Exhibit 1

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Court of Criminal Appeals of Alabama.

Benjamin YOUNG
v.
STATE of Alabama

CR-17-0595
|
August 6, 2021

Synopsis
Background: Defendant was convicted in the Circuit Court, Colbert County, No. CC-16-339, of capital murder, for which he was sentenced to death, and first-degree assault, for which he was sentenced to 20 years' imprisonment. Defendant appealed.

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

defendant failed to demonstrate that the grand jury was not drawn from a source fairly representative of the community;

defendant failed to establish a *Batson* violation;

coconspirators' out-of-court statements showing a conspiracy to kill victim were admissible;

trial court did not abuse its discretion in allowing witnesses to identify defendant as driver of pickup truck seen on surveillance footage;

trial court did not abuse its discretion in instructing jury that it could rely on the evidence of flight to support a finding of guilt;

State sufficiently corroborated accomplices' testimony;

sufficient evidence supported finding that victim suffered serious physical injury, as required to support conviction for first-degree assault; and

death sentence was warranted.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection; Preliminary Hearing or Grand Jury Proceeding Motion or Objection; Pre-Trial Hearing Motion.

Appeal from Colbert Circuit Court (CC-16-339); Jacqueline M. Hatcher, Judge

Attorneys and Law Firms

Angela L. Setzer, Ryan C. Becker, and Adam B. Murphy of Equal Justice Initiative, Montgomery, for appellant.

Steve Marshall, att'y gen., and Christopher R. Reader, asst. att'y gen., for appellee.

Opinion

MINOR, Judge.

***1** A Colbert County jury convicted Benjamin Young of capital murder for the shooting death of Ki-Jana Freeman while Freeman sat in his car, see § 13A-5-40(a)(17), Ala. Code 1975, and of first-degree assault, see § 13A-6-20(a)(1), Ala. Code 1975, for the shooting of Tyler Blythe. The jury unanimously found the existence of two aggravating factors and recommended, by a vote of 11-1, that the circuit court sentence Young to death for the capital-murder conviction. After receiving a presentenceinvestigation report and conducting a sentencing hearing, the circuit court followed the jury's recommendation and sentenced Young to death for the capital-murder conviction. For the first-degree-assault conviction, the circuit court sentenced Young to 20 years' imprisonment.

This appeal, which is automatic in cases involving the imposition of the death penalty, followed Young's sentence of death. See § 13A-5-53, Ala. Code 1975. After careful review and with the benefit of oral argument, we affirm Young's convictions and sentences, including the imposition of the death penalty.

Facts

On March 1, 2016, Young attended a meeting of a gang called the "Almighty Imperial Gangsters" [1] held by Thomas Hubbard, the leader of the gang, in Hubbard's bedroom at his mother's house on Midland Avenue in Muscle Shoals. Other members at the meeting were Peter Capote, Dewayne Austin Hammonds, Riley Hamm III, De'Vontae Bates, and Michael Blackburn. Two days earlier the Hubbards' house had been burglarized while Hubbard was attending his grandmother's funeral. Several items were stolen from the house, including a television, an Xbox game console, a PlayStation game console, and some cash. Hubbard reported the burglary to the Muscle Shoals Police Department. Officer Raymond Schultz of the Muscle Shoals Police Department, who responded to the burglary call, testified at trial that Hubbard was upset and angry about the burglary. (R. 463.)

Hubbard told everyone in the meeting on March 1 that he wanted to find and kill the person who burglarized his house. Hubbard asked the gang for help. Bates testified that in the meeting they developed a plan to find out who broke into Hubbard's house and then "lure him to a place" and kill him. (R. 749.)

Hammonds, who owned the Xbox game console stolen from Hubbard's house, testified that he told Hubbard at the meeting that Freeman might have taken the Xbox. Hammonds knew Freeman from working with him in the past, and he had seen a Facebook post by Freeman advertising an Xbox for sale. The gang developed a plan for Hammonds to meet with Freeman to see if the Xbox Freeman was offering to sell was Hammonds's Xbox. Although the plan changed throughout the meeting, the gist of the plan was that Hammonds (either alone or with Hamm) would meet with Freeman and, if the Xbox was the one stolen from Hubbard's house, Hammonds would signal to or call Young and Capote, who would take Freeman somewhere to interrogate and kill him. Hammonds testified that Young, Capote, and Hubbard planned to use Hubbard's SKS rifle and a pistol to kill Freeman. (R. 815.) Bates testified that besides the SKS rifle, Hubbard owned a .22-caliber revolver and a .45-caliber handgun. The State introduced an undated photograph showing Hubbard standing in his bedroom holding an SKS rifle.

***2** Hammonds testified that he sent a message to Freeman on Facebook Messenger [2] about the Xbox. Hammonds and Freeman communicated throughout the day about Hammonds purchasing the Xbox from Freeman. Hammonds's Facebook Messenger exchange with Freeman was introduced at trial.

A little before 9:00 p.m., Young and his girlfriend, Meagan, along with Capote and his girlfriend, Bridgette, left Hubbard's house to buy ammunition for the SKS rifle. Meagan testified that Young drove Meagan's car to the Gander Mountain outdoor retail store in Florence. Young asked Meagan to buy the ammunition, and he told her what kind of ammunition to buy. The State introduced surveillance footage from Gander Mountain showing Meagan's car pulling into the Gander Mountain parking lot. Surveillance footage from inside the store showed Meagan buying the ammunition at 9:01 p.m., and a receipt from the store showed that Meagan bought a box of 7.62X39-millimeter ammunition. The surveillance footage showed Meagan returning to the car and the car leaving the parking lot. Meagan testified that after she bought the ammunition Young drove them back to Hubbard's house.

Around the time Young, Capote, Meagan, and Bridgette got back to Hubbard's house from Gander Mountain, Hammonds left to go to work at a Wal-Mart in Florence. At 9:28 p.m., Hammonds sent Freeman a message asking him to call him, and he gave Freeman his cellular telephone phone number. Freeman did not call Hammonds but sent a message asking if Hammonds still wanted the Xbox. Hammonds testified that he never arranged a meeting with Freeman and that when he left for work around 9:30 p.m., the plan was for Bates to "handle it" by setting up Freeman. (R. 823.) Hammonds said that Young, Capote, Hubbard, Bates, Hamm, and Blackburn were at Hubbard's house when he left for work and that the plan was for them to use "the white Ram" to "go kill him." (R. 826-27.) The State introduced Hammonds's time card from Wal-Mart showing that Hammonds clocked in to work a little before 10:00 p.m. on March 1 and clocked out a little after 6:00 a.m. the next morning.

Around the time Hammonds left for work, Bates sent Freeman a message on Facebook Messenger asking him if he had "11 hits" of acid he could purchase. (R. 757-58.) Bates explained that he volunteered to lure Freeman to the Spring Creek Apartments by asking Freeman if he could buy some acid from him. Bates admitted he knew he was setting up Freeman so that the others could kill him.

A little after 10:30 p.m., Young, Capote, Hubbard, and Hamm left Hubbard's house in a white pickup truck. Young was driving and Capote was in the front passenger's seat. Hubbard and Hamm were in the backseat. They had with them two large black garbage bags. Bates testified that he stayed at Hubbard's house and continued exchanging messages with Freeman. Bates relayed all the information he received from

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Freeman to one of the gang member's girlfriends, who was at the house with Bates, and the girlfriend relayed the information to Young, who was in the truck on the way to the Spring Creek Apartments.

***3** The State introduced surveillance video from the Spring Creek Apartments showing a white four-door Dodge pickup truck pulling into the apartment complex around 10:47 p.m. Several minutes later Freeman sent Bates a message: "Boutta pull in. Just passed Fred's." Bates asked, "What kinda car u in cause im in the back." (C. 479.) Freeman responded at 10:58 p.m., "Blue Mustang. Pulling in now. The back on the right road or the left road." The surveillance video shows a blue Mustang vehicle pulling into the parking lot of the Spring Creek Apartments at 10:58 p.m.

Haley Burgner, Freeman's girlfriend, testified that on the afternoon of March 1 she and Freeman were communicating on Facebook Messenger. Freeman told her he planned to meet "Dewayne" to sell him an Xbox. (R. 508.) Freeman told Burgner that Tyler Blythe was with him in case anything "goes down." Later Freeman told Burgner that he was heading to meet "Vonte" to get some money that Vonte owed him. At 10:58 p.m., Freeman sent a message to Burgner that he was "getting my cash r[ight] n[ow]." The Facebook Messenger exchange between Freeman and Burgner was admitted into evidence.

Blythe testified that on March 1 he was with Freeman when Freeman asked him to ride with him to the Spring Creek Apartments to meet Bates. Blythe testified that Freeman pulled into the parking lot of the Spring Creek Apartment complex and parked the car. Blythe asked Freeman why they were there, and Freeman told Blythe they were there to sell some acid strips.

While they were sitting in Freeman's car in the parking lot, Blythe and Freeman turned around in their seats to look at a white pickup truck that had backed up in the parking lot. Blythe testified that they had just turned back around when Freeman looked in the rearview mirror and said something to Blythe and then, Blythe said, "they started shooting." (R. 556.) Freeman and Blythe were each shot several times. Blythe did not know how many shooters there were, but, he said, "it seemed like more than one." (R. 559.) Freeman was unresponsive at the scene and was pronounced dead a short time later. Blythe was taken by ambulance from the scene and airlifted to Huntsville Hospital, where he underwent surgery and was hospitalized for seven days.

Jodi Bohn testified that around 11:00 p.m. on March 1 she was looking out of her apartment window at the Spring Creek Apartments when she saw a white pickup truck back out of a parking space and stop next to a curb. Bohn saw the doors of the truck open. The driver and the front-seat passenger got out of the truck and started walking toward the back of the truck. Bohn heard gunfire that she thought came from more than one weapon, so she moved away from the window. Bohn described the driver of the pickup truck as "big and heavy." (R. 592.) The record shows that Young was 6 feet 4 inches tall and weighed 270 pounds. (C. 72.)

Lt. Jeremy Wear of the Tuscumbia Police Department testified that he was working a car-accident scene on the night of March 1 when he heard gunshots around 11:00 p.m. Lt. Wear headed toward the gunshots and, while en route, his dispatcher advised him that there was a 911 call about gunshots at the Spring Creek Apartment complex. When Wear arrived at the Spring Creek Apartment complex he saw several people screaming and running. Several witnesses told Lt. Wear they saw a white pickup truck leave the scene.

Lt. Wear saw a blue Mustang automobile with several bullet holes in it. Freeman was slumped over the console, unresponsive, with multiple gunshot wounds to his body. Lt. Wear saw several 7.62X39-millimeter shell casings scattered on the ground near the Mustang. There was an Xbox in the backseat of the Mustang.

***4** Detective Wes Holland of the Tuscumbia Police Department arrived at the scene shortly after 11:30 p.m. He testified that law-enforcement officers found 15 shell casings scattered "all over the parking lot." Det. Holland viewed surveillance footage from the Spring Creek Apartments' security cameras. He testified that he could see two people get out of a white pickup truck. The person who got out of the driver's seat appeared to Det. Holland to have his arm extended. The surveillance footage was admitted at trial and was played for the jury. [3]

In March 2016 Dale Springer lived in an apartment at the Chateau Orleans apartments in Muscle Shoals. Shortly after midnight on March 2, Springer went outside to smoke a cigarette. Springer saw a white Dodge pickup truck with a double cab pull into the parking lot of the Chateau Orleans complex "pretty fast" and back into a parking space. (R. 624.) Two men got out of the truck. Springer saw a "light silver" or "light gold" four-door automobile pull into the parking lot.

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The driver of the truck spoke with someone in the car, and the car left. The two men from the truck walked away, staying in the dark area of the apartment complex. Later that morning Springer heard on the radio that police were looking for a white Dodge pickup truck involved in a shooting, so Springer called the police. Law-enforcement officers learned that the white truck had been stolen earlier that year.

Det. Holland testified that, after interviewing Burgner the morning after the shooting, he began looking for Hammonds and Bates. He interviewed Bates on March 3 and Hammonds on March 4. Hammonds viewed the surveillance video from the Spring Creek Apartments and identified Young as the driver of the white truck and Capote as the passenger. Hammonds told Det. Holland that, after the shooting, Young told him that there were "15 shots that fired off" and that he "took care of it." (R. 830.) At trial both Hammonds and Bates testified that they had seen the surveillance video from the Spring Creek Apartments and that Young was the driver of the white pickup truck.

During his interview with Det. Holland on March 4, Hammonds provided Young's and Capote's names and Hubbard's name and address. Hubbard's house was located about one block from Chateau Orleans, where two days earlier law-enforcement had located the white pickup truck. Det. Holland and Captain Stuart Setliff of the Tuscumbia Police Department immediately went to Hubbard's house to set up surveillance. They saw Young leave the house in a silver car. When other law-enforcement officers tried to stop Young, Young "accelerated to a high rate of speed." (R. 933.) Young led officers from several law-enforcement agencies on a chase across state lines into Tennessee, where Young eventually wrecked the car and was arrested.

Det. Holland took a DNA swab from Young, and Young's DNA matched the DNA on a soda can found in the white pickup truck. DNA from a cigarette butt found in the pickup truck matched DNA from a swab taken from Capote.

Shawn Settles testified that, from August 2015 to May 2016, he was in the Colbert County jail awaiting trial on a second-degree-robbery charge and a fraudulent-use-of-a-credit-card charge. In March 2016 Hubbard, who had been arrested for Freeman's murder, became Settles's cellmate. Capote, who had also been arrested for Freeman's murder, was placed in a nearby cell. Settles testified that Hubbard and Capote communicated with each other and with Settles about the details of Freeman's murder. Settles helped Hubbard and Capote pass notes back and forth to each other, and, rather than destroy the notes for Hubbard as Hubbard thought Settles was doing, Settles secretly kept the notes. Settles testified at trial that he had been convicted of second-degree robbery and fraudulent use of a debit card and that he was testifying at trial based on an agreement with the State.

***5** Based on information from Settles, law-enforcement officers got a search warrant for property in Franklin County, Alabama. Law-enforcement officers found an SKS rife and a black magazine for the SKS buried in two black garbage bags on the property.

Nicholas Drake, a forensic scientist in the firearms and toolmarks section of the Alabama Department of Forensic Sciences, testified that the 15 shell casings found at the scene were fired from the SKS rifle recovered in Franklin County. He testified that the projectiles removed from Freeman's body during the autopsy had been fired from the SKS rifle.

A Colbert County grand jury returned a three-count indictment against Young, charging him with capital murder for intentionally causing Freeman's death by shooting him with a gun while Freeman was in a vehicle; first-degree assault for causing serious physical injury to Blythe with a gun, while intending to cause serious physical injury to Freeman; and discharging a firearm into an occupied vehicle.

At trial the State relied on a theory of accomplice liability to argue that, even if it could not show that Young fired a gun into Freeman's vehicle, Young was an accomplice to Freeman's murder and to Blythe's shooting. The jury convicted Young of capital murder for Freeman's death and of first-degree assault for Blythe's shooting. [4] The circuit court followed the jury's 11-1 recommendation and sentenced Young to death for the capital-murder conviction. For the first-degree-assault conviction the circuit court sentenced Young to 20 years in prison. Young timely appealed.

Standard of Review

Young raises several issues on appeal, including some that he did not raise in the circuit court. Because the circuit court sentenced him to death, however, we review the trial-court proceedings for plain error. See Rule 45A, Ala. R. App. We have previously explained the plain-error rule:

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

"Ex parte Brown, 11 So. 3d 933, 935-36 (Ala. 2008) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999)). See Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007); Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997); Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998) ('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.'). See also Harris v. State, 2 So. 3d 880, 896 (Ala. Crim. App. 2007) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999)). Although [a defendant's] failure to object at trial will not preclude this Court from reviewing an issue, it will weigh against any claim of prejudice he now makes on appeal. See Dotch v. State, 67 So. 3d 936, 965 (Ala. Crim. App. 2010) (citing Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)). Further,

> ***6** " ' " 'the plain[-]error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' " Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed. 2d 862 (1995).'

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

Shanklin v. State, 187 So. 3d 734, 753 (Ala. Crim. App. 2014).

Guilt-Phase Issues

I. The Grand Jury

Young argues that the circuit court should have dismissed the indictment against him because, he says, the grand jury that returned the indictment was not drawn from a fair cross-section of the Colbert County community. He says African Americans—who, he says, make up 16.3% of Colbert County's population—were underrepresented on the grand jury that indicted him and that the underrepresentation "appears to have been the result of systematic exclusion." (Young's brief, pp. 89-90.)

Young filed a motion to dismiss the indictment, which, under Rule 12.9, Ala. R. Crim. P., is the only way a defendant may challenge grand-jury proceedings. Under subsection (b) of that Rule, however, a motion to dismiss the indictment is timely only if it is filed before arraignment, unless the court sets a later date. Because Young filed his motion to dismiss the indictment several months after he was arraigned, his motion was untimely and did not preserve his challenge to the grand-jury proceedings. See Gavin v. State, 891 So. 2d 907, 944 (Ala. Crim. App. 2003). Thus, we review this claim for plain error. Rule 45A, Ala. R. App. P.

" ' "The Sixth Amendment requires that [grand juries and] petit juries 'be drawn from a source fairly representative of the community.' " ' " Acklin v. State, 790 So. 2d 975, 985 (Ala. Crim. App. 2000) (quoting McNair v. State, 706 So. 2d 828, 841-42 (Ala. Crim. App. 1997), in turn quoting Sistrunk v. State, 630 So. 2d 147, 149 (Ala. Crim. App. 1993)). Under § 12-16-55, Ala. Code 1975, it is the policy of the State of Alabama "that all persons selected for jury service be selected at random from a fair cross-section of the population of the area served by the court."

A defendant claiming that his jury was not drawn from a source fairly representative of the community bears the burden of establishing a prima face case of a "fair-cross-section" violation. Sistrunk, 630 So. 2d at 149.

> " ' "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in

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> the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 668, 58 L.Ed. 2d 579 (1979)." ' "

Peraita v. State, 897 So. 2d 1161, 1212 (Ala. Crim. App. 2003) (quoting Pierce v. State, 576 So. 2d 236, 241 (Ala. Crim. App. 1990)).

Before trial, Young filed several motions requesting discovery of the grand-jury proceedings. He requested a transcript of the grand-jury proceedings, the means and methods by which the grand jurors were summoned, and documentation showing the selecting, empaneling, swearing in, and names of the grand jurors. He also moved the circuit court to dismiss the indictment against him, arguing that the venire from which Young's grand jury was selected "systematically underrepresented African-Americans, women, and other constitutionally cognizable groups" and arguing that the "underrepresentation of African-Americans, women, and other cognizable groups in the grand jury pools constitute part of a history and pattern of discriminatory and systematic exclusion of members of those groups from the grand jury pools in Colbert County."

***7** In response, the State provided a transcript of the proceedings of the grand-jury venire affirming, under oath, that they were each over the age of 19, that they were citizens of the United States, and that they had been residents of Colbert County for at least 12 months. The State also provided a transcript of the swearing-in of the grand jurors, as well as the swearing-in of the grand-jury foreperson.

At the hearing on the motions, Young asked for the names, races, and addresses of the grand jurors who returned the indictment against him. He said he needed that information "to determine whether or not this was an 'all white' or 'all black' or 'all female' " grand jury and to determine whether any of the grand jurors that indicted Young had a relationship with Young or with any of the witnesses who would be testifying at trial.

The State advised the circuit court that Young could "get the demographic breakdown of the grand jury, men, women, you know, ages and things like that" from the circuit clerk's office. The State also advised that "[t]he means of and methods of summoning grand jury members is well known in the state of Alabama. It's the driver's license list. That's done by [the State office in] Montgomery." The State argued, though, that the names and addresses of the grand jurors were protected from disclosure. As for providing a transcript of the full grand-jury proceedings, the State said that there was no transcript to produce: "We don't have a practice of recording our grand jury sessions. There's no transcript of those." The circuit court denied Young's motions.

Of the information Young requested, the State provided the means and methods of summoning grand jurors (the driver's license list generated in Montgomery), documentation showing the empaneling and swearing-in of the grand jury and the grand-jury foreperson, and information about where Young could get the demographic make-up of the grand jury (the circuit clerk's office).

As for the State's method of selecting grand jurors, we have said that selecting jury members at random from a list of licensed drivers is an acceptable way to select a jury. See Acklin, 790 So. 2d at 985 ("Random selection from a list of licensed drivers has been held to be an acceptable manner in which to select a jury." (quoting Stanton v. State, 648 So. 2d 638, 641 (Ala. Crim. App. 1994))). Without some showing that the method by which Colbert County selected grand jurors from the driver's license list caused an underrepresentation in black jurors both on the grand jury that indicted Young and on other grand jury venires in Colbert County, Young's underrepresentation claim fails.

> " 'The third Duren [v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed. 2d 579 (1979)] element—that there has been a systematic exclusion of a distinctive group—constrains a defendant to establish that "the cause of the underrepresentation was ... inherent in the particular jury-selection process utilized." Duren, 439 U.S. at 366, 99 S.Ct. at 669.' Sistrunk v. State, 630 So. 2d at 149. Additionally, 'with regard to the second and third Duren elements, a defendant asserting a fair cross-section violation "must demonstrate ... not only that [blacks] were not adequately represented on his jury venire, but also that this was the general practice in other venires." Timmel v. Phillips, 799 F.2d 1083, 1086 (5th Cir. 1986).' Sistrunk v. State, 630 So. 2d at 150. In this case, there was absolutely no showing either that random computerized selection of licensed drivers inherently results in underrepresentation of blacks on jury venires in Conecuh County or that blacks had been underrepresented on other venires in Conecuh County."

***8** Stanton, 648 So. 2d at 640-41 (emphasis added). Although Young requested the demographic breakdown of the grand jury that indicted him, he did not request that

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information about other grand juries in Colbert County. Thus, even if the circuit court had granted all of Young's motions relating to the discovery of the grand jurors and the grand-jury proceedings, and even if that discovery had shown an underrepresentation of black veniremembers on the grand jury that indicted Young, his faircross-section claim would still fail. See Sistrunk, 630 So. 2d at 150 ("In the absence of a showing of systematic exclusion, the showing of a disparity between the percentage of blacks in the population of the county in which venue is situated and the percentage of blacks on the venire does not establish a violation of the fair cross-section requirement." (quoting Stewart v. State, 623 So. 2d 413 (Ala. Crim. App. 1993))).

We note, too, that there is nothing in the record showing that Young took the information the State provided about where he could find the demographic makeup of the grand jury and obtained or even tried to get that information in an effort to show that black jurors were underrepresented on the grand jury that indicted him. See State v. Isbell, 985 So. 2d 446, 452 (Ala. 2007) (rejecting the defendant's argument that a defendant has the right "to require the prosecutor to obtain materials in the hands of other government agencies," and holding that "because the records were public records, [the defendant] had the right 'to inspect, analyze, and copy' them without assistance from the prosecutor. He was entitled to no more."); Kelley v. State, 602 So. 2d 473, 478 (Ala. Crim. App. 1992) ("The state has no duty to disclose information that is available to the appellant from another source."). Thus, although Young had a right to the demographic data about the indicting grand jury, see State v. Matthews, 724 So. 2d 1140, 1142 (Ala. Crim. App. 1998), absent a showing that he could not obtain that information from the circuit clerk, he did not have the right to get that information from the prosecutor.

In response to Young's request for a transcript of the full grand-jury proceedings, the State represented that no such transcript existed, and Young did not establish that a transcript existed. See Millican v. State, 423 So. 2d 268, 270-71 (Ala. Crim. App. 1982) ("When the defendant, in effect, asks for the State District Attorney to produce a document, he should at least establish that this State official has such document or a copy thereof in his possession before the trial court will be put in error." (quoting Strange v. State, 43 Ala. App. 599, 197 So. 2d 437 (1966))); see also Hardy v. State, 804 So. 2d 247, 287 (Ala. Crim. App. 1999) ("In Alabama there is no statute requiring that testimony before a grand jury be recorded. 'A Grand Jury is not required to compile records and the testimony in the absence of a statute requiring preservation of the proceedings .... There is no such statute in this state.' " (quoting Sommerville v. State, 361 So. 2d 386, 388 (Ala. Crim. App. 1978))). And because Young did not show a pre-indictment "particularized need" for the grand-jury proceedings to be preserved, the circuit court did not err in denying Young's pre-indictment motion to preserve the grand-jury proceedings. See McKissack v. State, 926 So. 2d 367 (Ala. 2005).

The only items Young requested that the State did not provide, then, were the names and addresses of the grand jurors. A defendant is not entitled to the names and addresses of grand jurors. Matthews, 724 So. 2d at 1142. In Matthews, we recognized that a defendant "has a right to challenge the makeup of the grand jury." But we said:

> "The ramifications of disclosing the names of grand jury members are too great to comprehend. It is safe to conclude that the number of indictments would decrease drastically and the function of the grand jury would be greatly hindered if the grand jurors' names were not secret. The secrecy of the grand jury proceedings is well-grounded in this country's jurisprudence and has protected the grand jury system. [Defendant] is not entitled to this information."

***9** Id. Thus, the circuit court committed no error, much less plain error, in denying Young's motions for that information. Likewise, there was no error in the circuit court's denial of Young's motion to dismiss the indictment.

II. Change of Venue

Young argues that the circuit court should have granted his motion for a change of venue from Colbert County because, he says, the excessive media coverage about his case and his codefendants' cases prejudiced the community and the jury venire against him.

We review a circuit court's ruling on a motion for a change of venue for an abuse of discretion. Joiner v. State, 651 So. 2d 1155, 1156 (Ala. Crim. App. 1994). "A trial court is in a better position than an appellate court to determine what effect, if any, pretrial publicity might have in a particular case." Id.

Rule 10.1, Ala. R. Crim. P., allows a defendant to move the circuit court for a change of venue. The defendant bears the burden of showing that he or she cannot be reasonably expected to receive "a fair and impartial trial and an unbiased

verdict" in the county in which he or she is set to be tried. Rule 10.1, Ala. R. Crim. P.

Before trial, Young moved the circuit court to transfer his case to another venue because, he said, "[m]ajor newspapers, television, social media and radio in the area of Colbert County and Northwest Alabama have carried extensive and highly prejudicial coverage" about the case. He also argued that the trials of his codefendants would "result in an enormous amount of adverse and prejudicial publicity" in the area. (C. 169-70.) At the hearing on the motion for a change of venue, Young's counsel admitted that the motion was "a little premature"; he argued, though, that he expected things to heat up before trial.

> "[Defense counsel]: We have three trials that are going to be coming up. This is a little premature, but it still can be set before the Court at this time. We are putting the Court on notice. We're asking that at some point that motion be addressed, but when we have three trials in this county, it's going to be like a three-ring circus as far as television, radio and—
>
> "The Court: I don't know if it is or it isn't.
>
> "[Defense counsel]: Well, hopefully it won't be."

(Second supplemental record R. 31-32.) After the State objected to transferring the case to a different venue, the Court denied Young's motion but gave him leave to refile it. Young's counsel responded, "I expect it's going to be pretty hot and heavy here in a while." (Id. at 32-33.) Young did not again request the circuit court to transfer the case.

To succeed on a motion for a change of venue the defendant must show "that there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity." Stallworth v. State, 868 So. 2d 1128, 1142 (Ala. Crim. App. 2001) (quoting Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985)). That is, a defendant must show either that the jurors harbored actual prejudice against him or her or that, because of the prejudicial pretrial publicity that saturated the community, it must be presumed "that no impartial jury can be selected." McCray v. State, 88 So. 3d 1, 69 (Ala. Crim. App. 2010).

We have set out the "actual prejudice" standard as follows:

> ***10** " 'To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty .... Second, these jurors, it must be determined, could not have laid aside these preformed opinions and "render[ed] a verdict based on the evidence presented in court." ' "

Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993) (quoting Coleman v. Zant, 708 F. 2d 541, 544 (11th Cir. 1983)).

Young points to nothing in the record showing that any of the jurors harbored actual prejudice against him, and we have searched the record and can find no support for this claim. No potential jurors responded when the circuit court asked the jury veniremembers if any person had a fixed opinion about Young's guilt or innocence, and no one responded when the circuit court asked whether anyone knew anything about the facts of the case that would influence his or her verdict. Only five of the jury veniremembers revealed they had heard anything about the case at all. (R. 229-32.) Those five veniremembers stated that their knowledge of the case would not affect their decision if they were chosen for the jury. As it turns out, none of those five veniremembers were selected to serve on the jury. See Sale v. State, 8 So. 3d 330, 342 (Ala. Crim. App. 2008) ("A claim of actual prejudicial pretrial publicity requires an initial showing that at least one of the jurors who heard the case entertained an opinion that the defendant was guilty before hearing the evidence."). Thus, Young's claim of actual prejudice fails.

Young also has not shown that the presumed-prejudice standard affords him the relief he requests.

> "For prejudice to be presumed under [the 'presumed prejudice'] standard, the defendant must show: 1) that the pretrial publicity was prejudicial and inflammatory and 2) that the prejudicial pretrial publicity saturated the community where the trial was held. See Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). Under this standard, a defendant carries an extremely heavy burden of proof.
>
> "....
>
> " 'In determining whether the "presumed prejudice" standard exists the trial court should look at "the totality of the surrounding facts." Patton v. Yount, 467 U.S.

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1025, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 2d 589 (1975); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). The presumptive prejudice standard is "rarely" applicable, and is reserved for only "extreme situations." Coleman v. Kemp, 778 F.2d at 1537. "In fact, our research has uncovered only a very few ... cases in which relief was granted on the basis of presumed prejudice." Coleman v. Kemp, 778 F.2d at 1490.

" ' "... [T]he burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one." Coleman v. Kemp, 778 F.2d at 1537. "Prejudicial" publicity usually must consist of much more than stating the charge, and of reportage of the pretrial and trial processes. "Publicity" and "prejudice" are not the same thing. Excess publicity does not automatically or necessarily mean that the publicity was prejudicial.

" '....

" '... In order to meet the burden of showing the necessity for a change of venue due to pretrial publicity on the grounds of community saturation, "the appellant must show more than the fact 'that a case generates even widespread publicity.' " ***11** Oryang v. State, 642 So. 2d 979, 983 (Ala. Cr[im]. App. 1993), quoting, Thompson v. State, 581 So.2d 1216, 1233 (Ala. Cr[im]. App. 1991), cert. denied, [502] U.S. [1030], 112 S.Ct. 868, 116 L.Ed. 2d 774 (1992)."

Blanton v. State, 886 So. 2d 850, 877-78 (Ala. Crim. App. 2003).

Young alleged in his motion for a change of venue that "[m]ajor newspapers, television, social media and radio in the area of Colbert County and Northwest Alabama have carried extensive and highly prejudicial coverage" of his case. He claimed that this pretrial publicity "so saturated the community and prejudiced prospective jurors against" him that it would be impossible to select a fair and impartial jury. (C. 169.) He provided no documentation—newspapers, television clips, or otherwise—to support his motion. At the hearing on the motion he argued only that he anticipated extensive coverage of his case, but he did not allege that any extensive coverage had already happened.

"[Defense counsel]: ... [W]hen we have three trials in this county, it's going to be like a three-ring circus as far as television, radio and—

"The Court: I don't know if it is or it isn't.

"[Defense counsel]: Well, hopefully it won't be.

"....

"[Defense counsel]: I expect it's going to be pretty hot and heavy here in a while."

(Second Supplemental Record, R. 31-33.) Although the circuit court gave Young leave to refile his motion, Young did not refile or supplement his motion to show the circuit court that his fears of pretrial publicity had been realized. Young's unsupported allegations of prejudicial pretrial publicity, without more, are insufficient to show community saturation. See Lee v. State, 898 So. 2d 790, 867 (Ala. Crim. App. 2001) (a defendant's allegation of prejudicial pretrial publicity, without providing the court with copies or transcripts of the alleged prejudicial newspapers or media, is insufficient to show media saturation in the community).

Having offered no evidence of pretrial prejudicial media saturation, Young argues on appeal that, because some of the jury veniremembers revealed during voir dire that they had heard about the case from the media, social media, the newspaper, or "street rumors," his pretrial fear that prejudicial media would reach the jury was, in fact, realized. This claim also has no merit.

Of the 58 potential jurors, only 5 stated that they had heard about or knew something about the case. One potential juror said that she had heard about the case from the newspaper and from social media. Two others said that they had heard about the case from reading about it in the newspaper. Another revealed that he had heard about the case from "street rumors." And another said that she knew about the case from the newspaper, social media, and "just hearsay." All five jurors stated that they could set aside what they had heard about the case and decide the case based on the evidence at trial.

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That 5 of 58 potential jurors had heard about the case is not sufficient evidence of community saturation. See Hall v. State, 820 So. 2d 113, 123-24 (Ala. Crim. App. 1999) (holding that the fact that over onefourth of the venire had seen or read a newspaper article about the case was insufficient evidence of presumed prejudice, because the majority of the jurors who saw the newspaper article were struck for cause and the remaining jurors indicated that they could set aside what they had read and base their decision on the evidence at trial). What's more, Young offered nothing showing that the media coverage that those five potential jurors encountered was "sensational in nature," rather than factual. Carruth v. State, 927 So. 2d 866, 877 (Ala. Crim. App. 2005) (quoting Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993)) (" 'Newspaper articles alone would not necessitate a change of venue unless it was shown that the articles so affected the general citizenry through the insertion of such sensational, accusational or denunciatory statements, that a fair and impartial trial was impossible.' ").

***12** Nothing in the record suggests that the jury was prejudiced against Young or that media attention inflamed or so saturated the community that Young could not get a fair trial in Colbert County. We find no error, much less plain error, in the circuit court's denial of Young's motion for a change of venue.

III. Pretrial Death Qualification of the Jury

Young argues that the circuit court's pretrial death qualification of the jury produced a "conviction-prone" jury because, he says, death-qualified juries are "significantly more prone to convict and death qualification disproportionately excludes minorities and women." (Young's brief, pp. 96-97.) Young did not object to the circuit court's death qualifying the prospective jurors; thus, we review this issue for plain error. See Rule 45A, Ala. R. App. P.; Shanklin, 187 So. 3d at 767.

This Court has rejected the argument that death qualifying a jury results in a death-prone jury.

> "In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986), the United States Supreme Court held that veniremembers in a capital-murder trial may be 'death-qualified' to determine their views on capital punishment. The appellate courts in Alabama have repeatedly applied the Lockhart holding. As this Court stated in Sockwell v. State, 675 So. 2d 4 (Ala. Crim. App. 1993):
>
> > " ' "In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986), the Supreme Court held that the Constitution does not prohibit states from "death qualification" of juries in capital cases and that so qualifying a jury does not deprive a defendant of an impartial jury. 476 U.S. at 173, 106 S.Ct. at 1764. Alabama Courts have consistently held likewise. See Williams v. State, 556 So. 2d 737 (Ala. Crim. App. 1986), rev'd in part, 556 So. 2d 744 (Ala. 1987); Edwards v. State, 515 So. 2d 86, 88 (Ala. Crim. App. 1987); Martin v. State, 494 So. 2d 749 (Ala. Crim. App. 1985).'
>
> " '675 So. 2d at 18.'
>
> "Lee v. State, 44 So. 3d 1145, 1161-62 (Ala. Crim. App. 2009).
>
> "In Sneed v. State, 1 So. 3d 104 (Ala. Crim. App. 2007), cert. denied, 555 U.S. 1155, 129 S.Ct. 1039, 173 L.Ed. 2d 472 (2009), Sneed raised the same issues Dotch raises, and this court found no merit to his claims, stating:
>
> > " 'The appellant also argues that death-qualifying a jury is unconstitutional because the jurors are more prone to convict, it assumes that the defendant is guilty, and it disproportionately excludes minorities and women. In Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand), aff'd, 718 So. 2d 1166 (Ala. 1998), we stated:
> >
> > > " ' "A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr[im]. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986). Neither the federal nor the state constitution prohibits the state from[ ] death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391-92 (Ala. Cr[im]. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed. 2d 687 (1993)."

***13** “ ‘(Footnote omitted.) Therefore, the appellant's argument is without merit.’

“1 So. 3d at 136-37.”

Dotch v. State, 67 So. 3d 936, 988-89 (Ala. Crim. App. 2010). See also Ex parte Ford, 515 So. 2d 48, 52 (Ala. 1987) (“The Constitution does not prohibit the states from ‘death qualifying’ juries in capital cases.”). We find no error, plain or otherwise, in the circuit court's death qualification of the prospective jurors.

IV. Batson Challenge

Young argues that the State exercised its peremptory strikes in a discriminatory manner because the State used 6 of its 22 strikes to remove all 5 qualified black veniremembers and the only Hispanic veniremember from the jury pool. He says the State's proffered race-neutral reasons for striking those six jurors were a pretext for racial discrimination.

“In evaluating a Batson claim, a three-step process must be followed. As explained by the United States Supreme Court in Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003):

“ ‘First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson v. Kentucky,] 476 U.S. [79,] 96-97, 106 S.Ct. 1712[, 1723, 90 L.Ed.2d 69 (1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98 [106 S.Ct. 1712]. Third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98 [106 S.Ct. 1712].’

“537 U.S. at 328-29, 123 S.Ct. 1029.

“Recently, in Thompson v. State, [153 So. 3d 84] (Ala. Crim. App. 2012), this Court explained:

“ ‘ “ ‘After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors. Batson [v. Kentucky], 476 U.S. [79,] 97, 106 S.Ct. [1712,] 1723 [90 L.Ed.2d 69] (1986)]. The State then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. Ex parte Jackson, [516 So. 2d 768 (Ala. 1986)].’

“ ‘ “Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987).

“ ‘ “ ‘Within the context of Batson, a “race-neutral” explanation “means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.” Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed. 2d 395 (1991). “In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.” Id.

“[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies ‘peculiarly within the trial judge[ ]'s province.’ ” Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869.’

***14** “ ‘ “Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994).”

“ ‘Martin v. State, 62 So. 3d 1050, 1058-59 (Ala. Crim. App. 2010).

“ ‘ “ ‘When reviewing a trial court's ruling on a Batson motion, this court gives deference to the trial court and will reverse a trial court's decision only if the ruling is clearly erroneous.’ Yancey v. State, 813 So. 2d 1, 3 (Ala. Crim. App. 2001). ‘A trial court is in a far better position than a reviewing court to rule on issues of credibility.’ Woods v. State, 789 So. 2d 896, 915 (Ala. Crim. App. 1999). ‘Great confidence is placed in our trial judges in the selection of juries. Because they deal on a daily basis with the attorneys in their respective counties, they are better able to determine whether discriminatory patterns exist in the selection of juries.’ Parker v. State, 571 So. 2d 381, 384 (Ala. Crim. App. 1990).

“ ‘ “ ‘Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the

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finding will "largely turn on evaluation of credibility" 476 U.S. at 98, n.21, 106 S.Ct. 1712. In the typical challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.'

" ' "Hernandez v. New York, 500 U.S. 352, 365 (1991)."

" 'Doster v. State, 72 So. 3d 50, 73-74 (Ala. Crim. App. 2010).

" ' "[W]hen more than one reason was given for striking some veniremembers, we need only find one race neutral reason among those asserted to find that the strike was race-neutral; we need not address any accompanying reasons that might be suspect. See Powell v. State, 608 So. 2d 411 (Ala. Cr[im]. App. 1992); Davis v. State, 555 So. 2d 309 (Ala. Cr[im]. App. 1989)."

" 'Zumbado v. State, 615 So. 2d 1223, 1231 (Ala. Crim. App. 1993). " 'So long as there is a non-racial reason for the challenge, the principles of Batson are not violated.' " Jackson v. State, 686 So. 2d 429, 430 (Ala. Crim. App. 1996) (quoting Zanders v. Alfa Mut. Ins. Co., 628 So. 2d 360, 361 (Ala. 1993)).

" ' "Once the prosecutor has articulated a race-neutral reason for the strike, the moving party can then offer evidence showing that those reasons are merely a sham or pretext." Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). "A determination regarding a moving party's showing of intent to discriminate under Batson is ' "a pure issue of fact subject to review under a deferential standard." ' Armstrong v. State, 710 So. 2d 531, 534 (Ala. Crim. App. 1997), quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)." Williams v. State, 55 So. 3d 366, 371 (Ala. Crim. App. 2010). "The trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses." Heard v. State, 584 So. 2d 556, 561 (Ala. Crim. App. 1991).'

"Thompson, [153] So. 3d at [123]."

Wilson v. State, 142 So. 3d 732, 753-54 (Ala. Crim. App. 2010).

***15** We address below each of the veniremembers Young says the State struck for pretextual reasons. Because the State offered what it said were race-neutral reasons for each of its challenged strikes, we need not decide whether Young established a prima facie case of discrimination, and we turn to the second and third steps of the Batson inquiry: whether the reasons the State offered for its peremptory strikes were race-neutral, and whether those reasons were pretextual or merely a sham. See Battles v. City of Huntsville, [Ms. CR-19-0116, Oct. 16, 2020] ––– So. 3d ––––, 2020 WL 6110618 (Ala. Crim. App. 2020).

A. Prospective Juror L.B.

The State used its second peremptory strike to remove the only Hispanic veniremember, L.B., from the jury. Young contends that the State's offered reasons for striking L.B. were not race-neutral, but, even if they were, Young says, those reasons were a pretext for discrimination.

When Young challenged at trial the State's striking L.B. from the jury, the State responded with its reasons for striking L.B.

"[Prosecutor]: Judge, as to Juror [L.B.], we have information that Juror [L.B.] had a failure-to-appear in his background. And given the nature and severity of this case, we did not want to have someone on the jury that had had a failure-to-appear. Due to the fact that, of course, timely and prompt appearance as a juror would be required of him in order to properly serve before this Court. And that is why we struck Juror [L.B.].

"....

"[Defense counsel]: Okay. Judge, I don't see why that would be an appropriate reason to strike someone. That was not even brought out in the jury questioning. Now, granted, it's quite possible part of the public record, but that was not brought out in questioning.

"[Prosecutor]: And, Judge, that is exactly why he was struck—because he did not answer that he had been subject to a failure-to-appear—that he

had been arrested for a failure-to-appear."

(R. 404-07.) After the circuit court dealt with the other challenged jurors and denied Young's challenges to those jurors, the circuit court returned to L.B.

"The Court: I'm concerned about [L.B.]

"[Prosecutor]: Well, Judge, he's got the failure-to-appear in his background—

"The Court: They didn't know that.

"[Prosecutor]: With all due respect to the Court, the defense has access or ability to research criminal histories as well. They have the opportunity to undertake the same due diligence that the State does, Your Honor. And the fact that he did not answer causes the State to question his ability to sit fairly and impartially. He has also previously sat as a juror.

"The Court: Did he—he was a juror in a capital-murder case, but I don't think that's cause, though.

"[Defense counsel]: And, Judge, I don't know if failure to—was that an actual criminal charge for failure-to-appear or just an alias warrant?

"[Prosecutor]: It is a disobey of a Court order. It is failure to abide by a lawful order of the Court issued pursuant to lawful service. That shows disrespect for the Court and its process. Therefore, based upon that, the State struck him.

"The Court: I'm waiting for a response.

"[Defense counsel]: Judge, again, we did not know about that. That's not a conviction. It's a failure-to-appear. I mean, I'm assuming an alias issued which this Court does on a regular basis. I just don't feel that would be a race-neutral reason.

"The Court: He may just not of had notice of the proceedings. His lawyer may not have gotten it. We don't know the basis of that failure-to-appear, do we, or do we?

"[Prosecutor]: I do not at this time, Your Honor. I can look and see if it's reflected in the documents I have regarding his criminal history. However, it's a race-neutral reason. Failure to abide by a Court's lawful order as use for a peremptory challenge is a race-neutral reason.

***16** "The Court: It is a race-neutral reason, and I'm waiting for the Defendant to explain to me why it is either a pretext or a sham. And I'm not hearing anything from you other than you don't know nothing of it and that's not really an argument, [defense counsel]. So I'm waiting to hear something from you.

"[Defense counsel]: Okay. Judge, again, we were not aware of that. Okay. As [prosecutor] said it could very well be a public record, but he was not asked about that. [L.B.] may not have thought of that as being any type of criminal conviction or anything he should have answered. It could have been just a speeding ticket where he forgot to show up to court on. I'm not sure, Judge. I mean, it's something he may not even be aware of. I assume he was arrested on, but he may not have even been arrested on the failure-to-appear. He may have showed up to court and it was not ever executed.

"[Prosecutor]: And, Judge, if I may also so say, whether or not he was arrested is not an issue. Whether or not he answered that question is not the issue. What was going on during his mind during jury selection process is not the issue. The issue is whether the State exercised a race-neutral reason for using a peremptory challenge or strike. And the State having this information that he had failure-to-appear used its strike appropriately to remove him from jury venire. It was a pretextual reason, it is a valid and articulable race-neutral for the State to exercise that strike.

"The Court: You got anything to offer me?

"[Defense counsel: Judge, I—

"The Court: Other than that's just not enough.

"[Defense counsel]: Judge, I don't have anything to add other than what I've already said, Judge."

(R. 414-18.) The circuit court denied Young's challenge to L.B.

Although the State did not know the circumstances surrounding L.B.'s failure-to-appear, we have held that a potential juror's failure-to-appear is a race-neutral reason for a peremptory strike. Fort v. State, 668 So. 2d 888, 890 (Ala. Crim. App. 1995); Jackson v. State, 640 So. 2d 1025, 1036

(Ala. Crim. App. 1992). Because there was no discriminatory intent "inherent in the prosecutor's explanation," the circuit court did not err in finding the State's reason to be race-neutral. See Allen v. State, 659 So. 2d 135 (Ala. Crim. App. 1994).

Young offered no evidence showing that the failure-to-appear reason offered by the State was "merely a sham or pretext." Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). Although Young says that one of the State's offered reasons for striking L.B.—"He has also previously sat as a juror"—was pretextual because a white veniremember who sat on Young's jury was also a juror in a murder trial, the circuit court rejected that reason and did not base its finding on that reason. See Zumbado v. State, 615 So. 2d 1223, 1232 (Ala. Crim. App. 1993) ("[W]hen more than one reason was given for striking some veniremembers, we need only find one race-neutral reason among those asserted to find that the strike was race-neutral; we need not address any accompanying reasons that might be suspect."). We find no error, plain or otherwise, in the circuit court's denial of Young's Batson challenge to L.B.

B. Prospective Juror M.S.

Young says the State's reason for striking M.S.—that he had a drug conviction—was a pretext for discrimination because, Young says, the State misrepresented M.S.'s voir dire response on which it based that strike.

***17** During voir dire the State asked if there was anyone who had been charged with a criminal offense. M.S. responded that he had been charged in an "old case" but that he could not remember what the charges were.

When the State offered its reason for striking M.S., the circuit court, defense counsel, and the prosecutor discussed the nature of M.S.'s criminal history.

> "[Prosecutor]: Judge, Juror [M.S.] has a criminal drug conviction. He answered in the affirmative when the State asked that question, and based upon his prior conviction, the State struck him.
>
> "[Defense counsel]: Judge, if I recall correctly, that was mistaken for a misdemeanor and he had no complaints or anything of that nature. No complaints as [to] how he was treated by police, prosecution, or anything of that nature.
>
> "[Prosecution]: And, Judge, I recall [M.S.] answering that he had a distribution conspiracy charge, was my understanding, of [M.S.]'s answer to that question. And in the event, he had been charged with a criminal defense [sic]. Pursuant to Question No. 7, he answered in the affirmative that he had been charged with a criminal offense, distribution conspiracy, and based on that, he was struck.
>
> "The Court: What were those charges?
>
> "[Prosecution]: [M.S.] answered distribution conspiracy.
>
> "The Court: Distribution conspiracy.
>
> "[The prosecution]: Yes, sir. That is the way I recall him answering that question, Judge.
>
> "The Court: Do you recall differently?
>
>> "[Defense counsel]: I thought it was some kind of misdemeanor, possession of drug—possession of prescription drugs or something of that nature, Judge."

(R. 409-11.)

From reviewing the record, it seems that both the prosecutor and Young's counsel were confused about what charges M.S. disclosed during voir dire. Even so, M.S. disclosed that he had been charged with a criminal offense, and that was a race-neutral reason for striking him. See, e.g., Thompson v. State, 153 So. 3d 84, 127 (Ala. Crim. App. 2012). The prosecutor's (and defense counsel's) confusion over the nature of those charges does not show that the State's strike was a pretext for discrimination. DeBlase v. State, 294 So. 3d 154, 203 (Ala. Crim. App. 2018) (holding that a prosecutor can strike "based on a mistaken belief" and that "[a] mistaken belief does not itself establish pretext."). We find no error, plain or otherwise, in the circuit court's denial of Young's challenge to M.S.

C. Prospective Juror L.H.

Young challenges the State's peremptory strike of veniremember L.H. The State offered as its reason for striking

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L.H. that L.H. had a nephew who had been charged with murder in the late nineties, a nephew who had been murdered, and a daughter who had been "run over." (R. 407.) Young says the State's reason for striking L.H. was pretextual because, he says, the State did not strike L.G., a similarly situated white juror.

The record shows that L.H. disclosed in voir dire that she had a nephew who had been convicted of murder, a nephew who had been murdered, and a daughter who someone had intentionally run over. (R. 257.) L.G. disclosed in voir dire that her estranged father-in-law was convicted of a crime, but, she said, "it wasn't a violent crime." (R. 263.) "[A] prosecutor's failure to strike similarly situated jurors is not pretextual where there are relevant differences between the jurors who were struck and those who were not struck." Creque v. State, 272 So. 3d 659, 708 (Ala. Crim. App. 2018) (holding that the State's reason for striking a black veniremember was not pretextual when the crime for which the black veniremember's relative had been arrested was a "far more serious crime" than the crimes committed by the relatives of the white jurors whom the State did not strike). Young failed to show that the State's reason for striking L.H. was pretextual. Thus, we find no error, plain or otherwise, in the circuit court's denial of Young's motion challenging the State's strike of L.H.

D. Prospective Juror D.S.

***18** Young contends that the State's reasons for striking veniremember D.S. were pretextual because, he says, the reasons the State gave did not accurately reflect D.S.'s answers in voir dire, and the State did not ask any questions "probing their alleged concerns."

During voir dire, D.S. said that he had a friend who was incarcerated for capital murder and a cousin who was incarcerated for armed robbery. When the State used a peremptory strike to remove D.S. from the jury, the circuit court, defense counsel, and the prosecutor discussed D.S.'s voir dire answers:

> "[Prosecution]: [D.S.] ... answered that he had a—if I understand him correctly, a friend that had been convicted of capital murder, and a good friend that had been convicted o[f] armed robbery in response to State's Question No. 8. Based upon those answers—
>
> "The Court: Did he say he had a family member on death row?
>
> "[Prosecutor]: I think he said a friend on death row, I think, Judge, and I think he had a cousin that was convicted and charged with robbery one. Those are my notes.
>
> "....
>
> "[Prosecutor]: And, Judge, if I may add something on [D.S.], he also stated that he had knowledge of the facts of this case from—he said the 'street rumors.'
>
> "The Court: So there are a number of things on him?
>
> "[Prosecutor]: Yes, sir.
>
> "The Court: Do you dispute that?
>
> "[Defense counsel]: No, Judge, I believe I do remember him stating something to that effect. I do not dispute that."

(R. 411-13.) The circuit court denied Young's challenge to Juror D.S.

Although the circuit court, defense counsel, and the prosecutor did not recall exactly what D.S. said about his friend's and his cousin's criminal charges and incarcerations, D.S. said in voir dire that his friend was incarcerated for capital murder and his cousin was incarcerated for armed robbery. Those were race-neutral reasons for striking D.S. Creque, 272 So. 3d at 708 ("Although [defendant] correctly notes that the prosecutor misspoke because, in fact, [the black veniremember] said that her ex-husband had been arrested for—not convicted of—drug trafficking ... the exercise of a peremptory strike against a veniremember where a member of his or her family had been arrested is a race-neutral reason."). And even if the prosecutor was mistaken about what D.S. said in voir dire, a prosecutor's mistaken belief about a prospective juror does not show pretext. See DeBlase, supra.

That the State did not ask D.S. follow-up questions about his friend's and his cousin's incarcerations also does not show pretext. Creque, 272 So. 3d at 707 (" 'Neither a prosecutor's mistaken belief about a juror nor failure to ask a voir dire question provides "clear and convincing" evidence

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of pretext.' " (quoting Parker v. Allen, 565 F.3d 1258, 1271 (11th Cir. 2009))). Thus, we find no error, much less plain error, in the circuit court's denial of Young's challenge to D.S.

E. Prospective Juror S.B.

Young says the State's reason for striking veniremember S.B. —because S.B. asked to be excused for her chronic-pain issues—was a pretext for discrimination because, he says, the State did not strike, M.M., a similarly situated white juror.

When the circuit court asked the potential jurors whether anyone had a reason why they could not serve on the jury, both S.B. and M.M. requested to be excused. S.B. said that she injured her neck and back in a car accident three or four years ago and that since then she could not sit for an hour "without it killing me." (R. 156.) M.M. provided a letter from her employer, which the circuit court described as "a work excuse from the VA Medical Center, and she is paid salary." (R. 180.) The circuit court denied both S.B.'s and M.M.'s requests to be excused, even though both Young and the State told the circuit court they believed S.B. should be excused.

***19** When the State later used a peremptory strike to remove S.B. from the jury and provided its reason for doing so, Young agreed with the State about removing S.B. from the jury.

> "[Prosecutor]: As to Juror [S.B.], as the Court may recall, when the Court accepted excuses, [S.B.] ... asked to be excused from jury service. She stated that she suffered from back pain and could not sit without discomfort for long periods of time. And due to [the] fact that she asked to be excused and stated that she had chronic pain issues, she was struck by the State.
>
> "
>
> ....
>
> > "[Defense counsel]: So I agree that she did say that because I do recall talking about that, Judge. So Ms. [S.B.], I would agree with the State on that one, Judge."

(R. 406-07.)

We first note that, although Young now argues on appeal that the State's reason for striking S.B. from the jury was a pretext for discrimination, at trial Young agreed with the State about removing S.B. from the jury. Thus, to the extent that this claim is before us, we review it for plain error. See Petersen v. State, [Ms. CR-16-0652, Jan. 11, 2019] ––– So. 3d ––––, 2019 WL 181145 (Ala. Crim. App. 2019). [5]

The State's reason for striking S.B. from the jury was race-neutral. See Bang v. State, 620 So. 2d 106, 107 (Ala. Crim. App. 1993) (holding that concerns over jurors' health problems affecting their jury service are race-neutral). We disagree with Young that M.M. was similarly situated to S.B., because M.M. offered a different reason—a letter from her employer unrelated to her health—for why she should be excused from jury service. Thus, Young failed to show that the State's reason for striking S.B. was a pretext for discrimination. We find no error, plain or otherwise, in the circuit court's denial of Young's Batson challenge to S.B.

F. Prospective Juror D.R.

***20** Young offers as his only reason for challenging the State's peremptory strike of veniremember D.R. that the State did not ask D.R. any follow-up questions after D.R. said during voir dire that he did not feel he was treated fairly by local law enforcement when he was a victim of theft.

The State said it struck D.R. because D.R. said in voir dire that he was unhappy with how law enforcement handled his case when he was the victim of a theft.

> "[Prosecutor]: Judge, [D.R.] answered a question propounded by the State when he was asked about being a victim of a crime, that there had been a crime that was committed against him that he did not feel as though law enforcement had appropriately responded to, that he had some jewelry stolen that he did not feel as though the law enforcement had done everything they could. [D.R.] has a Tuscumbia address, and his case was investigated by the Tuscumbia Police Department. Therefore, based upon that, [D.R.] was struck."

(R. 408-09.) Young agreed that the State offered a race-neutral reason for its strike, and he made no further objection to that strike. Thus, to the extent that this claim is before us (see note 5, supra), we review this claim for plain error.

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" 'A hostile attitude toward law enforcement or dissatisfaction with the police has also been upheld as a sufficiently race-neutral explanation for the use of a peremptory challenge.' " Scott v. State, 163 So. 3d 389, 423 (Ala. Crim. App. 2012) (quoting Stephens v. State, 580 So. 2d 11, 19 (Ala. Crim. App. 1990)). The fact that the State did not ask D.R. more questions about his encounter with police does not, without more, show pretext. See, e.g., Creque, 272 So. 3d at 707.

We find no error, plain or otherwise, in the circuit court's denial of Young's motion challenging the State's peremptory strike of D.R.

V. Evidence of Young's Gang Affiliation Under Rule 404(b)

Young claims that the circuit court erred in allowing the State to introduce evidence of Young's gang affiliation because, he says, there was no evidence that Freeman was affiliated with a rival gang or that Freeman was murdered for any reason "other than Mr. Hubbard's own personal motivation." Young argues that the lack of connection between Freeman's murder and any gang activity rendered evidence about Young's gang affiliation inadmissible.

Young did not object to any of the many references at trial to Young's gang affiliation, so we review this issue for plain error. See Rule 45A, Ala. R. App. P.

Under Rule 404(b), Ala. R. Evid., "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." It may, though, be admissible for some other reason, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b), Ala. R. Evid.

"Evidence ... of a defendant's association with a 'gang,' may properly be considered to be evidence of collateral bad acts." R.D.H. v. State, 775 So. 2d 248, 252 (Ala. Crim. App. 1997). "Evidence of collateral 'bad acts' is presumptively prejudicial and is admissible only when the evidence is probative and under certain limited circumstances." Id.

> " '[T]he exclusionary rule prevents the State from using evidence of a defendant's prior [or subsequent] bad acts to prove the defendant's bad character and, thereby, protects the defendant's right to a fair trial.' Ex parte Drinkard, 777 So. 2d 295, 302 (Ala. 2000). '[T]he purpose of the rule is to protect the defendant's right to a fair trial by preventing convictions based on the jury's belief that the defendant is a "bad" person or one prone to commit criminal acts.' Ex parte Arthur, 472 So. 2d 665, 668 (Ala. 1985) ....
>
> ***21** "However, '[t]he State is not prohibited from ever presenting evidence of a defendant's prior [or subsequent] bad acts.' Moore v. State, 49 So. 3d 228, 232 (Ala. Crim. App. 2009). '[E]vidence of collateral crimes or bad acts is admissible as part of the prosecutor's case if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty of the charged offense because of his past misdeeds.' Bush, 695 So. 2d at 85.
>
> > " ' "In all instances, the question is whether the proposed evidence is primarily to prove the commission of another disconnected crime, or whether it is material to some issue in the case. If it is material and logically relevant to an issue in the case, whether to prove an element of the crime, or to controvert a material contention of defendant, it is not inadmissible because in making the proof the commission of an independent disconnected crime is an inseparable feature of it." '
>
> "Bradley v. State, 577 So. 2d 541, 547 (Ala. Crim. App. 1990) (quoting Snead v. State, 243 Ala. 23, 24, 8 So. 2d 269, 270 (1942)).

Horton v. State, 217 So. 3d 27, 45-47 (Ala. Crim. App. 2016).

The evidence at trial showed that Young was a member of the Almighty Imperial Gangsters. Although Young was a top-ranking member of the gang, Hubbard was the leader of the gang and was above Young in the hierarchy. After Hubbard's house was burglarized, Hubbard had a "business discussion" with the members and told them that he wanted to find and kill the person who broke into his house. (R. 744.) He asked the gang for their help. This meeting, which Young attended, took place in Hubbard's bedroom, where, according to testimony, Hubbard generally conducted gang-related business. When Hammonds told Hubbard that Freeman might be the person who broke into Hubbard's house, Hubbard and the other members of the gang planned to kill Freeman. This evidence of Young's gang affiliation—and especially his rank in the gang below Hubbard—was relevant to show Young's motive for participating in killing Freeman at Hubbard's behest.

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Young says, though, that under Ex parte Boone, 228 So. 3d 993 (Ala. 2016), a defendant's membership in a gang is inadmissible to show motive when the offense arose out of a personal dispute between the defendant and the victim, rather than out of gang-related animosity.

In Boone, the Alabama Supreme Court held that the defendant's gang affiliation was irrelevant to show his motive for shooting the victim because no evidence indicated that the victim was in a rival gang or that the shooting was gang-related. Ex parte Boone, 228 So. 3d at 995. The Court stated:

> "The record does not disclose any evidence indicating that [the victim] or anyone in his family was a member of a gang. The motive advanced by the State at trial was that there was animosity between Boone and his friends, on the one hand, and [the victim's] family, on the other hand, arising from the participation of [the victim's] mother in police drug investigations that led to the arrest of Boone's friends. The State does not explain how the evidence of 'gang' affiliation is relevant to Boone's motive for shooting [the victim]. It appears that the asserted animosity arose out of a personal dispute between Boone and [the victim's] family, not out of a gang affiliation or a gang dispute."

Ex parte Boone, 228 So. 3d at 996-97.

Here, though, the State did not advance as Young's motive a personal dispute between Young and Freeman unrelated to his (Young's) gang affiliation. Rather, the State's theory of Young's motive was that Hubbard, as the leader of the Almighty Imperial Gangsters, had a personal dispute with whoever broke into his house—who he believed to be Freeman—and that, because of that personal dispute, Hubbard rounded up other gang members to kill Freeman for him. So, regardless of Hubbard's personal dispute with Freeman that made him to want to kill Freeman, Young's motive for shooting Freeman was not personal animosity but carrying out his gang leader's wishes. Thus, evidence of Young's gang affiliation was admissible under Rule 404(b) to show Young's motive for killing Freeman.

***22** We note that other courts have held that evidence of a defendant's gang affiliation is admissible when the evidence suggests that the defendant acted in his capacity as a gang member to handle a gang leader's personal dispute. See, e.g., United States v. Peete, 781 F. App'x 427 (6th Cir. 2019) (not selected for publication in the Federal Reporter).

In Peete, the defendant was a "security team" member of the Gangster Disciples gang. When a "ranking member" of the gang believed that his niece's boyfriend had carelessly gotten her in trouble with the police, the ranking member of the gang enlisted members of the Gangster Disciples security team to retaliate against his niece's boyfriend. The defendant, as part of the gang's security team, pointed a gun at the niece's boyfriend and, as part of that encounter, shot a former gang member. The defendant was charged with one count of being a felon in possession of a firearm and one count of possessing a firearm with an obliterated serial number.

Before trial the district court granted the defendant's motion to exclude all evidence of his gang affiliation. The government appealed.

The United States Court of Appeals for the Sixth Circuit found that evidence of the defendant's gang affiliation was admissible as part of the res gestae of the crime and also under Rule 404(b), Fed. R. Evid., to show the defendant's motive. [6] The Court distinguished between a defendant acting out of his own personal dispute with the victim and a defendant acting because of his gang-leader's personal dispute with a victim.

> "As the government notes, the alleged reason that [the defendant] was present during the altercation on October 28, 2013 was because another gang member ... had ordered [the defendant] to assist him as part of [the defendant]'s duties as a security team member. ... [the defendant]'s gang affiliation, therefore, is not a separate, or tangential, aspect of the government's case; rather, it is the catalyst for all of the events underlying the charged crime. ... [E]vidence of [the defendant's] gang affiliation is intrinsic to telling the story of why he was allegedly present during the specific altercation on October 28, 2013 ....
>
> "In response, [the defendant] contends that the October 28, 2013 altercation was not gang-related but, instead, was a personal dispute between [the ranking member] and [his niece's] boyfriend. ... True, the government's proffered evidence indicates that, following the October altercation, the Disciples determined that [the ranking member] had inappropriately recruited Disciples gang members to assist him in a personal issue. ... However, simply because the Disciples later determined that the altercation should not have involved gang members does not indicate that, at the time of the altercation, [the defendant] was responding to [the ranking member's] request in [defendant's] personal capacity. In other words, this evidence is probative to show [defendant's] understanding and motive on October 28,

2013; that probative value is not fatally undermined by subsequent acts ....

"....

"... [A]lthough [gang-member] witnesses could, theoretically, state that they and [defendant] were 'friends' or 'associates' of [the defendant], this description unnecessarily sanitizes their testimony and removes the probative context of their true relationship with [the defendant].

***23** "....

> "... [B]ecause [defendant's] involvement in the shooting was at the direction of [the ranking member] (a Disciples member), gang evidence explained [defendant's] motive for being present during the October altercation."

Peete, 781 F. App'x at 438-41.

The State's evidence at trial showed that Hubbard, as the leader of the Almighty Imperial Gangsters, recruited the other gang members to assist him in a personal dispute. That the matter did not directly involve gang-related business does not mean that, when Young responded to Hubbard's request that the gang members find and kill Freeman, he was acting in his personal capacity. Thus, the evidence of Young's gang affiliation was relevant to show his motive for his involvement in Freeman's death.

Even when evidence of a defendant's association with a gang is relevant, a circuit court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, Ala. R. Evid.

> "[W]e are, however, also mindful of the well-settled principle that even where the proffered evidence of collateral bad acts is relevant, its probative value must not be substantially outweighed by the danger of undue and unfair prejudice for the evidence to be admissible .... 'Prejudicial' in this context means ' "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." ' Averette v. State, 469 So. 2d 1371, 1374 (Ala. Cr[im]. App. 1985), quoting State v. Forbes, 445 A. 2d 8, 12 (Me. 1982). Before the probative value of evidence of collateral bad acts may be held to outweigh its potential prejudicial effect, the evidence must be 'reasonably necessary' to the state's case. Bush[v. State], 695 So. 2d [70] at 85 [(Ala. Crim. App. 1995)]; Averette, 469 So. 2d at 1374."

R.D.H., 775 So. 2d at 253-54.

Young says that the evidence of his gang affiliation prejudiced him because it came from sources—Bates, Hammonds, and Meagan—that were not credible and because the jury impermissibly used the gang-affiliation evidence to "fill significant gaps"in the State's circumstantial-evidence case. [7]

Whatever credibility determinations had to be made about Bates, Hammonds, and Meagan, those determinations were for the jury to make. Lynch v. State, 209 So. 3d 1131, 1139 (Ala. Crim. App. 2016) ("[E]vidence of criminal conspiracies hardly ever comes from ministers and civic leaders. The appellant can hardly complain of the unsavory character of the witnesses against him as they were all his chosen companions. The weight and credibility of the testimony was for the jury to determine."). And as relevant evidence, the gang-affiliation evidence was less gap-filler and more a "crucial" part of the State's case. Griffin v. State, 790 So. 2d 267, 299 (Ala. Crim. App. 1999), rev'd on other grounds, Ex parte Griffin, 790 So. 2d 351 (Ala. 2000).

***24** The evidence of Young's gang affiliation was reasonably necessary to the State's case because it showed why Young, who did not have a personal disagreement with Freeman, had a motive to kill him. See Bush v. State, 695 So. 2d 70, 85 (Ala. Crim. App. 1995). There was "no less prejudicial means of presenting this evidence of motive." Griffin, 790 So. 2d at 299. Although we agree that evidence that Young was a member of the Almighty Imperial Gangsters likely cast him in a poor light at trial, as the United States Court of Appeals for the Sixth Circuit noted: "Most street gangs suffer from poor public relations." United States v. Lewis, 910 F.2d 1367, 1372 (7th Cir. 1990) (holding that, even though evidence of the defendant's gang affiliation was "damaging to him in the eyes of the jury," the danger of prejudice did not substantially outweigh the probative value of that evidence). Thus, the probative value of the evidence of Young's gang affiliation was not substantially outweighed by the danger of unfair prejudice. See Capote v. State, [Ms. CR-17-0963, Jan. 10, 2020] ––– So. 3d –––, 2020 WL 113875 (Ala. Crim. App. 2020).

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For the same reasons, references at trial to the gang's drug activity did not unfairly prejudice Young. Hammonds testified that his job in the gang was to sell drugs; that on the day of the murder Young and Bates went to Decatur to meet someone "for some weed" and that he met with Young the day after the shooting to give Young "what weed I had left over because I couldn't sell it." Hammonds's testimony that his job in the gang was to sell drugs came during his explanation of the gang's hierarchy and helped explain his role in the gang's activities. His testimony that Young and Bates went to Decatur "for some weed" on the day of the shooting and that he returned unsold drugs to Young the day after the shooting was part of the res gestae of the crime and gave context to the events around the time of the crime. See, e.g., Largin v. State, 233 So. 3d 374, 400 (Ala. Crim. App. 2015). These handful of references Hammonds made to the gang's drug activity were no more prejudicial to Young than the other gang-related evidence that was admissible to prove motive. As other courts have noted, the fact that the public generally associates street gangs with criminal activity does not make gang evidence inadmissible. See, e.g., United States v. Wilson, 634 F. App'x 718, 739 (11th Cir. 2015) (not selected for publication in Federal Reporter) (citing United States v. Jernigan, 341 F.3d 1273, 1285 (11th Cir. 2003)) (holding that expert testimony from a detective that the defendants exhibited conduct during their offense consistent with membership in a gang was admissible, even though, the Court recognized, " 'modern American street gangs are popularly associated with a wealth of criminal behavior and social ills, and an individual's membership in such an organization is likely to provoke strong antipathy in a jury' ").

The circuit court also did not err in not sua sponte providing a limiting instruction to the jury about Young's gang affiliation. See Capote, supra. We find no error, much less plain error, in the circuit court's admission of evidence of Young's gang affiliation. Young is entitled to no relief on this claim.

VI. Out-of-Court Statements by Hubbard and Capote

Young argues that the circuit court should not have allowed Hammonds and Bates to testify about out-of-court statements made by Hubbard and Capote, because, Young says, those statements were hearsay and the State did not prove by independent evidence the existence of a conspiracy to kill Freeman. We disagree.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, Ala. R. Evid. Although hearsay is "not admissible except as provided by [the Alabama Rules of Evidence], or by other rules adopted by the Supreme Court of Alabama or by statute," Rule 802, Ala. R. Evid., a statement is not hearsay if "[t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), Ala. R. Evid.

***25** "The existence of the conspiracy must be proved by evidence which does not include the statements of the coconspirator." Deutcsh v. State, 610 So. 2d 1212, 1223 (Ala. Crim. App. 1992).

> " ' "In order for the extrajudicial statement of a coconspirator to qualify under the coconspirators' exception, three distinct conditions must be met. First, the statement must have been made in furtherance of the conspiracy. Second, the statement must have been made during the pendency of the conspiracy. Finally, ... the existence of the conspiracy must be shown by independent evidence." ' "

Hillard v. State, 53 So. 3d 165, 168 (Ala. Crim. App. 2010) (quoting Deutcsh, 610 So. 2d 1212 (quoting in turn Annot., Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statements of Coconspirators, 46 A.L.R.3d 1148 (1972))). The existence of the conspiracy may be shown by circumstantial evidence. Deutcsh, 610 So. 2d at 1222.

> " 'A conspiracy is rarely proven by positive or direct testimony but usually by circumstances.' Muller v. State, 44 Ala. App. 637, 642, 218 So. 2d 698, 703 (1968), cert. denied, 283 Ala. 717, 218 So. 2d 704 (1969). The existence of a conspiracy 'may be inferred from all of the facts and circumstances surrounding the transaction.' Hanson v. State, 27 Ala. App. 147, 149, 168 So. 698, 700, cert. denied, 232 Ala. 585, 168 So. 700 (1936). 'It is well-settled that a conspiracy need not be proved by direct and positive evidence, but may be determined from the conduct and relationship of the parties, from relevant testimony,

> from the circumstances surrounding the act, and from the conduct of the accused and his confederates subsequent to the act.' Lewis v. State, 414 So. 2d 135, 140 (Ala. Cr[im].App.), cert. denied, 414 So. 2d 140 (Ala. 1982)."

Deutcsh, 610 So. 2d at 1222-23.

Besides Hubbard's and Capote's out-of-court statements showing a conspiracy to kill Freeman, the State offered independent evidence that members of the Almighty Imperial Gangsters, including Young, conspired to kill Freeman. The State presented evidence that two days before Freeman was murdered Hubbard reported a burglary at his house on Midland Avenue in Muscle Shoals. The responding officer said that Hubbard was angry about the burglary, and Young's girlfriend, Meagan, testified that she and others had to calm Hubbard down. Meagan testified that two days later she was at Hubbard's house when Young and several others went into Hubbard's bedroom for about 10-15 minutes. When Young came out he drove Meagan, Capote, and Capote's girlfriend to a store in Florence so that Meagan could buy some ammunition. Meagan testified that Young told her what kind of ammunition to buy. The State's evidence showed that, a little after 9:00 p.m. on March 1, Meagan bought a box of 7.62x39mm ammunition from the store. Young drove back to Hubbard's house, where he went with Hubbard, Capote, Bates, Blackburn, and Hamm into another room.

Surveillance footage from the Spring Creek Apartments in Tuscumbia showed a white four-door pickup truck arriving at the apartment complex around 10:47 p.m. on March 1. A blue Mustang arrived about 10-11 minutes later. The time stamps from the surveillance footage showing Freeman's blue Mustang arriving at the Spring Creek Apartment complex corresponded with the time stamps from Burgner's Facebook Messenger exchange with Freeman, in which Freeman told her that he was meeting Bates to get money Bates owed him.

***26** Bohn, a resident of the Spring Creek Apartments, testified that she looked out of her apartment window and saw two men get out of a white Dodge pickup truck. The man who got out of the driver's side was "big and heavy." The driver's arm was outstretched. Bohn testified that she heard more than one weapon firing. At the scene, law-enforcement officers found several 7.62x39mm shell casings—the same type of ammunition Young directed Meagan to buy about two hours before Freeman was murdered.

Shortly after midnight, Springer saw a white Dodge pickup truck park at the Chateau Orleans apartment complex in Muscle Shoals, which is located about a block away from Hubbard's house. Springer testified that he saw a silver or gold car pull up. The driver of the pickup truck talked with the driver of the car before the car sped away. The two men who had gotten out of the pickup truck walked away and left the truck parked at Chateau Orleans. Meagan testified that Young had in the past driven a white Dodge pickup truck, and DNA from a grape soda can found in the white Dodge pickup truck at the Chateau Orleans complex matched DNA from a cheek swab taken from Young. This evidence independently showed a conspiracy between members of the Almighty Imperial Gangsters to kill Freeman. Because the State proved a conspiracy by independent evidence, Capote's and Hubbard's out-of-court statements were admissible. Deutcsh, 610 So. 2d at 1222.

Citing Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004), Young also contends that, by admitting Bates's and Hammonds's testimony about Capote's and Hubbard's out-of-courtstatements, the circuit court violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. We find no such violation.

Statements of a coconspirator in furtherance of a conspiracy are nontestimonial and do not implicate Confrontation Clause concerns. See, e.g., United States v. Wilson, 788 F.3d 1298, 1316 (11th Cir. 2015). The circuit court committed no error, much less plain error, in allowing Bates and Hammonds to testify to Capote's and Hubbard's out-of-court statements made in furtherance of the conspiracy to kill Freeman. Young is due no relief on this claim.

VII. Admission of Spring Creek Apartments Surveillance Video

Young argues that the State did not lay a proper foundation for the admission of the surveillance video from the Spring Creek Apartments because it did not, he says, meet two of the elements of the test set out in Voudrie v. State, 387 So. 2d 248 (Ala. Crim. App. 1980). Young contends that the State did not show that the device was "capable of recording what a witness would have seen or heard had a witness been present at the scene," and it did not show, he says, the "identification of the speakers or persons pictured." (Young's brief, pp. 78-79.)

Young did not object when the State offered the surveillance video so we review this claim for plain error. See Rule 45A, Ala. R. App. P.

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"Surveillance video may be admissible under the pictorialcommunication theory or the silent-witness theory." Capote, ––– So. 3d at ––––. Which theory applies depends on whether there is a witness who can testify that the video recording accurately reflects what that witness saw or heard at the time. Straughn v. State, 876 So. 2d 492, 502 (Ala. Crim. App. 2003).

> " 'The proper foundation required for admission into evidence of a sound recording or other medium by which a scene or event is recorded (e.g., a photograph, motion picture, videotape, etc.) depends upon the particular circumstances. If there is no qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the "silent witness" foundation must be laid. Under the "silent witness" theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability. When the "silent witness" theory is used, the party seeking to have the sound recording or other medium admitted into evidence must meet the seven-prong Voudrie [v. State, 387 So. 2d 248 (Ala. Crim. App. 1980),] test. Rewritten to have more general application, the Voudrie standard requires:
>
>> ***27** " '(1) a showing that the device or process or mechanism that produced the item being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded,
>>
>> "(2) a showing that the operator of the device or process or mechanism was competent,
>>
>> " '(3) establishment of the authenticity and correctness of the resulting recording, photograph, videotape, etc.,
>>
>> " '(4) a showing that no changes, additions, or deletions have been made,
>>
>> " '(5) a showing of the manner in which the recording, photograph, videotape, etc., was preserved,
>>
>> " '(6) identification of the speakers, or persons pictured, and
>>
>> " '(7) for criminal cases only, a showing that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement."

McCray, 88 So. 3d at 61-62 (quoting Ex parte Fuller, 620 So. 2d 675, 678 (Ala. 1993)).

> "The 'silent witness' theory is that a photograph, etc., is admissible, even in the absence of an observing or sensing witness, because the process or mechanism by which the photograph, etc., is made ensures reliability and trustworthiness. In essence, the process or mechanism substitutes for the witness's senses, and because the process or mechanism is explained before the photograph, etc., is admitted, the trust placed in its truthfulness comes from the proposition that, had a witness been there, the witness would have sensed what the photograph, etc., records."

Ex parte Fuller, 620 So. 2d at 678.

The State offered the surveillance video from the Spring Creek Apartments during Mary Sumerel's testimony. Sumerel's testimony, along with the testimony of Bates and Hammonds, established not only that the surveillance camera was "capable of recording what a witness would have seen or heard had a witness been present at the scene" and the "identification of the speakers or persons pictured," but also the other Voudrie factors. [8]

Sumerel testified that in March 2016 she was the property manager of the Spring Creek Apartments in Tuscumbia. She testified that she is familiar with the buildings and the layout of the apartment complex. She testified that there are five surveillance cameras on the property located on the office building and facing out toward the eight apartment buildings. Sumerel testified that the cameras, which were installed in February 2016, are stamped with the date and time. She testified that the date and time stamps are accurate, and that, to her knowledge, the cameras were working properly in March 2016.

Although Sumerel was not at the Spring Creek Apartments at the time of the shooting, law-enforcement officers contacted her to come to the apartment complex. Sumerel arrived at the Spring Creek Apartments shortly after the shooting and viewed the surveillance footage in her office with law-enforcement officers. She testified that the video she watched that night was a fair and accurate recording of all the areas of the apartment complex that the cameras depict and that it was a fair and accurate recording of the Spring Creek Apartment complex as it existed on March 1. Sumerel testified that

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she copied the footage to a flash drive and gave it to law-enforcement officers. She said that she did not alter or change the video in any way; she said: “There's no way to change it.” (R. 535.) Sumerel viewed the video offered at trial and testified that it had not been altered or changed in any way.

***28** Sumerel's testimony clearly established the first five Voudrie factors. Her testimony showed (1) that the five cameras recorded the area of the Spring Creek Apartment complex that were seen in the video offered at trial and that the video showed an accurate picture of what that area of the Spring Creek Apartment complex looked like on the night of March 1; (2) that she knew when the camera system was installed, how it worked, and what it was intended to record; (3) that the video shown to the jury at trial was the same video she viewed in her office on the night of the shooting, and that it accurately showed the Spring Creek Apartment complex as it appeared on the night of March 1; (4) that the date and time stamps on the video were accurate, and that there is no way to alter or change the video in any way; and (5) that she preserved the footage by copying it to a flash drive and giving it to law-enforcement officers.

For the sixth Voudrie factor—“identification of the speakers, or persons pictured”—the State offered the testimony of Bates and Hammonds, who each testified that Young was the driver and Capote the front passenger of the white pickup truck seen in the video. See Riley v. State, 166 So. 3d 705, 753 (Ala. Crim. App. 2013) (Voudrie factors established by the testimony of two witnesses combined).

Because the State met the Voudrie factors for admission of the surveillance footage under the silent-witness theory, we find no error, plain or otherwise, in the circuit court's admission of the surveillance video. Young is due no relief on this claim.

VIII. Admission of Spring Creek Apartments Surveillance Video to Show Identity of Young

Young argues that the circuit court should not have allowed the State to introduce the surveillance footage of the shooting for the purpose of identifying Young at the scene of the shooting. He says that the surveillance video was “so unclear” and “so unreliable” that it was not probative of the identity of the shooter or shooters. He says that the video was irrelevant and thus inadmissible to show that Young was at the scene of the shooting. Because the surveillance video was inadmissible for identification purposes, his argument goes, the circuit court should have excluded Bates's and Hammonds's testimony identifying Young on the video, and it should have excluded Det. Holland's testimony about Hammonds's out-of-court identification of Young from viewing the surveillance video.

Young did not object when the State offered the surveillance video during Sumerel's testimony; he did not object when Bates and Hammonds testified that, from viewing the surveillance video, they could see that Young was the driver of the white truck; and he did not object when Det. Holland testified that Hammonds viewed the video and identified Young as the driver of the truck. Thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Relevant evidence is admissible; irrelevant evidence is not. See Rule 402, Ala. R. Evid. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, Ala. R. Evid. If evidence is even slightly probative of a matter at issue, it is relevant. See, e.g., Mitchell v. State, 473 So. 2d 591, 594 (Ala. Crim. App. 1985).

> “Evidence is relevant if it has ‘any tendency to throw light upon the matter in issue, even though such light may be weak and falls short of demonstration.’ McCain v. State, 46 Ala. App. 627, 247 So. 2d 383 (1971); Austin v. State, 434 So. 2d 289 (Ala. Crim. App. 1983). ‘Any fact which has causal connection or logical relation to another fact, so as to make the other fact either more or less probable, is competent or relevant.’ Hurst v. State, 397 So. 2d 203 (Ala. Crim. App.), cert. denied, 397 So. 2d 208 (Ala. 1981); Waters v. State, 357 So. 2d 368 (Ala. Crim. App.), cert. denied, 357 So. 2d 373 (Ala. 1978). Further, evidence is relevant if it has any probative value, however slight, upon a matter at issue in the case. C. Gamble, McElroy's Alabama Evidence, § 21.01 (3d ed. 1977).”

***29** Mitchell, 473 So. 2d at 594. The decision whether evidence is admissible is “within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion.” See Hulsey v. State, 866 So. 2d 1180, 1191 (Ala. Crim. App. 2003); Ex parte Dennis, 730 So. 2d 138, 143 (Ala. 1999) (“A trial court has broad discretion in determining the relevancy of evidence ... and its ruling on these issues will not be disturbed on appeal absent a clear showing of abuse of that discretion.”).

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The surveillance video of the shooting was relevant to show the identities of the two individuals who got out of the white pickup truck. Although Young says the video was "so unclear" as to render it useless—and therefore irrelevant—as a means of identification, the video showed the driver of the pickup truck walking toward the back of the truck with his arms outstretched, stopping behind the truck, and then taking a few steps backwards before getting back into the truck and driving away. Although the driver's face cannot be clearly seen in the video, the video was relevant to show other identifying characteristics of the driver, such as his height, gait, arm-span, and clothing.

Young also says that, because Bates and Hammonds were not at the scene of the shooting, the circuit court should not have allowed them to identify Young as being at the scene of the shooting. He says Bates and Hammonds "were in no better position than the jury to identify Mr. Young." (Young's brief, p. 33.)

We considered this issue in Capote, supra, and rejected the argument Young now makes. In Capote, Peter Capote, Young's codefendant, argued that the circuit court erred in admitting Bates's and Hammonds's testimony that Capote was the shooter in the video from the Spring Creek Apartments and Det. Holland's testimony that Hammonds had identified Capote from the video. We quoted extensively from Hardy v. State, 804 So. 2d 247 (Ala. Crim. App. 1999), regarding the admissibility of testimony from witnesses who, in that case, identified the defendant as the gunmen shown in a store's surveillance video. We held:

> "In the present case, both Hammonds and Bates were members of the same gang as Capote and were familiar with his appearance at the time of the shooting. In fact, Bates saw Capote leave in the white truck shortly before the shooting. Hammonds's and Bates's familiarity with Capote derived from a 'substantial or sustained contact with' Capote; therefore, they were in a better position to identify him than the jury, especially given the poor quality of the surveillance video. See Hardy, 804 So. 2d at 272; United States v. Pierce, 136 F.3d 770, 774 (11th Cir. 1998); United States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991). Further, as this Court held in Hardy, ' "[a]lthough identification testimony embraces an issue of fact —the identity of the perpetrator, and perhaps evidence of guilt —the persons providing the identifications are not providing opinions of defendant's guilt or innocence or telling the jury how it should decide the case." ' Hardy, 804 So. 2d at 274 (quoting State v. King, 883 P. 2d [1024] at 1036 [Ariz. 1994)]). Thus, this Court rejects Capote's contention that Hammonds's and Bates's identification testimony amounted to impermissible opinions as to the ultimate fact in issue."

Capote, ––– So. 3d at ––––– (emphasis added).

***30** Just as they were with Capote, Bates and Hammonds were familiar with Young's appearance through their "substantial or sustained" contact with him: They were in the same gang as Young; they were familiar with his appearance at the time of the shooting; they both saw Young on the day of the shooting; Bates saw Young leave from Hubbard's house in the white truck right before the shooting; and Hammonds testified that he recognized Young and Capote in the surveillance video "[f]rom the way they look." (R. 832.) Bates and Hammonds were clearly in a "better position to identify [Young] than the jury," and the circuit court did not err in admitting their testimony identifying Young from the video as the driver of the white truck. The circuit court also did not err in admitting Det. Holland's testimony that Hammonds identified Young as the driver of the truck from the surveillance video. Capote, supra.

Finally, Young says that, even if Bates's and Hammonds's identification of Young from the surveillance video was admissible, the probative value of that evidence was "substantially outweighed by the danger of unfair prejudice." See Rule 403, Ala. R. Evid. He says that Bates's and Hammonds's testimony identifying Young on the surveillance footage was "highly prejudicial because it answered the critical question in the case: Was Mr. Young present at the scene of the crime?" (Young's brief, p. 34.) Young says that, had it not been for Bates's and Hammonds's testimony that they could identify Young from the surveillance video as being at the scene,"[t]his question would have otherwise gone unanswered given the lack of direct evidence against [Young]."

Under Rule 403, Ala. R. Evid., relevant evidence may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice."

> " ' " '[P]rejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contention; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.' State

v. Hurd, 360 A.2d 525, 527 n. 5 ([Me.] 1976), quoting McCormick, Handbook on the Law of Evidence § 185 at 439 n.31 (2nd ed. 1972)."

" 'State v. Forbes, 445 A.2d 8, 12 (Me. 1982).' "

Horton v. State, 217 So. 3d at 57 (quoting Averette v. State, 469 So. 2d 1371, 1374 (Ala. Crim. App. 1985)).

That Bates's and Hammonds's testimony helped answer the question "Was Mr. Young present at the scene of the crime?" does not make their testimony so unfairly prejudicial as to be inadmissible. As we said in Hardy, 804 So. 2d at 274 (quoting State v. King, 180 Ariz. 268, 883 P.2d 1024, 1036 (1994)), "Although identification testimony embraces an issue of fact —the identity of the perpetrator, and perhaps evidence of guilt —the persons providing the identifications are not providing opinions of defendant's guilt or innocence or telling the jury how it should decide the case."

We also reject Young's contention that, because the surveillance video "may have been relevant for certain purposes such as establishing a chronology," the circuit court should have instructed the jury not to rely on the video to identify Young at the scene. The surveillance video and testimony about who can be seen in the video was substantive evidence; thus, no limiting instruction was necessary. See Hosch v. State, 155 So. 3d 1048, 1084 (Ala. Crim. App. 2013).

The circuit court committed no error, much less plain error, in admitting Bates's and Hammonds's identification of Young as the driver of the white truck from the surveillance video.

IX. Bates's Testimony about Viewing "Closer" Surveillance Video

Young says that Bates's testimony at trial that he viewed a "closer" version of the surveillance video of the Spring Creek Apartments than the surveillance footage admitted at trial amounted to false testimony that the State was obligated to correct because, he says, there was no evidence that another video existed that Bates could have viewed. The gist of Young's argument is that, by not correcting Bates's "false" testimony at trial that he had viewed a better surveillance video than the one the jury viewed, the State led the jury to believe that a "significantly more probative piece of evidence placed Mr. Young at the scene of the crime," which, Young says, undermined his attempt to make Bates's in-court identification of Young on the surveillance footage appear unreliable. (Young's brief, p. 90.)

***31** Young did not object to Bates's testimony that he viewed a "closer" video than the one he was shown at trial. We review this claim for plain error. See Rule 45A, Ala. R. App. P.

"[T]he knowing use of material false evidence by the state in a criminal prosecution does violate due process. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed. 2d 104, 108 (1972)." Jones v. State, [Ms. CR-13-1552, Nov. 22, 2019] ––– So. 3d ––––, ––––, 2019 WL 6243057 (Ala. Crim. App. 2019) (quoting Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984)).

> "To prove a Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972), violation, the petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused. Williams v. Griswald, 743 F.2d [1533] at 1542 [(11th Cir. 1984)]. '[T]he defendant must show that the statement in question was "indisputably false," rather than merely misleading.' Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000) (quoting United States v. Lochmondy, 890 F.2d 817, 823 (6th Cir. 1989)). 'The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.' Lochmondy, 890 F.2d at 822. '[I]t is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.' United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991) (citing United States v. Bigeleisen, 625 F.2d 203, 208 (8th Cir. 1980)). '[T]he fact that a witness contradicts himself or herself or changes his or her story does not establish perjury.' Malcum v. Burt, 276 F. Supp. 2d 664, 684 (E.D. Mich. 2003) (citing Monroe v. Smith, 197 F. Supp. 2d 753, 762 (E.D. Mich. 2001))."

Perkins v. State, 144 So. 3d 457, 469-70 (Ala. Crim. App. 2012).

Bates testified at trial that he viewed the surveillance video from the Spring Creek Apartments and that it was Young who got out of the driver's side of the white pickup truck. On cross-examination, Bates said that the video he viewed before trial was "closer" than the one shown at trial.

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"[Defense counsel:] You mentioned a moment ago that Benjamin Young got out on the driver's side of the car—truck?

"[Bates:] Yes, sir.

"[Defense counsel:] That you had seen that video and you were able to identify that?

"[Bates:] Yes, sir.

"[Defense counsel:] Is that—were you literally able to look at that and see who he was?

"[Bates:] When they showed me the video, it was a whole lot closer than the one y'all have.

"[Defense counsel:] So you saw a different than what we had? Closer?

"[Bates:] Yes, sir.

"[Defense counsel:] Is that right? So your explanation then as to why—no one in this courtroom can identify that, though, is because you were shown a magnified or bigger video; is that correct?

"[Bates:] Yes, sir.

"[Defense counsel:] Have you seen the one that this jury has seen and this Court has seen?

"[Bates:] Yes, sir.

"[Defense counsel:] And were you able to identify who the driver was in that one?

***32** "[Bates:] Yes, sir, I was."

(R. 773-74.)

Young has not shown a Giglio violation. To start, he has not shown that Bates's testimony that he viewed a closer or magnified version of the video is false. Although from the record it is clear that there was only one version of the surveillance footage Bates could have viewed before trial, nothing in the record contradicts Bates's testimony that he was shown a "magnified" version of that same video. Even if Bates's testimony were misleading, though, to prove the falsity of the statement Young must show that the statement was "indisputably false," rather than "merely misleading." Perkins, 144 So. 3d at 469 (quoting Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000)). Young did not make that showing.

What's more, Young has failed to show that Bates's testimony about the "magnified" surveillance footage was material to Young's guilt or innocence. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Ex parte Belisle, 11 So. 3d 323, 330-31 (Ala. 2008) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed. 2d 481 (1985)). [9]

Besides testifying that he viewed a "closer" version of the surveillance video before trial in which he identified Young as the driver of the white pickup truck, Bates testified at trial that he had viewed the surveillance footage shown to the jury and that he could identify Young as the driver in that video. Hammonds, who testified at trial that he had viewed the surveillance footage and that he could identify Young in the video, never mentioned a "closer" or "magnified" version of the video. Thus, even if the admission of Bates's testimony about the "magnified" video he viewed before trial was improper, it was not material to Young's guilt or innocence. See Funches v. State, 518 So. 2d 781, 785 (Ala. Crim. App. 1987) (holding that exculpatory evidence that the State allegedly suppressed "was merely cumulative towards its purpose; [thus,] the failure to disclose did not deny the appellant a fair trial, nor did the 'suppression' of the testimony undermine the confidence in the outcome of the trial").

We find no error, plain or otherwise, in the circuit court's admission of the surveillance video, Bates's and Hammonds's testimony identifying Young on the surveillance video, or Det. Holland's testimony about Hammonds's out-of-court identification of Young on the surveillance video. Thus, this claim has no merit.

X. Young's High-Speed Chase and His Arrest in Tennessee

Young argues that the circuit court should not have allowed the State to introduce evidence that he did not stop his vehicle when police tried to pull him over and that he led police on a high-speed chase into Tennessee. He says this evidence did not show that he had a consciousness of guilt about Freeman's murder because the car chase happened several days after Freeman's murder and did not originate from the scene of the

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crime. He also argues that the circuit court's jury instruction about evidence of flight requires reversal.

***33** "Alabama caselaw has long held that evidence of flight or attempted flight in a criminal case is a circumstance that a jury may take into consideration in determining guilt or innocence." Henderson v. State, 248 So. 3d 992, 1011 (Ala. Crim. App. 2017).

> " 'In a criminal prosecution the state may prove that the accused engaged in flight to avoid prosecution ... as tending to show the accused's consciousness of guilt. ... The state is generally given wide latitude or freedom in proving things that occurred during the accused's flight.' C. Gamble, McElroy's Alabama Evidence § 190.01(1) (3rd ed. 1977)."

Beaver v. State, 455 So. 2d 253, 257 (Ala. Crim. App. 1984). "Evidence of flight is admissible even though it is weak or inconclusive or if several days have passed since the commission of the crime." Tate v. State, 346 So. 2d 515, 520 (Ala. Crim. App. 1977) (emphasis added).

At trial the State presented evidence showing that, the day after Freeman's murder, Young "thought it was best" that he and his girlfriend leave Hubbard's house. Two days later, right after Hammonds gave Young's and Capote's names and Hubbard's name and address to law-enforcement officers, officers went to Hubbard's house. While Det. Holland was watching Hubbard's house he saw a silver car leave the house. He identified Young as the driver of the car. When officers tried to stop Young, Young "accelerated to a high rate of speed" and led law-enforcement officers on a chase from Alabama into Tennessee. Young eventually crashed the car in Tennessee and was arrested. Although Young was not fleeing the scene when he fled from law-enforcement officers three days after the murder, he had just left the place where, three days earlier, he helped plan Freeman's murder and to which, right after the murder, he returned. Under these facts, the circuit court properly admitted the evidence of Young's flight from law-enforcement officers three days after Freeman's murder.

Young also says the circuit court should not have admitted evidence of his flight from law-enforcement officers because, he says, he had a history of driving erratically and attempting to elude police officers, including past charges for speeding and for leaving the scene of an accident, which shows, he says, that his failure to stop for law-enforcement officers was unrelated to a consciousness of guilt about Freeman's murder. We disagree. In Rogers v. State, 630 So. 2d 88 (Ala. 1992), the Alabama Supreme Court held that evidence of the defendants' flight from law-enforcement officers was admissible even though the flight happened two months after the crime, and even though the defendants offered another reason—they were armed escapees from a work-release program traveling in a stolen vehicle—for fleeing from police. The Court said:

> "[E]ven though the defendants did not actually know that they had been named as suspects in the capital murder, their conduct in fleeing and their conduct in firing at the state trooper pursuing them was such that a jury could infer from it that they were attempting to evade law enforcement officers for some reason other than the ones they stated—the trial court properly admitted the flight evidence."

***34** Rogers, 630 So. 2d at 92. Young's conduct in fleeing from several law-enforcement units and in leading them on a high-speed chase across state lines "was such that a jury could infer from it that [he was] attempting to evade law enforcement officers for some reason other than the ones [he] stated." Id.

Young also says that, "given the lack of connection [of the flight evidence] to the offense," the circuit court should not have instructed the jury that it could rely on the evidence of flight to support a finding that Young was guilty of capital murder.

> > " 'A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. Raper v. State, 584 So. 2d 544 (Ala. Cr[im]. App. 1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, Stewart v. State, 601 So. 2d 491 (Ala. Cr[im]. App. 1992), aff'd in relevant part, 659 So. 2d 122 (Ala. 1993), and we must evaluate instructions like a reasonable juror may have interpreted them. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L.Ed. 2d 344 (1985); Stewart v. State.'
>
> "Ingram v. State, 779 So. 2d 1225, 1258 (Ala. Crim. App. 1999).
>
> "In Long v. State, 668 So. 2d 56 (Ala. Crim. App. 1995), this Court stated:
>
> > " 'In Sartin v. State, 615 So. 2d 135, 137 (Ala. Cr[im]. App. 1992), this court stated:
> >
> > > " ' " 'In a criminal prosecution the state may prove that the accused engaged in flight to avoid prosecution.

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This principle is based upon the theory that such is admissible as tending to show the accused's consciousness of guilt. The flight of the accused is admissible whether it occurred before or after his arrest.

" ' " 'The state is generally given wide latitude or freedom in proving things that occurred during the accused's flight. This is especially true of those acts of the accused which tend to show that the flight was impelled by his consciousness of guilt.'

" ' "C. Gamble, McElroy's Alabama Evidence, § 190.01(1) (4th ed. 1991) (citations omitted). See also 2 Wigmore, Evidence § 276(4) (Chadbourn rev. 1979); Chandler v. State, 555 So. 2d 1138 (Ala. Cr[im]. App. 1989)."

"....

"668 So. 2d at 60-61."

Capote, —— So. 3d at ——.

The circuit court instructed the jury:

"Some evidence has been introduced to the effect that [Young] fled or attempted to flee after the commission of the offense. The State is allowed to show flight on the part of the accused. You should first determine whether [Young] did, in fact, flee or attempt to flee.

"If you find that the defendant fled or attempted to flee, then you must determine whether [Young] fled or attempted to flee from a consciousness of guilt or if there was some other reason.

"If you determine that the flight, i[f] any, was from a consciousness of guilt, then the flight is a circumstance which might tend to infer guilt on the part of [Young] and may be considered along with the other evidence in the case.

"On the other hand, if you find that [Young] fled or attempted to flee, not because of a consciousness of guilt but because of some other reason, then the flight, if any, should not be considered as any indication of or inference of guilt. Whether [Young] did, in fact, flee or attempt to flee and the reason for the flight, if any, is to be determined by you from the evidence."

***35** (R. 1324-25.) Based on the evidence presented at trial, the circuit court's flight instruction to the jury was not improper.

We find no error, plain or otherwise, in the circuit court's admission of evidence of Young's flight from law-enforcement officers three days after Freeman's murder or in the circuit court's instruction about that flight to the jury. Young is entitled to no relief on this claim.

XI. Admission of Autopsy Photographs

Young argues that the admission at trial of photographs from Freeman's autopsy "infected the trial with such unfairness as to make Mr. Young's conviction a denial of due process." (Young's brief, p. 80.)

Before trial, Young moved the circuit court to preclude the State from introducing "prejudicial photographs" at trial. The circuit court denied the motion but gave Young leave to refile the motion "closer to trial." Young did not again move the circuit court to exclude the autopsy photographs, and he did not object at trial when the State offered the photographs. Thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

" 'Generally, photographs are admissible into evidence in a criminal prosecution "if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge." ' Bankhead v. State, 585 So. 2d 97, 109 (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, 625 So. 2d 1146 (Ala. 1993), quoting Magwood v. State, 494 So. 2d 124, 141 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 154 (Ala. 1986). 'Photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome.' Williams v. State, 506 So. 2d 368, 371 (Ala. Crim. App. 1986) (citations omitted). In addition, 'photographic evidence, if relevant, is admissible

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even if it has a tendency to inflame the minds of the jurors.' Ex parte Siebert, 555 So. 2d 780, 784 (Ala. 1989). 'This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries.' Ferguson v. State, 814 So. 2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001). ' "[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter." ' Jackson v. State, 791 So. 2d 979, 1016 (Ala. Crim. App. 2000), quoting Perkins v. State, 808 So. 2d 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed. 2d 830 (2002), on remand to, 851 So. 2d 453 (Ala. 2002)."

Brooks v. State, 973 So. 2d 380, 393 (Ala. Crim. App. 2007).

In Ex parte Phillips, 287 So. 3d 1179 (Ala. 2018), the Alabama Supreme Court considered whether graphic autopsy photographs depicting a dissection in a homicide case were admissible.

"[P]hotographs of a victim taken after a homicide or assault are 'usually admitted upon the basis that they tend to illustrate, elucidate, or corroborate some relevant material inquiry or corroborate testimony.' Charles W. Gamble,

***36** McElroy's Alabama Evidence § 207.01(2), at 1285 (6th ed. 2009).

"The 'gruesomeness' of a photograph becomes objectionable where there is distortion of two kinds:

" ' " '[F]irst, distortion of the subject matter as where necroptic or other surgery caused exposure of nonprobative views, e.g., "massive mutilation," McKee v. State, 33 Ala. App. 171, 31 So. 2d 656 [(1947)]; or second, focal or prismatic distortion where the position of the camera vis-á-vis the scene or object to be shown gives an incongruous result, e.g., a magnification of a wound to eight times its true size, Wesley v. State, 32 Ala. App. 383, 26 So. 2d 413 [(1946)].'

" ' "Braswell v. State, 51 Ala. App. 698, 701, 288 So. 2d 757 (1974)." '

"Stallworth v. State, 868 So. 2d 1128, 1151 (Ala. Crim. App. 2001) (quoting Acklin v. State, 790 So. 2d 975, 997-98 (Ala. Crim. App. 2000)). See Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007) (holding autopsy photographs depicting the internal views of wounds admissible); Gamble, § 207.01(2), at 1285-86 (collecting cases). See also Taylor v. Culliver, (No. 4:09-cv-00251-KOB-TMP) 2012 WL 4479151 (N.D. Ala. Sept. 26, 2012) (not selected for publication in F. Supp) (holding, in review of an action seeking habeas corpus relief with respect to a petitioner's capital-murder conviction and death sentence, that the introduction of numerous autopsy photographs, including a photograph depicting the sawing and removal of the skull cap and brain, as well as the medical examiner's trial testimony referencing the photographs and the prosecutor's remarks about the gruesome nature of the photographs, 'did not render [the petitioner's] trial fundamentally unfair' nor deprive him of due process).

"This Court's review of the record indicates that Dr. Ward used the photograph depicting the products of conception when testifying about the presence of a placenta and a corpus luteum cyst, present in some pregnant women. The State had the burden of proving beyond a reasonable doubt that Erica was pregnant and that Baby Doe did not survive to prove that Phillips killed two persons. Thus, the photograph was used as probative evidence to establish that Erica was pregnant at the time Phillips shot her. Because the probative value outweighs any inflammatory or prejudicial effect, this Court cannot conclude that the photograph so 'infected the trial with unfairness as to make [Phillips's] conviction a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986)."

Ex parte Phillips, 287 So. 3d at 1218-19.

As Young requested (see Young's brief, p. 80), we reviewed the autopsy photographs in color. Although unpleasant to view, the autopsy photographs were relevant and admissible to show the location and the extent of the wounds to Freeman's body. The State had the burden of proving beyond a reasonable doubt that Young intended to kill Freeman "by or through the use of a deadly weapon while the victim is in a vehicle." § 13A-5-40(17), Ala. Code 1975. Among other things, the photographs showed the number and the location of the gunshot wounds to Freeman's body. Thus, the photographs were relevant to show Young's intent that Freeman be killed and to show that Freeman was seated in his vehicle when he was shot. We also note that the photographs of the injured vital organs showed "only so much of the surrounding dissected body area" as was "reasonably necessary to furnish visual aid to the jury." See McKee v.

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State, 33 Ala. App. 171, 177, 31 So. 2d 656, 661 (1947). For these reasons, we find no error, much less plain error, in the admission of the autopsy photographs. Young is due no relief on this claim.

***37** Young also argues that the State's "distracting and irrelevant hypothetical questions" to the medical examiner, Dr. Valerie Green, while Dr. Green reviewed the autopsy photographs during her testimony "augmented the prejudice" of the photographs. (Young's brief, pp. 82-83.) He points to four questions the State asked Dr. Green while Dr. Green viewed the photographs that, he says, "distracted the jury from their critical role as objective finders of fact":

> "Q. And if [Freeman] had survived, would he had likely suffered some long-term impairment or disfigurement as a result of this particular injury?
>
> "A. Yes. Most likely, yes, because the bone would have to be reattached and realigned.
>
> "....
>
> "Q. And would likely have suffered an amputation as a result of that had he survived?
>
> "A. I would say it's very likely that he would.
>
> "....
>
> "Q. Could you explain to the ladies and gentlemen of the jury, based on the particular area of his injury, what type of long-term consequences [Freeman] may have suffered had he survived?
>
> "....
>
> "Q. When you say 'loss of function,' are you talking about paralysis?"

(R. 133-34; R. 1161-63.)

Young did not object to the first two questions so we review those questions and Dr. Green's response to them for plain error. See Rule 45A, Ala. R. App. P. Young objected to the last two questions and the circuit court sustained those objections. Thus, we review those two questions for plain error. See Capote, supra.

We find that neither these questions nor Dr. Green's responses to the first two questions prejudiced Young to the point of plain error. The questions went to the extent of Freeman's injuries and helped explain the nature of those injuries. We find no error, plain or otherwise, in these questions or responses.

XII. Corroboration of Accomplice Testimony

Young argues that the State failed to corroborate the accomplice testimony of Hammonds and Bates. He says that, other than Hammonds's and Bates's testimony, the State offered no evidence tending to connect him to the crimes for which the jury convicted him. (Young's brief, p. 61.) We disagree.

Young did not object on this basis at trial to Bates's or Hammonds's testimony. Thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Under § 12-21-222, Ala. Code 1975, a person cannot be convicted of a felony on the testimony of an accomplice unless there is other evidence corroborating the accomplice's testimony.

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

§ 12-21-222, Ala. Code 1975. " '[C]orroborative evidence need not directly connect the accused with the offense but need only tend to do so.' " Green v. State, 61 So. 3d 386, 393 (Ala. Crim. App. 2010) (quoting Pace v. State, 904 So. 2d 331, 347 (Ala. Crim. App. 2003)). This Court has said:

> " ' " ' "Corroboration need only be slight to suffice." Ingle v. State, 400 So. 2d 938, 940 (Ala. Cr. App. 1981). "While corroborating evidence need not be strong, it '... must be of substantive character, must be inconsistent with the innocence of a defendant and must do more than raise a suspicion of guilt.' McCoy v. State, 397 So. 2d 577 (Ala. Crim. App.), cert. denied, 397 So. 2d 589 (Ala. 1981)." Booker v. State, 477 So. 2d 1388, 1390 (Ala. Cr. App. 1985). "However, the corroboration need not be sufficiently

strong by itself to warrant a conviction." Miles v. State, 476 So. 2d 1228, 1234 (Ala. Cr. App. 1985).

***38** " ' "Hodges v. State, 500 So. 2d [1273] at 1275–76 [(Ala. Crim. App. 1986)]."

" 'Arthur v. State, 711 So. 2d 1031, 1059 (Ala. Cr[im]. App. 1996), cert. denied, 711 So. 2d 1097 (Ala. 1997).' "

McGowan v. State, 990 So. 2d 931, 987 (Ala. Crim. App. 2003).

Circumstantial evidence can show corroboration, and sufficient corroboration of an accomplice's testimony " 'may be furnished by a tacit admission by the accused, by the suspicious conduct of the accused, and the association of the accused with the accomplice, or by the defendant's proximity and opportunity to commit the crime.' " Arthur v. State, 711 So. 2d 1031, 1056 (Ala. Crim. App. 1996) (quoting Jacks v. State, 364 So. 2d 397, 405 (Ala. Crim. App. 1978)). Consciousness of guilt, as shown by how the accused acted after the offense, may also be corroborative. Green, 61 So. 3d at 394. Independent evidence of flight is also sufficient corroboration of an accomplice's testimony. McGowan, 990 So. 2d at 988.

The test for whether evidence sufficiently corroborates an accomplice's testimony " 'consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense.' " Ex parte Bullock, 770 So. 2d 1062, 1067 (Ala. 2000) (quoting Andrews v. State, 370 So. 2d 320, 321 (Ala. Crim. App. 1979)). We have said, though, that "when the testimony of the accomplice is subtracted, the remaining testimony does not have to be sufficient by itself to convict the accused." Johnson v. State, 820 So. 2d 842, 869 (Ala. Crim. App. 2000).

Even without Hammonds's and Bates's testimony of Young's involvement in the murder of Freeman and the shooting of Blythe, the State presented sufficient evidence tending to connect Young with those offenses.

The State presented evidence that two days before Freeman was murdered Hubbard reported a burglary at his house on Midland Avenue in Muscle Shoals. The responding officer said that Hubbard was angry about the burglary, and Young's girlfriend, Meagan, testified that she and others had to calm down Hubbard because "he was acting really stupid." (R. 896.) Meagan testified that two days later she was at Hubbard's house when Young and several others went into Hubbard's bedroom. When Young came out of the bedroom 10-15 minutes later, he went with Meagan, Capote, and Capote's girlfriend to the Gander Mountain store in Florence. Young asked Meagan to buy some ammunition and he told her what kind of ammunition to buy. Meagan bought a box of 7.62x39mm ammunition from Gander Mountain at 9:01 p.m. on March 1. After Meagan bought the ammunition, Young drove everyone back to Hubbard's house.

Surveillance footage from the Spring Creek Apartments in Tuscumbia shows a white Dodge four-door pickup truck arriving at the apartment complex around 10:47 p.m. on March 1. A blue Mustang arrived about 10-11 minutes later. The time stamps from the surveillance footage showing Freeman's blue Mustang arriving at the Spring Creek Apartments corresponded with the time stamps from Burgner's Facebook Messenger exchange with Freeman in which Freeman told her that he was "getting my cash r[ight] n[ow]" that "Vonte" owed him.

***39** Bohn, who lived at the Spring Creek Apartments, testified that she looked out of her apartment window and saw two men get out of a white Dodge pickup truck. The man who got out of the driver's side was "big and heavy." The record shows that Young is 6 feet 4 inches tall and weighed 270 pounds.

Law-enforcement officers found several shell casings at the scene. The State produced evidence that the shell casings found at the scene were 7.62x39mm—the same type of ammunition Young directed Meagan to buy from Gander Mountain two hours before Freeman was murdered.

Shortly after midnight, Springer saw a white Dodge pickup truck park at the Chateau Orleans apartment complex in Muscle Shoals near Hubbard's house. He saw a silver or gold four-door car pull up. The driver of the pickup truck talked with the driver of the car before the car sped away. The two men who had gotten out of the pickup truck walked away and left the truck parked at the Chateau Orleans apartment complex.

Meagan testified that when she woke up at Hubbard's house on March 2, Young "thought it was best" that they leave Hubbard's house that day. Meagan testified that Young had in the past driven a white Dodge pickup truck. DNA from a grape soda can found in the white Dodge pickup truck parked

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at the Chateau Orleans apartment complex matched DNA from a cheek swab taken from Young.

Three days after Freeman was murdered law-enforcement officers were watching Hubbard's house when they saw Young leave Hubbard's house driving a silver car. When law-enforcement officers tried to stop Young, Young led several law-enforcement agencies on a chase through northern Alabama and into Tennessee.

Based on information Settles provided them, law-enforcement officers later found an SKS rifle matching the description of one that Hubbard owned. Forensic scientists tested the rifle and found that the 7.62x39mm-shell casings found at the scene, as well as the projectiles recovered from Freeman's body during the autopsy, were fired from the SKS rifle.

The State's evidence, independent of Bates's and Hammonds's testimony, tended to connect Young to the commission of the offenses for which the jury convicted him. Thus, the State produced sufficient evidence corroborating Bates's and Hammonds's accomplice testimony. We find no error, much less plain error, in the admission of this testimony.

Young also argues that the circuit court erred when it did not instruct the jury that accomplice testimony must be corroborated under § 12-21-222, Ala. Code 1975. We apply the harmless-error rule in capital cases when the circuit court fails to instruct the jury that an accomplice's testimony must be corroborated. Lewis v. State, 24 So. 3d 480, 515 (Ala. Crim. App. 2006).

Although the circuit court did not instruct the jury that Bates and Hammonds were accomplices, their status as accomplices was made clear through their testimony about their involvement in planning Freeman's death. Bates testified that he had pleaded guilty to conspiracy to commit murder for Freeman's death and that he was awaiting sentencing for that conviction. Hammonds testified that he had not been charged for his part in Freeman's death, but, he said, the State "never promised me immunity from this." He testified that he understood that the State could still charge him. The circuit court instructed the jury that it could "take into consideration any interest which any witness might have shown to have in the outcome of the case." (R. 1327.) And as we held above, besides Bates's and Hammonds's testimony, the State presented sufficient evidence tending to connect Young with the commission of the offenses for which the jury convicted him. Thus, any error in the circuit court's failure to instruct the jury on the requirement that accomplice testimony be corroborated was harmless and did not rise to the level of plain error. See Lewis, 24 So. 3d at 515-16. Young is due no relief on this claim.

XIII. The First-Degree-Assault Conviction

***40** Young says that the State produced insufficient evidence to support his first-degree-assault conviction because there was no evidence, he says, that Blythe suffered a "serious physical injury" under § 13A-6-20, Ala. Code 1975.

At the close of the State's case, Young argued that the State failed to prove a prima facie case of first-degree assault. The circuit court denied that motion.

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

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

A person commits the crime of first-degree assault if, "[w]ith intent to cause serious physical injury to another person, he or she causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument." §

13A-6-20(a)(1), Ala. Code 1975. "Serious physical injury" is "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." § 13A-1-2(14), Ala. Code 1975. "In determining whether serious physical injury has occurred, 'neither the jury nor this Court [are] required to ignore "common sense, common reason, and common observation." Thompson v. State, 21 Ala. App. 498, 499, 109 So. 557 (1926).' " Ex parte Marlowe, 854 So. 2d 1189, 1191 (Ala. 2003) (quoting Hale v. State, 654 So. 2d 83, 86 (Ala. Crim. App. 1994)).

In Ex parte Marlowe, supra, the Alabama Supreme Court approved a shift away from a rigid definition of "serious physical injury":

> "The Court of Criminal Appeals recognized that their opinion appeared to signify a less stringent definition of 'serious physical injury.' Its opinion states:
>
> > " 'We acknowledge that our decision in this case may appear to signal a shift away from the seemingly more stringent definition of "serious physical injury" this Court applied in Wilson v. State, 695 So. 2d 195 (Ala. Crim. App. 1997), Saylor v. State, 719 So. 2d 266 (Ala. Crim. App. 1998), and other cases. [We do not] address[ ] whether today's decision signals such a shift ....'
>
> > ***41** "Marlowe, 854 So. 2d at 1188. To the extent that the Court of Criminal Appeals' opinion signals a shift in the application of § 13A-1-2(9), Ala. Code 1975, we adopt that shift."

Ex parte Marlowe, 854 So. 2d at 1192-93.

Blythe testified that he was shot several times and that right after the shooting he could not tell where he was bleeding from because blood "was just running down me." (R. 563.) He testified that he was flown by helicopter to a hospital in Huntsville where he underwent surgery—"They just went in and, like, cleaned all the bullet fragments out and stuff and sewed me up"—and where he was hospitalized for seven days. Blythe testified that after he was released from the hospital he had to go to wound care for several weeks and he had to use a walker for two months because he could not walk unassisted. Blythe testified that, although he was no longer under a doctor's care by the time of trial, he experienced pain because of the gunshot wounds. He testified he still has 13 scars from the gunshot wounds. Photographs of the scars on Blythe's leg, thigh, right calf, left shoulder, and back were admitted at trial.

Although "evidence of a gunshot wound alone is insufficient to prove that the victim had suffered a 'serious physical injury,' " see Westbrook v. State, 722 So. 2d 788, 790 (Ala. Crim. App. 1998), we have said many times that a gunshot wound can cause "serious physical injury" to a victim. See, e.g., Thomas v. State, 555 So. 2d 1183 (Ala. Crim. App. 1989) (holding that evidence that a bullet entered the victim's side and went through the victim's body before exiting the victim's body a half inch from the victim's spine, along with evidence that the victim was hospitalized for three or four days and was out of work for two weeks, was sufficient evidence of "serious physical injury"); Hale, 654 So. 2d 83 (holding that evidence that the victim sustained gunshot wounds to his ankle, left shoulder, and arm requiring surgery and nearly two weeks of hospitalization, during which time one of his lungs collapsed, along with the victim's presentation of his scars to the jury, was sufficient evidence that the victim had sustained a "serious physical injury"); Collins v. State, 508 So. 2d 295 (Ala. Crim. App. 1987) (holding that it was a jury question whether a superficial gunshot wound to the head created a "substantial risk of death" to satisfy the definition of "serious physical injury," when the evidence showed that the victim suffered extensive blood loss from the gunshot wound and had swelling and blood under her scalp); Thomas v. State, 418 So. 2d 964 (Ala. Crim. App. 1982) (holding that evidence that the victim suffered "superficial" gunshot wounds caused by two bullets entering and exiting the victim's back, even though the injury was not life-threatening and required only two days of hospitalization and two weeks of bed rest, caused "serious physical injury" to the victim because the State presented evidence that a slight deflection in the paths of the bullets could have caused paralysis or death by hitting a vital organ).

Blythe's testimony, along with the presentation of his scars to the jury, was sufficient for the jury to find that he suffered a "serious physical injury." There was no error, much less plain error, in the circuit court's submission of the first-degree-assault charge to the jury.

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XIV. Young's Claim that the State Improperly Vouched for the Credibility of Key Witnesses

***42** Young says that the State improperly vouched for the credibility of key State witnesses during closing arguments. Because Young did not object at trial to any of the comments he now challenges on appeal, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

"[I]t is improper for a prosecutor to vouch for the credibility of a witness." Shanklin, 187 So. 3d at 790.

> " 'In reviewing these claims of alleged improper prosecutorial argument, we must evaluate the comments and their impact in the context of the entire argument, and not view the allegations of improper argument in the abstract. Duren v. State, 590 So. 2d 360 (Ala. Cr[im]. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991). Also,
>
> > " ' " 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' "
>
> " 'Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed. 2d 197 (1991), quoting Johnson v. Wainwright, 778 F.2d 623, 629 n.6 (11th Cir. 1985), cert. denied, 484 U.S. 872, 108 S. Ct. 201, 98 L.Ed. 2d 152 (1987). We also point out that the control of a closing argument is in the broad discretion of the trial court. Thomas v. State, 601 So. 2d 191 (Ala. Cr[im]. App. 1992). That court is in the best position to determine if counsel's argument is legitimate or if it degenerates into impropriety. Thomas, supra. "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 v. State, 585 So. 2d 97, 107 (Ala. Crim. App. 1989), quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L.Ed. 2d 144 (1986).'
>
> > "Acklin v. State, 790 So. 2d 975, 1002 (Ala. Crim. App. 2000). A prosecutor may argue all legitimate inferences that may be drawn from the evidence. Taylor v. State, 666 So. 2d 36, 64 (Ala. Crim. App. 1994). The standard of review is not whether the defendant was prejudiced, but whether the comment 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 169, 106 S. Ct. 2464, 91 L.Ed. 2d 144 (1986)."

Gobble v. State, 104 So. 3d 920, 970 (Ala. Crim. App. 2010).

We address below each of the comments Young challenges on appeal.

A. Prosecutor's Comments about De'Vontae Bates

Young says that the State improperly vouched for Bates's credibility when, in rebuttal closing, the prosecutor said:

> "[Bates] came forward and wanted to tell the truth. He did on the stand. When I asked him, I said, 'Did you know that they were going to kill him?' 'Yes, sir.' Well, he could have said, 'No. I just thought they was going to shoot him and maybe hurt him. I didn't know they was going to kill him.' He could have said that if he wanted to, but he told you the truth."

(R. 1283.) Young argues that by this comment the State "sought to enhance the reliability" of Bates's testimony by vouching for his credibility. He says the State's vouching for Bates's credibility was particularly egregious because, under Bates's plea agreement with the State, Bates had to testify to having "full knowledge that his codefendants were going to the victim's location to kill him." (Young's brief, pp. 36-37.) Young argues that the prosecutor's comment during rebuttal closing that Bates told the truth about knowing his codefendants planned to kill Freeman even though he "could have said" that he did not know they planned to kill him, was not "rooted in the evidence presented at trial" because, Young says, under Bates's plea agreement with the State, Bates had to testify that he knew his codefendants planned to kill Freeman.

***43** A prosecutor does not personally vouch for the credibility of a witness when he or she does not personally

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guarantee the truthfulness of the witness's testimony but argues that the witness is credible based on the evidence presented at trial. In Jackson v. State, 169 So. 3d 1 (Ala. Crim. App. 2010), we considered whether a similar statement by the prosecutor constituted improper vouching for a witness:

> " 'I don't care what you think of Runyan Richardson. And I can assure you, the State of Alabama's case ain't predicated on what Runyan Richardson had to say. That came to us last week. That—my case doesn't hinge on Runyan Richardson. But just like [cocounsel] said, if he's going to lie, why not tell the big lie? He says—he said—he said he could have lied to you—I mean, he said he could have given you more details. If this was factual, he could have given you more details. If he had given you more details, then he would have been lying, ladies and gentlemen. So, he could have lied to you. But he didn't.' "

Jackson, 169 So. 3d at 75 (emphasis added). We held that the prosecutor's comment in Jackson was not an improper vouching for the witness.

> "Here, the prosecutor was arguing the credibility of the witnesses based on the evidence in this case. Therefore, because the prosecutor was not personally vouching for the witnesses or urging the jury to believe them because he believed them, there was no impropriety. See Johnson v. State, 120 So. 3d 1130, 1165 (Ala. Crim. App. 2009) ('Here, there is no indication in the record that the prosecutor impermissibly vouched for any witness's credibility as he never suggested that there was evidence undisclosed to the jury that would support a witness's testimony nor did he ever make personal assurances of a witness's veracity.')."

Jackson, 169 So. 3d at 75. See also DeBruce v. State, 651 So. 2d 599, 610 (Ala. Crim. App. 1993) (holding that prosecutor's statements in closing that "I'll submit to you, [accomplice] is telling you the truth" and "I'll submit to you, it [how the robbery/murder occurred] is just like [accomplice] said" was not an improper bolstering of a witness's testimony because the prosecutor "did not give any personal assurance of [accomplice's] veracity and did not imply that he had information that had not been presented to the jury that supported [accomplice's] testimony"). The prosecutor's statement in closing about Bates telling the truth was not improperly vouching for Bates's credibility.

We also note that a copy of Bates's plea agreement with the State—in which Bates represented "as conditions precedent" to the plea agreement that he knew his codefendants planned to kill Freeman—was made an exhibit during Bates's testimony. The terms of the plea agreement provided that the agreement would be void if the State found out that any of the representations Bates made in the plea agreement were false. That Bates's plea agreement could have been in jeopardy if he testified at trial differently than he represented in his plea agreement does not mean, though, as Young says it does, that the State's comment about Bates's ability to tell the jury something different was akin to arguing as fact "that which is not supported by the evidence." See Hyde v. State, 778 So. 2d 199, 224 (Ala. Crim. App. 1998) (holding that the prosecutor did not mislead the jury when the prosecutor represented, during the codefendant's testimony, that the codefendant "could have refused [to testify at trial] and nothing could have happened" to him, even though the codefendant's plea agreement depended on the codefendant testifying at the defendant's trial). Thus, the prosecutor's comment about Bates's ability to tell the jury, if he had wanted to, that he did not know his codefendants planned to kill Freeman, was not inconsistent with the evidence presented at trial. [10]

***44** In the context of the prosecutor's entire argument, the comment about Bates telling the truth was a proper comment on the legitimate inferences to be drawn from the evidence. We find no error, much less plain error, in this comment by the prosecutor during closing arguments.

B. Prosecutor's Comments about Austin Hammonds

Young says that the State improperly assured the jury that Hammonds was telling the truth when the prosecutor said, during rebuttal closing:

> "Austin Hammonds, you watched the video of his interview with Wes Holland, and he says he's lying in the beginning ... but then Austin starts telling the truth ... he came forward and told the truth ... And because Austin came forward and told the truth during that interview, the arrests were made that day."

(Young's brief, pp. 37-38.) Young says that this statement, with "no evidentiary bridge between Hammonds 'lying in the beginning' and the State's improper assurances that he was 'telling the truth' on the stand," was improper vouching by the State for Hammonds's credibility.

The parts of the prosecutor's rebuttal closing omitted with ellipsis from Young's brief provides the "evidentiary bridge" between the prosecutor's statement about Hammonds lying in his interview with Det. Holland and then changing his story to "[tell] the truth":

> "[Hammonds], you watched that video of his interview with Wes Holland, and he says he's lying in the beginning. And I think [Bates] testified that that was part of his original story. He dropped him off at Spring Creek, and he asked [Hammonds] to sort of back him up on that. So [Hammonds] is going along with [Bates's] lies in the beginning, but then [Hammonds] starts telling the truth. And the defense says, 'Well, he was terrified.' Well, yeah, he was terrified. What do you think? And just when he started to tell the truth in that interview, he says, 'These people,' but he doesn't say 'people,' 'are going to kill me. I'm tell[ing] you what I know, but these people are going to kill me.' He was—yeah, he was terrified. He was terrified of Benjamin Young, Thomas Hubbard, and Peter Capote. But he came forward and he told the truth, and he didn't lure [Freeman] to Spring Creek Apartments. He didn't go to the scene. He did go to work. And if he hadn't come forward when he did, then the arrest in this case wouldn't have been made when it was. Remember you can hear this on the video, I believe, if you will listen to it. When he starts giving them Midland Avenue. He starts telling them where the house is. What do they say? The investigators to each other say, 'You better get somebody on that house.' And I think [Holland] said, 'ASAP.' 'You better get somebody on that house.' And because [Hammonds] came forward and told the truth during that interview, the arrests were made that day."

(R. 1284-86 (emphasis added).) The prosecutor's argument summarizing Hammonds's videotaped interview with Det. Holland—a video which Young offered at trial and played for the jury—did not constitute improper vouching for Hammonds's testimony. The prosecutor did not suggest to the jury that there was evidence not disclosed to the jury that would support Hammonds's testimony, nor did he urge the jury to believe Hammonds because he (the prosecutor) believed Hammonds. See Jackson, 169 So. 3d at 75. Rather, the prosecutor argued legitimate inferences regarding why Hammonds changed his story in his interview with Det. Holland. Thus, we find no error, plain or otherwise, in this comment by the prosecutor.

C. Prosecutor's Comments about the Credibility of Law-Enforcement Officers

***45** Young says that the State improperly bolstered the credibility of law-enforcement officers and "solidified the 'prestige of the government' " when the prosecutor told the jury in rebuttal closing that the law-enforcement officers were "exceptional people." In his brief on appeal, Young says that the prosecutor claimed in closing argument that Holland and the Tuscumbia Police Department "did an outstanding job in this case ... [because] [w]ithin four days of the murder, [Wes Holland] arrested them, most of them." (Young's brief, p. 38.) Young says that the State's emphasis on the speed of Young's arrest "improperly presupposed the guilt of the accused" and was a comment on the prosecutor's "personal belief in the guilt or innocence of the accused."

During closing arguments the prosecutor discussed the State's witnesses and compared the "exceptional people" the State called with the "other witnesses" the State called that were "chosen just by the facts and the circumstances of the case."

> "Now, the witnesses in any case, they really just develop from the facts and the circumstances of that case. I don't get to give them—I don't get to pick who was there or what they did or who was at the house. They just develop from the facts of the case.
>
> "Let me say this. Some of these people that have testified in this case have been exceptional people. Let me say this. Tuscumbia Police Department did an outstanding job on this case. Wes Holland led the investigation, and they did an outstanding job in this case. Within four days of the murder, he arrested them, most of them. Jeremy Ware, a police officer, drives toward the gunshots. He is out on another call. This was before dispatch had even called him. He gets in his vehicle, and he drives toward the scene.
>
> "Natasha Shackleford, the paramedic who comes to a potentially dangerous scene to treat a gunshot wound.
>
> "Dale Springer who testified, who lives there at the Chateau, sees a suspicious truck at Chateau Orleans, and instead of doing what so many other people would do, he picked up the phone, and he made six phone calls and he gets involved. That's exceptional.
>
> "Derrick Thomas, another police officer with Loretto P[olice] D[epartment], I believe, puts his very life on the

line to stop a fleeing capital murder suspect and to protect other motorists that are on the road with him. He put his own life on the line. That's exceptional. All the officers involved in that chase at 100 miles an hour for 45 minutes.

> "Well, there's some other witnesses that were in this case. People that hung out with [Young]. People that hung out at ... Midland Avenue in Muscle Shoals, the Imperial Almighty Gangsters. We told you, there won't be any Sunday school teachers that were at that house. There's no pillars of the community that were at that house that knows about the plan to kill KJ Freeman. No. The people that were there were people like De'Vontae Bates and Austin Hammonds. The witnesses have been chosen just by the facts and the circumstances of the case. And I told you during voir dire ... you're not going to like them. I don't blame you. You shouldn't like them. But where are you going to hear about the circumstances and the planning and conspiracy to kill KJ Freeman unless it's from people like that? So the question isn't do you like them, the question is did they tell you the truth, did they testify from that stand truthfully. You alone can make that decision."

(R. 1276-78.)

One way a prosecutor may improperly vouch for the credibility of a witness is by " 'plac[ing] the prestige of the government behind the witness, by making explicit personal assurances of the witness'[s] veracity.' " Barber v. State, 952 So. 2d 393, 442-43 (Ala. Crim. App. 2005) (quoting DeBruce, 651 So. 2d 599, 611 (Ala. Crim. App. 1993), quoting in turn United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983)). A comment by the prosecutor that law-enforcement officers did a good job investigating the offense, however, is not improper if it is a reasonable inference to be drawn from the evidence presented at trial. Ex parte Waldrop, 459 So. 2d 959, 961 (Ala. 1984). Considered in the context of the prosecutor's full argument, the prosecutor's comments about the "exceptional people" in the case and about the "outstanding job" Det. Holland and the Tuscumbia Police Department did investigating the case was not improper. We find no error, plain or otherwise, in these comments by the prosecutor.

D. Prosecutor's Appeal to the Jury

***46** Young also says the State made an "improper appeal" to the jury when the prosecutor said, in rebuttal closing:

> "And we talked about the agreements. We talked about De'Vontae Bates. We talked about Shawn Settles or their testimony. You know, look, if you don't agree with that, that's fine. That's fine. But hold it against me. Be angry at me. Don't hold it against [Freeman]. Don't hold it against his family."

(R. 1282-83.) Young says this comment by the prosecutor was improper because the State "encourage[d] the jury to find the witnesses credible because of the impact of the crime on the victim's family." (Young's brief, p. 40.) We disagree. The prosecutor did not encourage the jury to find the witnesses credible because of the effect of Freeman's murder on his family; instead, the prosecutor told the jury that, if it was upset because the State agreed to recommend that Bates and Settles receive lesser sentences because of their testimony at Young's trial, it should direct that anger at the prosecutor and not let it affect the jury's consideration of the evidence. This type of comment on the role of the prosecutor is not improper. See generally Gaddy v. State, 698 So. 2d 1100, 1127 (Ala. Crim. App. 1995) ("[A] prosecutor's statement during closing argument explaining his duty as a prosecutor and his relation as such to organized society [is not error].").

We find no error, much less plain error, in this statement by the prosecutor. Thus, Young is due no relief on this claim.

Penalty-Phase Issues

XV. Denial of Young's Motion for a Mistrial

Young argues that the circuit court should have granted a mistrial when a juror, on the evening before the penalty phase began, telephoned the sheriff's office because he saw some "suspicious activity" in his neighborhood that he thought

might relate to Young's trial. Young says the circuit court erred in denying his motion for a mistrial because, he says, the juror relied on "opinions or evidence external to the trial," which, Young says, impermissibly influenced the juror and undermined Young's right to a fair and unbiased sentencing jury. At a minimum, Young says, the circuit court should have replaced that juror with an alternate juror.

"[T]he granting of a mistrial is an extreme measure and should be taken only when it is manifestly necessary or when the ends of justice would otherwise be defeated." Harrell v. State, 608 So. 2d 434, 436 (Ala. Crim. App. 1992).

> " ' "A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice." Hammonds v. State, 777 So. 2d 750, 767 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 777 (Ala. 2000) (citing Ex parte Thomas, 625 So. 2d 1156 (Ala. 1993)). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So. 2d 130, 135 (Ala. Crim. App. 1991). " 'The granting of a mistrial is addressed to the broad discretion of the trial judge, and his ruling will not be revised on appeal unless it clearly appears that such discretion has been abused.' " Grimsley v. State, 678 So. 2d 1197, 1206 (Ala. Crim. App. 1996) (quoting Free v. State, 495 So. 2d 1147, 1157 (Ala. Crim. App. 1986)).'

***47** "Baird v. State, 849 So. 2d 223, 247 (Ala. Crim. App. 2002). ' "[T]he granting of a mistrial in cases of private communications between jurors and third persons is largely within the discretion of the trial judge, and his decision is subject to reversal only where that discretion has been abused." ' Cox v. State, 394 So. 2d 103, 105 (Ala. Crim. App. 1981), quoting Woods v. State, 367 So. 2d 974, 980 (Ala. Crim. App.), rev'd on other grounds, 367 So. 2d 982 (Ala. 1978). 'In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion "where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the remark." ' Holland v. State, 588 So. 2d 543, 546 (Ala. Crim. App. 1991), quoting Bascom v. State, 344 So. 2d 218, 222 (Ala. Crim. App. 1977).

" ' "Any communication or contact outside the jury room about the matters at trial between a juror and another person is forbidden where that contact 'might have unlawfully influenced that juror.' " ' Knox v. State, 571 So. 2d 389, 390-91 (Ala. Crim. App. 1990), quoting Ebens v. State, 518 So. 2d 1264, 1267 (Ala. Crim. App. 1986), quoting in turn Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). However:

> " 'An unauthorized contact between the jurors and a witness [or other person] does not necessarily require the granting of a mistrial. It is within the discretion of the trial court to determine whether an improper contact between a juror and a witness [or other person] was prejudicial to the accused.'

"Ex parte Weeks, 456 So. 2d 404, 407 (Ala. 1984).

> " 'The prejudicial effect of communications between jurors and others, especially in a criminal case, determines the reversible character of the error. Whether there has been a communication with the juror and whether it has caused prejudice are fact questions to be determined by the Court in the exercise of sound discretion.'

"Gaffney v. State, 342 So. 2d 403, 404 (Ala. Crim. App. 1976)."

Minor v. State, 914 So. 2d 372, 411-12 (Ala. Crim. App. 2004).

After the jury reached its verdict in the guilt phase of Young's trial, the circuit court dismissed the jury for the day and directed the jurors to return the next morning for the penalty phase of the trial. The next morning, outside the presence of the other jurors, the circuit court requested juror B.M. come into the courtroom.

> "The Court: Let the record reflect that Juror [B.M.] and Bailiff Ernest Bechard, both just came in the courtroom. It is my understanding—the Court's understanding—that you noticed some suspicious activity in your neighborhood last night which made you uneasy and concerned you that there may be some relation to this case. You appropriately contacted the sheriff's department, which is absolutely what you should have done. And it is also the Court's understanding that the sheriff's office took your call seriously and investigated and dealt with your concern and your call. And at this time, I have asked the Sheriff to come in here and explain to you what was done in response to the conduct. Okay. Now, first of all—
>
> "[Sheriff] Williamson: I'm Frank Williamson.
>
> "[Juror B.M.]: [B.M.]

"The Court: Now, Mr. [B.M.], first of all, let me ask if I have stated correctly what occurred last night?

"[Juror B.M.] Yes, sir.

"The Court: Okay. Now then, Sheriff, go ahead.

"[Sheriff] Williamson: I didn't want to talk to you last night because I didn't want to be unethical or get in the way of these folks that have worked hard on this case. So what I wanted to talk to you about was, we checked this guy out, and you did good by getting us a tag number. And what we think that—we don't think it has anything to do with this case. We think that it has to do with the break-ins that's going on out there right now. So I just wanted you to feel at ease so that you could do your job today.

***48** "[Juror B.M.]: I mean, you know, I drove up.

"The Court: Be careful what you say.

"[Juror B.M.]: I mean, I just drove up and it was happening.

"The Court: Okay. Does the Sheriff's explanation put your mind at ease?

"[Juror B.M.] Correct.

"The Court: We just wanted to let you know that your contact was responded to and dealt with.

"[Juror B.M.]: Thank you."

(R. 1349-52.) Young moved for a mistrial, arguing that B.M. "has obviously been impacted and put in fear of his participation with this jury." (R. 1353.) The State pointed out that the sheriff's department was not the investigating agency for Young's case; thus, the State argued, B.M.'s contact with the sheriff's department "in no way would involve any issue or relate to any fact that could have been found during the guilt or the sentencing phase of this particular trial." (R. 1354.) After Sheriff Williamson confirmed that he did not speak with B.M., the circuit court denied Young's motion for a mistrial.

The circuit court did not abuse its discretion in denying Young's motion for a mistrial. The circuit court questioned B.M. about his call to the sheriff's office, the circumstances surrounding that call, and whether the sheriff's explanation about the unrelated nature of the break-ins in B.M.'s neighborhood put B.M.'s "mind at ease." The circuit court was in the best position to investigate the incident and decide whether the incident prejudiced Young. That a juror has some outside influence between the guilt phase and the penalty phase–even when, as was not the case here, the juror engages in misconduct—does not, alone, prejudice the defendant. See, e.g., State v. Sheppard, 84 Ohio St.3d 230, 232-33, 703 N.E.2d 286 (1998); Matthews v. Workman, 577 F.3d 1175, 1182-83 (10th Cir. 2009).

Young argues, though, that "the Alabama Supreme Court has made clear that no showing of prejudice is required where external influences have impermissibly risked impacting a juror's ability to fairly consider only the evidence presented at trial." (Young's brief, p. 44.) But the Alabama Supreme Court has distinguished those cases in which jurors have close and continuous contact with key state witnesses (cases when prejudice may be presumed) from those cases in which jurors do not have close and continuous contact with key state witnesses (cases when prejudice must be shown).

"Minor cites Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965), and Ex parte Pierce, 851 So. 2d 606 (Ala. 2000), for the proposition that whenever a juror has contact with outside influences, prejudice is presumed. However, as the State correctly points out in its brief to this Court, both Turner and Ex parte Pierce are distinguishable from the present case and are thus not controlling. In both Turner and Ex parte Pierce, the jurors had close and continual contact with key prosecution witnesses throughout the trial; specifically, the law-enforcement officers who were in charge of taking care of the jury, who transported the jurors to and from their lodging each day, who ate meals with the jurors, and who conversed with the jurors on a regular basis throughout the trial, were key prosecution witnesses in both Turner and Ex parte Pierce. Based on this situation, the United States Supreme Court held in Turner, and the Alabama Supreme Court held in Ex parte Pierce, that the defendant's due-process right to a fair trial by an impartial jury was violated and that prejudice could be presumed from such close and continual contact even if there was no evidence to show that the law-enforcement officers had discussed the facts of the case with the jurors. Specifically, the Court in Turner stated that 'it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution.' 379 U.S. at 473, 85 S.Ct. 546.

***49** "In this case, there was no contact between the jury and prosecution witnesses, much less the close and continual contact that occurred in Turner and Ex parte

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Pierce. Rather, the outside contact juror Y.G. had in this case was with the defendant's brother, who made several comments within the hearing of, and presumably directed at, juror Y.G. Therefore, prejudice cannot be presumed under the facts in this case as it was in Turner and Ex parte Pierce; rather, as this Court held in Myers v. State, 677 So. 2d 807, 810 (Ala. Crim. App. 1995), '[i]n order to be entitled to a mistrial due to contact by a juror with witnesses or others, prejudice must be shown.' See also Mangione v. State, 740 So. 2d 444, 453-55 (Ala. Crim. App. 1998); Johnson v. State, 648 So. 2d 629, 634-37 (Ala. Crim. App. 1994); and Davis v. State, 457 So. 2d 992, 993-95 (Ala. Crim. App. 1984).

"In order to show prejudice in a case such as this one involving misconduct by a non-juror in speaking to a juror, a defendant must establish only that the verdict might have been affected by the juror's outside contact with the other person. See Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932) ('The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.'). See also Ex parte Dobyne, 805 So. 2d 763, 771 (Ala. 2001) (citing Roan in the context of juror misconduct, specifically the failure of a juror to properly respond to questions on voir dire). However, this might-have-influenced-the-verdict standard nevertheless requires more than a mere showing that the juror was exposed to outside influences. See Ex parte Apicella, 809 So. 2d 865 (Ala. 2001). In Ex parte Apicella, the Alabama Supreme Court, addressing a juror-misconduct claim (a juror spoke with an attorney not associated with the case), explained the standard as follows:

> " 'On its face, this standard would require nothing more than that the defendant establish that juror misconduct occurred. As Apicella argues, the word "might" encompasses the entire realm of possibility and the court cannot rule out all possible scenarios in which the jury's verdict might have been affected.
>
> " 'However, as other Alabama cases establish, more is required of the defendant. In Reed v. State, 547 So. 2d 596, 598 (Ala. 1989), this Court addressed a similar case of juror misconduct:
>
> > " ' "We begin by noting that no single fact or circumstance will determine whether the verdict rendered in a given case might have been unlawfully influenced by a juror's [misconduct]. Rather, it is a case's own peculiar set of circumstances that will decide the issue. In this case, it is undisputed that the juror told none of the other members of the jury of her experiment until after the verdict had been reached. While the question of whether she might have been unlawfully influenced by the experiment still remains, the juror testified at the post-trial hearing on the defendant's motion for a new trial that her vote had not been affected by the [misconduct]."
>
> " 'It is clear, then, that the question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case. In this case, as in Reed, the effect of the misconduct was confined to the juror who committed the misconduct. The Reed Court stated:
>
> > " ' "We cannot agree with the defendant that the verdict rendered might have been unlawfully influenced, where the results of the [misconduct] were known only to the one juror who [committed the misconduct] and that juror remained unaffected by the [misconduct]."
>
> ***50** " '547 So. 2d at 598. Because no evidence indicates that [the juror] shared the content of his conversation with the other members of the jury and because no evidence indicates that [the juror's] own vote was affected, we cannot say the trial court abused its discretion in finding no actual prejudice.'

"809 So. 2d at 871."

Minor, 914 So. 2d at 412-14.

Nothing in the record shows that B.M.'s contact with the sheriff's office was improper or that he shared information about the incident in his neighborhood with the other members of the jury. And nothing in the record shows that B.M.'s vote in the penalty phase was affected by either the incident in his neighborhood or by his contact with the sheriff's office reporting that incident. Thus, we cannot say that the circuit court abused its discretion in denying Young's motion for a mistrial. The circuit court also did not abuse its discretion in not replacing B.M. with an alternate juror. See Lam Luong v. State, 199 So. 3d 173, 212 (Ala. Crim. App. 2015) (quoting Rocker v. State, 443 So. 2d 1316, 1320 (Ala. Crim. App. 1983)) (" 'Whether it is necessary for an alternate

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juror to replace a principal juror ... is a decision within the sound discretion of the trial judge.' "). We find no error, much less plain error, in the circuit court's denial of Young's motion for a mistrial or in its failure to replace B.M. with an alternate juror.

XVI. Jury's Advisory Sentencing Verdict

Young says that the State and the circuit court misled the jury about the importance of the jury's role in sentencing because, he says, the State and the circuit court "repeatedly misinformed" the jury that its sentencing verdict was "advisory." (Young's brief, pp. 96.)

Young objected neither to the State's comments during closing arguments nor to the circuit court's penalty-phase instructions that he now challenges. Thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The Colbert County grand jury indicted Young for capital murder in August 2016. When the circuit court sentenced Young to death, a jury's sentencing verdict recommending death for a defendant charged in 2016 with capital murder was just that—a recommendation. The circuit court was not bound to follow the jury's recommendation. State v. Billups, 223 So. 3d 954, 965 (Ala. Crim. App. 2016) ("A jury's advisory verdict recommending a sentence of death pursuant to § 13A-5-46(e)(3) is not binding on the trial court."). Although that law has now changed,[11] when Young was sentenced the State's comments and the circuit court's instructions about the jury's role in sentencing were correct statements of the law. And in reviewing death-penalty sentences under the law that was in effect when Young was indicted for this offense, "this Court has consistently held that informing a jury that its penalty-phase role is 'advisory' or to provide a 'recommendation' is not error." Phillips, 287 So. 3d at 1225. We find no error, much less plain error, in these comments by the State and the circuit court. Young is entitled to no relief on this claim.

XVII. Aggravating Circumstance that Young Knowingly Created a Great Risk of Death to Many People

***51** Young argues that the State did not prove beyond a reasonable doubt the aggravating circumstance that Young knowingly created a great risk of death to many people.[12] He says the shooting happened late at night when most people were inside their apartments, and there was no evidence, he says, that anyone other than Freeman and Blythe were present or in the line of fire. He also points to the physical evidence at the scene which showed that, of the 15 shots fired, 13 struck Freeman's Ford Mustang and 2 hit an unoccupied vehicle nearby. Based on these facts, Young says, the circuit court should not have allowed the jury to consider § 13A-5-49(3) as an aggravating circumstance, and he says the circuit court erred in considering and weighing that circumstance in sentencing Young to death.

The jury unanimously found the existence of the statutory aggravating circumstance that Young "knowingly created a great risk of death to many persons." See § 13A-5-49(3), Ala. Code 1975. The evidence at trial showed that after Young parked the white pickup truck at the Spring Creek Apartments and got out of the vehicle with Capote, one or both of them shot at Freeman at least 15 times. Det. Holland testified that after the shooting there were shell casings scattered "all over the parking lot." The surveillance footage shows several vehicles in the parking lot near the shooting. Less than a minute after the shooting a man can be seen on the surveillance footage opening an apartment door and peering outside. Lt. Wear, who arrived at the Spring Creek Apartments less than five minutes after the shooting, testified that when he arrived there were "[a] lot of people" at the scene, and two or three witnesses told him that a white truck had left the scene. Captain Setliff testified that when he arrived at the scene less than 30 minutes after the shooting there were people "[a]ll the way around the parking lot." He estimated there were "at least 75 to 100" people in the parking lot. Sumerel, the apartment's property manager, testified that there are 60 units in the Spring Creek Apartments with a total capacity of 224 people. She testified that in March 2016 at least 55 of the 60 units were full, mostly of women and children.

This evidence, showing that there were people in the residential area where the shooting happened, was enough for the circuit court to submit to the jury the question whether Young "knowingly created a great risk of death to many persons," and for the jury to find—and the circuit court to consider and weigh—that aggravating circumstance. See White v. State, 587 So. 2d 1218, 1232 (Ala. Crim. App. 1990) (holding that the evidence supported a finding that the defendant knowingly created a great risk of death to many persons when the evidence showed that the defendant "indiscriminately" fired a shotgun into an occupied dwelling containing three people and in the front yard of a residential

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neighborhood where several others were present). See also Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997) (holding that the evidence supported submitting the question whether the defendant knowingly created a great risk of death to many persons when the evidence showed that the defendant shot two people in a residential neighborhood); Spencer v. State, 201 So. 3d 573, 615-16 (Ala. Crim. App. 2015) (holding that the circuit court properly submitted to the jury whether the defendant knowingly created a great risk of death to many persons because the evidence showed that "[t]he shootings took place in an apartment complex in a residential neighborhood" and "[r]esidents were in the apartment complex at the time").

***52** Finally, the fact that Young's jury found the existence of this aggravating factor but Capote's jury did not is not, as Young says, "antithetical to the rule of law." See generally Parker v. State, 516 So. 2d 859, 862 (Ala. Crim. App. 1987) ("It is not the law, nor is it reasonable, that a jury should be bound in their determination of guilt or innocence by verdicts of other juries in trials of co-defendants. Different juries reviewing the same set of facts may reasonably reach opposite results .... Further, the same person telling of the same event is not likely to use identical language each time he testifies. Still further, the jury may have understood the testimony a little differently."); see also Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) (holding that the trial court's rejection of the "pecuniary gain" aggravating circumstance in the defendant's first trial did not foreclose consideration of that aggravating circumstance at a second sentencing hearing); see also Com v. Gibbs, 403 Pa. Super. 27, 588 A.2d 13 (1991) (holding that the State could seek to prove at the retrial of the defendant an aggravating circumstance found not to exist by the sentencing jury at the defendant's first trial).

We find no error, much less plain error, in the jury's finding of, and the circuit court's consideration and weighing of, the aggravating circumstance that Young knowingly created a great risk of death to many people. Young is due no relief on this claim.

XVIII. Nonstatutory Mitigating Evidence

Young argues that the circuit court failed to find and consider uncontested nonstatutory mitigating evidence in the penalty phase. He contends that the circuit court failed to consider that Young may have had brain damage from fetal exposure to drugs, that he displayed a significant capacity to love and forgive, and that he would not pose a risk to others if he was sentenced to life imprisonment without parole. Although Young admits that the circuit court's sentencing order addresses the other mitigating evidence he offered, he says the circuit court should have found that evidence to be mitigating.

To begin, it is not the law of this state that the circuit court must consider and find the existence of all uncontested mitigating evidence offered in the penalty phase. Phillips, 287 So. 3d at 1160-61. Although a circuit court must consider all evidence a defendant offers as mitigation, it is within the circuit court's discretion to find that evidence to be mitigating. Id.

Next, although Young argues that the circuit court failed to consider Young's lack of formal education, his extreme poverty, his having been bullied as a child, the facts that his caretakers were drug addicts and that he was often left at home alone to fend for himself, the fact that his mother did not visit him when he was in state facilities as a child, and the fact that his only male role model as a child was a convicted sex offender, the circuit court considered Young's family background and found it to be mitigating, calling the evidence about Young's family and upbringing "very sad and compelling." (C. 359-60.)

The circuit court's sentencing order shows that the circuit court also considered the evidence Young offered that he suffered from a substance-abuse disorder and that he had conditional diagnoses of disruptive disorder, conduct disorder, and possible attention-deficit/hyperactivity disorder (ADHD), but that it did not find that evidence to be mitigating. We find no error, much less plain error, in this determination. See, e.g., Floyd v. State, 289 So. 3d 337, 348-51 (Ala. Crim. App. 2017) (finding no error in circuit court's determination that defendant's uncontested substance abuse was not mitigating); White v. State, 179 So. 3d 170, 236-37 (Ala. Crim. App. 2013) (finding no error in circuit court's determination that defendant's ADHD and intermittent explosive disorder was not mitigating).

Finally, although the circuit court's sentencing order does not mention Young's fetal exposure to drugs, his risk-level if sentenced to life in prison without the possibility of parole, or his capacity to love and forgive, the circuit court need not list or discuss every nonstatutory mitigating factor offered by a defendant. Phillips, 287 So. 3d at 1170.

***53** “ ‘In Ex parte Lewis, 24 So. 3d 540 (Ala. 2009), the Alabama Supreme Court stated:

> “ ‘ “In Clark v. State, 896 So. 2d 584 (Ala. Crim. App. 2000), the Court of Criminal Appeals conducted a proper review of a trial court's failure to find that proffered evidence constituted a mitigating circumstance, stating, in pertinent part:
>
> > “ ‘ “ ‘The sentencing order shows that the trial court considered all of the mitigating evidence offered by Clark. The trial court did not limit or restrict Clark in any way as to the evidence he presented or the argument she made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A–5–51, Ala. Code 1975, and it determined that none of those circumstances existed under the evidence presented. Although the trial court did not list and make findings as to the existence or nonexistence of each non statutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings indicates only that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider this evidence. Clearly, the trial court considered Clark's proffered evidence of mitigation but concluded that the evidence did not rise to the level of a mitigating circumstance. The trial court's findings in this regard are supported by the record.
> >
> > “ ‘ “ ‘Because it is clear from a review of the entire record that the trial court understood its duty to consider all the mitigating evidence presented by Clark, that the trial court did in fact consider all such evidence, and that the trial court's findings are supported by the evidence, we find no error, plain or otherwise, in the trial court's findings regarding the statutory and nonstatutory mitigating circumstances.’
>
> “ ‘ “896 So. 2d at 652-53 (emphasis added).”

“ ‘Ex parte Lewis, 24 So. 3d at 545. As Lewis and Clark establish, a trial court is not required to make an itemized list of the evidence it finds does not rise to the level of nonstatutory mitigating circumstances.’ ”

Phillips, 287 So. 3d at 1170 (quoting Stanley v. State, 143 So. 3d 230, 328-29 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court)). As Justice Kavanaugh recently explained in Jones v. Mississippi, ––– U.S. ––––, 141 S. Ct. 1307, 209 L.Ed. 2d 390 (2021):

> “In a series of capital cases over the past 45 years, the Court has required the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty. See Woodson [v. North Carolina], 428 U.S. [280] at 303-305 [96 S.Ct. 2978, 49 L.Ed.2d 944] [(1976)] (plurality opinion); Lockett [v. Ohio], 438 U.S. [586] at 597-609 [98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] (plurality opinion); Eddings [v. Oklahoma], 455 U.S. [104] at 113-115 [102 S.Ct. 869, 71 L.Ed.2d 1] [(1982)]; see also Tennard v. Dretke, 542 U.S. 274, 285 [124 S.Ct. 2562, 159 L.Ed.2d 384] (2004); Penry v. Lynaugh, 492 U.S. 302, 318-319 [109 S.Ct. 2934, 106 L.Ed.2d 256] (1989).
>
> > “But the Court has never required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances. The reason is evident: Under the discretionary death penalty sentencing procedure required by cases such as Woodson, Lockett, and Eddings, the sentencer will necessarily consider relevant mitigating circumstances. A sentencing explanation is not necessary to ensure that the sentencer in death penalty cases considers the relevant mitigating circumstances.”

***54** Jones, ––– U.S. ––––, 141 S. Ct. at 1320.

The record shows that the circuit court knew and understood its duty to consider all mitigating evidence Young presented. When it instructed the jury in the penalty phase, the circuit court explained that “[a] mitigating circumstance is any circumstance that indicates, or tends to indicate, that the Defendant should be sentenced to life imprisonment without parole.” (R. 1565.) The circuit court told the jury that Young was allowed to offer “any evidence in mitigation” and that Young did not bear the burden of proving the mitigating circumstance but had only to “simply present the evidence.” (R. 1569.) The circuit court instructed the jury that mitigating evidence “shall also include any aspect of [Young's] character or background, any circumstances

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surrounding the offense, and any other relevant mitigating circumstances or evidence that [Young] offers as support for a sentence of life imprisonment without parole instead of death." The circuit court knew, then, its duty to consider all of Young's mitigating evidence, including his fetal exposure to drugs, his risk-level if sentenced to life imprisonment without the possibility of parole, and his capacity to love and forgive. That the circuit court did not list those mitigating circumstances in its sentencing order does not mean the circuit court did not consider those factors, but only that it did not find those factors to be mitigating. Phillips, 287 So. 3d at 1169-70.

The circuit court committed no error, much less plain error, in its consideration of Young's nonstatutory mitigation evidence. Young is due no relief on this claim.

XIX. Alabama's Capital-Sentencing Scheme

Young argues that Alabama's capital-sentencing scheme that was in place when the circuit court sentenced him to death (see Part XVI above) is unconstitutional under Hurst v. Florida, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). He says (1) that Hurst requires the jury to make the necessary findings about the existence of statutory aggravating circumstances and whether the aggravating circumstances outweigh the mitigating circumstances, but here, he says, the circuit court based Young's death sentence on its own findings instead of those of the jury; (2) that the circuit court's imposition of the death penalty after the jury's 11-1 recommendation for the death penalty is unconstitutional because the jury's verdict was a nonunanimous sentencing verdict; and (3) that the indictment did not contain the elements necessary to subject Young to the death penalty because the indictment did not "allege the aggravators." (Young's brief, pp. 94-95.)

The record shows that the jury unanimously found the existence of two statutory aggravating circumstances: that Young had been previously convicted of a felony involving the use or threat of violence to the person, see § 13A-5-49(2), Ala. Code 1975; and that Young knowingly created a great risk of death to many persons, see § 13A-5-49(3), Ala. Code 1975. (C. 342.) The jury's sentencing verdict recommending death is sufficient evidence that it found that the aggravating circumstances outweighed the mitigating circumstances. See Billups, 223 So. 3d at 967-68. As for Young's other arguments, we have repeatedly rejected those claims.

> ***55** "Lane argues that Hurst and Ring prohibit a capital-sentencing scheme that provides that the jury's sentencing verdict is a recommendation and that allows the jury to recommend a death sentence on a less-than-unanimous verdict. These claims have been repeatedly rejected by the Alabama Supreme Court. See, e.g., Ex parte Bohannon, 222 So. 3d 525, 534 (Ala. 2016) ('[T]he making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst.'); Capote v. State, [Ms. CR-17-0963, January 10, 2020] ––– So. 3d –––, –––, 2020 WL 113875 (Ala. Crim. App. 2020) (noting that the Alabama Supreme Court 'has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring'); and Brownfield v. State, 44 So. 3d 1, 39 (Ala. Crim. App. 2007) (rejecting claim that jury's sentencing recommendation must be unanimous and noting that 'both this Court and the Alabama Supreme Court have upheld death sentences imposed after the jury made a less-than-unanimous recommendation that the defendant be sentenced to death')."

Lane v. State, [Ms. CR-15-1087, May 29, 2020] ––– So. 3d –––, –––, 2020 WL 2830015 (Ala. Crim. App. 2020). And "aggravating circumstances do not have to be alleged in the indictment." Stallworth, 868 So. 2d at 1186. We find no error, much less plain error, in the circuit court's sentencing Young to death under Alabama's capital-sentencing scheme.

XX. This Court's Review of Record for Error and Propriety of Death Sentence

In every case in which the death penalty is imposed, this Court must review the case for any error involving the defendant's conviction, and we must review the propriety of the death sentence. § 13A-5-53(a), Ala. Code 1975.

The jury convicted Young of one count of capital murder for the shooting death of Freeman while Freeman sat in his car, see § 13A-5-40(a)(17), Ala. Code 1975, and for one count of first-degree assault, see § 13A-6-20(a)(1), Ala. Code 1975, for shooting Blythe. The jury recommended by a vote of 11-1 that the circuit court sentence Young to death for his capital-murder conviction and to 20 years' imprisonment for his assault conviction. The circuit court followed the jury's recommendation and sentenced Young to death.

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The record does not show that Young's sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975. In sentencing Young to death, the circuit court commended the attorneys for not seeking to influence the jury's emotions with passion, prejudice, or other arbitrary factors, and it found that the jury's recommendation that Young be sentenced to death was void of passion, prejudice, or other arbitrary factors. (R. 1606.) Nothing in the record shows otherwise.

Under § 13A-5-53(b)(2), Ala. Code 1975, the death sentence was the proper sentence for Young. The jury unanimously found two aggravating circumstances: (1) that Young had been previously convicted of a felony involving the use or threat of violence to the person, see § 13A-5-49(2), Ala. Code 1975; and (2) that Young knowingly created a great risk of death to many persons, see § 13A-5-49(3), Ala. Code 1975. Following that finding the circuit court considered the statutory mitigating circumstances and found that none existed. (R. 1612-13.) The circuit court considered Bates's guilty plea to conspiracy to commit murder and the State's recommended sentence of 20 years in prison but found that it was not a mitigating factor. It also considered the jury's 11-1 recommendation of death. The circuit court considered the nonstatutory mitigating evidence that Young presented, including Young's family background. (R. 1614.) The circuit court's sentencing order shows that the circuit court properly weighed the aggravating circumstances and the mitigating circumstances and correctly sentenced Young to death. The record supports the circuit court's findings.

***56** In independently weighing the aggravating and mitigating circumstances, see § 13A-5-53(b)(2), we conclude that Young's sentence of death is the appropriate sentence.

We now consider whether Young's death sentence is excessive or disproportionate to the penalty imposed in similar cases. § 13A-5-53(b)(3), Ala. Code 1975. Young argues that, because he did not "instigate the offense" and was not, he says, the person who shot Freeman, he had only a "minor role" in Freeman's death. Young says that his death sentence is disproportionate to other sentences for similar crimes, and he points to Hubbard's sentence to life imprisonment without parole following Hubbard's conviction for capital murder for his involvement in Freeman's murder. (Young's brief, pp. 97-98.)

The jury convicted Young of murder made capital because Freeman was killed while he sat in his car. The State relied on a theory of accomplice liability to argue that, even if it could not show that Young fired the shot that killed Freeman, Young was an accomplice to Freeman's murder. Imposition of the death penalty for a nontriggerman following a conviction for capital murder based on accomplice liability is not an anomaly. See, e.g., Doster v. State, 72 So. 3d 57810, 97-98 (Ala. Crim. App. 2010); Sneed v. State, 1 So. 3d 104, 130-31 (Ala. Crim. App. 2007); Haney v. State, 603 So. 2d 368, 386-87 (Ala. Crim. App. 1991). The fact that one of Young's codefendants did not receive the death penalty "does not render the trial court's decision to sentence [the defendant] to death 'excessive and disproportionate.' " Lewis, 24 So. 3d at 531.[13] Thus, Young's death sentence is neither excessive nor disproportionate.

Rule 45A, Ala. R. App. P., requires this Court to search the entire record for any error that may have adversely affected Young's substantial rights. We have done so and have found none.

Young's convictions for capital murder and first-degree assault and the related sentences are affirmed.

AFFIRMED.

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

All Citations

--- So.3d ----, 2021 WL 3464152

Footnotes

1 Witnesses during trial referred to the gang both as the "Almighty Imperial Gangsters" and the "Imperial Almighty Gangsters."

2 Facebook Messenger is an instant-messaging tool that allows users to send messages in real time to other Facebook users. The messages are sent and received on users' mobile devices.

3 This Court has viewed the surveillance video.

4 The jury also convicted Young of discharging a firearm into an occupied vehicle, see § 13A-11-61, Ala. Code 1975, but, on the State's motion, the circuit court vacated that conviction.

5 In Petersen, we said that plain-error review should not apply to Batson claims raised for the first time on appeal.

> "[W]e note that a plurality of the Alabama Supreme Court has recently stated that Alabama appellate courts should no longer include such claims in plain-error review under circumstances like those present in Petersen's case. See Ex parte Phillips, [287 So. 3d 1179, 1243] (Ala. 2018) (Stuart, C.J., concurring specially, joined by Main and Wise, JJ.) ('Simply, (1) plain error should not be available for a Batson [or J.E.B.] issue raised for the first time on appeal because the failure to timely make a Batson inquiry is not an error of the trial court; (2) the defendant should be required to timely request a Batson hearing to determine whether there was purposeful discrimination because, under the plain-error rule, the circumstances giving rise to purposeful discrimination must be so obvious that failure to notice them seriously affects the integrity of the judicial proceeding ....'); see also id. at [1255] (Sellers, J., concurring specially) ('I also concur with Justice Stuart's discussion of the Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), issue, which aligns our jurisprudence with what I believe is persuasive jurisprudence from federal courts. A Batson claim is a unique type of constitutional claim that, for the reasons set out in Justice Stuart's opinion, should be deemed waived even in capital cases if not timely made. Batson claims are forfeited if there is no objection to the composition of the jury before the commencement of a trial.')."

Petersen, supra.

6 "Rule 404(b), Ala. R. Evid., is identical to Rule 404(b), Fed. R. Evid. '[C]ases interpreting the Federal Rules of Evidence will constitute authority for construction of the Alabama Rules of Evidence.' Advisory Committee's Notes, Rule 102, Ala. R. Evid." Ex parte Billups, 86 So. 3d 1079, 1085 (Ala. 2010).

7 Young also argues that the evidence of his gang affiliation prejudiced him because, on the evening before the penalty-phase began, a juror contacted the sheriff's office to report "suspicious activity" in his neighborhood that he thought might relate to Young's trial. We address that issue in Part XV of this opinion. For the reasons discussed in Part XV, that claim has no merit.

8 The seventh Voudrie factor—"a showing that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement"—is inapplicable here.

9 The standard for materiality is the same for failure-to-disclose claims under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and for failure-tocorrect claims under Giglio, 405 U.S. 150, 92 S.Ct. 763. See, e.g., Williams v. State, 710 So. 2d 1276, 1296-97 (Ala. Crim. App. 1996).

10 A codefendant testifying under a plea agreement will often jeopardize the agreement if he or she changes his or her testimony at trial, but that does not ensure that a witness will not change his or her testimony at trial to paint himself or herself in a better light or for some other reason. See, e.g., United States v. Tran, 568 F.3d 1156, 1162 (9th Cir. 2009); United States v. Gonzalez-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987).

11 " 'The jury's sentencing verdict is no longer a recommendation. Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury.' DeBlase, 294 So. 3d at 173 n.1. This amendment applies to any

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'defendant who is charged with capital murder after April 11, 2017....' § 13A-5-47.1, Ala. Code 1975." Belcher v. State, [Ms. CR-18-0740, Dec. 16, 2020] ––– So. 3d ––––, –––– n.17, 2020 WL 7382535 (Ala. 2020).

12 The jury also unanimously found the existence of the statutory aggravating circumstance that Young had been previously convicted of a felony involving the use or threat of violence to the person, see § 13A-5-49(2), Ala. Code 1975.

13 Another of Young's codefendants, Capote, was also sentenced to death. We upheld Capote's conviction and sentence to death on direct appeal, and the Alabama Supreme Court denied certiorari review. The United States Supreme Court denied certiorari review of Capote's claims. Capote v. Alabama, ––– U.S. ––––, ––– S.Ct. ––––, 209 L.Ed.2d 577 (2021).

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Exhibit 2

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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Gerri Robinson
Assistant Clerk

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(334) 229-0751
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February 4, 2022

CR-17-0595 **Death Penalty**

Benjamin Young v. State of Alabama (Appeal from Colbert Circuit Court: CC16-339)

NOTICE

You are hereby notified that on February 4, 2022, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Jacqueline M. Hatcher, Circuit Judge
Hon. Mark R. Eady, Circuit Clerk
Angela Setzer, Attorney
Christopher R. Reader, Asst. Attorney General
Morgan B. Shelton, Asst. Attorney General

Exhibit 3

IN THE SUPREME COURT OF ALABAMA

October 21, 2022

1210291

Ex parte Benjamin Young PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Benjamin Young v. State of Alabama) (Colbert Circuit Court: CC-16-339; Criminal Appeals: CR-17-0595).

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

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

I, 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