (C. 61-62.) Having independently weighed the aggravating circumstance against the mitigating circumstances, we agree with both

the jury and the trial court that the aggravating circumstance outweighs the mitigating circumstances.

Third, we must consider whether Keaton's death sentence "is excessive or disproportionate to the penalty imposed in similar cases." § 13A-5-53(b)(3), Ala. Code 1975. We conclude that it is not because the death penalty has been imposed in Alabama in other cases in which the victim was less than 14 years of age and the murder was especially heinous, atrocious, or cruel. See Boyle v. State, 154 So. 3d 171, 245-46 (Ala. Crim. App. 2013), overruled on other grounds by Towles, supra; Johnson v. State, 40 So. 3d 753, 761-63 (Ala. Crim. App. 2009); Gobble, 104 So. 3d at 987-89; and Blackmon, 7 So. 3d at 421-22. See also Woolf, 220 So. 3d at 396 (collecting cases in which the death sentence has been imposed for the murder of a victim under 14 years of age).

Based on the foregoing, we conclude that the death penalty was the proper sentence in Keaton's case.

Conclusion

Keaton has not demonstrated any reversible error in either the guilt phase or penalty phase of her trial. In addition, pursuant to Rule 45A,

Ala. R. App. P., this Court has meticulously reviewed the entire record of both the trial and the resentencing proceedings and has not found any error that did or probably did adversely affect Keaton's substantial rights. Accordingly, we affirm Keaton's capital-murder conviction and her death sentence, as well as her reckless-manslaughter conviction and her sentence of 20 years' imprisonment for that conviction.

AFFIRMED.

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

ATTACHMENT B

IN THE SUPREME COURT OF ALABAMA

October 21, 2022

SC-2022-0559

Ex parte Heather Leavell-Keaton. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: State of Alabama v. Heather Leavell-Keaton) (Mobile Circuit Court: CC-12-3096; Criminal Appeals: CR-14-1570).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on October 21, 2022:

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

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, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on November 16, 2022, I served a copy of the foregoing upon counsel for the Respondent:

Polly Kenny
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
polly.kenny@alabamaag.gov

/s/ *Mark Loudon-Brown*
Mark Loudon-Brown