# EXHIBIT 1

246 So.3d 1086
Court of Criminal Appeals of Alabama.

Nicholas Noelani D. SMITH
v.
STATE of Alabama

CR–13–0055
|
March 17, 2017
|
Rehearing Denied May 26, 2017
|
Certiorari Denied August 25, 2017
|
Alabama Supreme Court 1160781

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Calhoun County, No. CC–11–494, Brian P. Howell, J., of capital murder and was sentenced to death. Defendant appealed.

**Holdings:** The Court of Criminal Appeals held that:

[1] improper victim-impact testimony admitted during guilt phase was not plain error;

[2] evidence did not support jury instruction on voluntary intoxication or lesser-included offense of manslaughter;

[3] defendant was not entitled to suppression of confession;

[4] admission of evidence of prior bad acts at guilt phase was not reversible error;

[5] police investigators' testimony regarding statements of codefendants was not hearsay;

[6] crime-scene and autopsy photographs were not unduly prejudicial;

[7] defendant's two capital murder convictions did not violate double jeopardy; but

[8] trial court's allowing improper victim-impact testimony and argument at penalty phase was plain error.

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

Windom, P.J., concurred in part, dissented in part, and filed opinion.

Burke, J., concurred in part and dissented as to Part IX.

West Headnotes (33)

[1] **Criminal Law** Necessity of Objections in General

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.

[2] **Sentencing and Punishment** Harmless and reversible error

Although capital defendant's failure to object at trial would not bar review of any issue on appeal following imposition of death penalty, it would weigh against any claim of prejudice. Ala. R. App. P. 45A.

[3] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Witnesses' description of murder victim's kindness, conscientiousness, dedication as a teacher to his students and work, and responsible nature was not improper victim-impact testimony at guilt phase of capital murder prosecution, but was relevant evidence, properly admitted to explain the early stages of murder investigation; testimony explained why victim's friends and family were insistent that his disappearance be investigated in the face of hesitance on the part of law enforcement.

1 Case that cites this headnote

  

[4] **Criminal Law** Immaterial or incompetent evidence in general

The admission of victim-impact evidence during the guilt phase is not a ground for reversal if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.

1 Case that cites this headnote

[5] **Criminal Law** Particular Evidence

Improper victim-impact testimony admitted during guilt phase of capital murder prosecution was not plain error; defendant did not deny involvement in victim's murder, evidence of guilt was overwhelming, including defendant's admission that he had cut victim's throat, defense counsel did not deny that victim's death was tragic, and defense strategy was directed toward the penalty phase and avoiding imposition of the death penalty.

2 Cases that cite this headnote

[6] **Criminal Law** Intoxication

**Criminal Law** Existence of specific intent essential to offense

Voluntary drunkenness neither excuses nor palliates crime; however, where the defendant is charged with a crime requiring specific intent and there is evidence of intoxication, drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. Ala. Code § 13A-3-2.

[7] **Homicide** Manslaughter

When the crime charged is intentional murder and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter. Ala. Code § 13A-3-2.

2 Cases that cite this headnote

[8] **Criminal Law** Reasonable or rational basis

**Criminal Law** Some, any, slight, or weak evidence

A defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position; this is true regardless of however weak, insufficient, or doubtful in credibility the evidence concerning that offense.

1 Case that cites this headnote

[9] **Criminal Law** Evidence Justifying or Requiring Instructions

**Criminal Law** Effect of defendant's objection or defense inconsistent with lesser charge

When there is evidence that would support a charge on a lesser included offense, the defendant is entitled to the charge even where the defendant denies the charge, and where the evidence supporting the defendant's position is offered by the State.

1 Case that cites this headnote

[10] **Criminal Law** Intoxication

A charge on intoxication should be given if there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt on the element of intent.

[11] **Homicide** Evidence justifying or requiring instruction on other degree or offense in general

**Homicide** Intoxication

It is not merely the consumption of intoxicating liquors or drugs that justifies an instruction on intoxication and the relevant lesser-included offenses in a murder prosecution; instead, there must be evidence of a disturbance of mental or physical capacities resulting from the

  

introduction of any substance into the body. Ala. Code § 13A-3-2(e)(1).

2 Cases that cite this headnote

[12] **Homicide** Intoxication

The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill; stated differently, the level of intoxication needed to negate intent must rise to the level of statutory insanity.

3 Cases that cite this headnote

[13] **Homicide** Evidence justifying or requiring instruction on other degree or offense in general

**Homicide** Intoxication

Murder defendant was not entitled to jury instruction on voluntary intoxication or lesser-included offense of manslaughter, notwithstanding evidence that defendant had consumed alcohol and drugs on the day of victim's murder; although defendant and his companions purchased and consumed an 18–pack of beer, defendant's statement consistently minimized his consumption of alcohol, indicating that his companions drank "the majority of the beer," and defendant's ability to recall the crime in detail was inconsistent with a level of intoxication rising to the point of insanity. Ala. Code § 13A-3-2.

3 Cases that cite this headnote

[14] **Criminal Law** Particular cases

Officer did not improperly undermine *Miranda* warnings by telling defendant that speaking with law enforcement would be helpful to him; defendant was not misled regarding the importance of an attorney, defendant had extensive experience with criminal-justice system and gave no indication that he did not understand his rights, defendant was not poorly educated, officer made no promise to defendant that a confession would be harmless, defendant was provided food and water during his statement, and defendant had been previously informed of his *Miranda* rights since his arrest.

[15] **Criminal Law** Promise of leniency in general

Defendant's confession to murder was not rendered involuntary by officer's alleged offer to seek mercy or leniency for defendant; officer offered only to inform district attorney's office of defendant's cooperation, drug problem and request for mercy.

[16] **Criminal Law** Showing bad character or criminal propensity in general

On the trial of a person for the alleged commission of a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative function of such evidence is to show his bad character, inclination or propensity to commit the type of crime for which he is being tried; this is a general exclusionary rule which prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question. Ala. R. Evid. 404(b).

[17] **Criminal Law** Purposes for Admitting Evidence of Other Misconduct

The general exclusionary rule for evidence of other bad acts serves to protect the defendant's right to a fair trial; the jury's determination of guilt or innocence should be based on evidence relevant to the crime charged. Ala. R. Evid. 404(b).

[18] **Criminal Law** Gang membership

**Criminal Law** Pictures of accused or others; identification evidence

Photographs of defendant's tattoos, including one tattoo on defendant's right forearm that

  

depicted the word "gangsta," were relevant to identify defendant as the individual who appeared in security camera footage, and were not improper other bad acts evidence in murder prosecution. Ala. R. Evid. 404(b).

1 Case that cites this headnote

[19] **Criminal Law** Innocence

**Criminal Law** Evidence of other offenses and misconduct

Murder defendant was not prejudiced by admission into evidence of video recordings showing defendant entering police interrogation room while wearing leg irons and handcuffs attached to a waistband; jury's view of defendant's restraints was brief, jury likely believed that restraints were simply standard procedure, and defendant's presumption of innocence was likely dispelled during opening statement conceding his role in victim's murder.

1 Case that cites this headnote

[20] **Criminal Law** Other offenses and character of accused

Admission of evidence indicating that defendant previously had been incarcerated and that he was serving a term of probation at the time victim was murdered was not plain error in guilt phase of capital murder prosecution; references were brief and were not belabored by the State, evidence of guilt was overwhelming, and defense strategy was directed toward the penalty phase and avoiding imposition of the death penalty.

[21] **Criminal Law** Other offenses and character of accused

Admission of evidence of 9mm ammunition and a receipt for a 9mm pistol that was unconnected to victim's murder was not plain error in capital murder prosecution; evidence at issue was simply mentioned to the jury as part of an inventory of items collected during a search, and evidence of guilt was overwhelming.

[22] **Criminal Law** Out-of-court statements and hearsay in general

The Sixth Amendment prohibits the admission of testimonial hearsay statements offered for the truth of the matter asserted, and interrogations by law enforcement officers fall squarely within that class. U.S. Const. Amend. 6.

3 Cases that cite this headnote

[23] **Criminal Law** Grounds of Admissibility in General

**Criminal Law** Confessions or declarations of codefendants

When offered for the truth of the matter asserted, a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible against the accused; it does not fall within any recognized exception to the hearsay rule and it violates the accused's confrontation rights. U.S. Const. Amend. 6; Ala. R. Evid. 801(c), 802.

1 Case that cites this headnote

[24] **Criminal Law** Grounds of Admissibility in General

Police investigators' testimony regarding statements by codefendants during custodial interrogation, specifically regarding the names of other people involved in victim's murder, was not hearsay in capital murder prosecution; the testimony was not offered to prove the truth of the matter asserted, but rather to explain the course of police investigation. Ala. R. Evid. 801(c).

2 Cases that cite this headnote

[25] **Criminal Law** Depiction of places; scene of crime

**Criminal Law** Depiction of Injuries or Dead Bodies

Probative value of crime-scene and autopsy photographs was not substantially outweighed by danger of unfair prejudice in capital murder prosecution; photographs and related testimony

  

were relevant, and although unpleasant, the photographs and testimony were not unduly gruesome.

2 Cases that cite this headnote

[26] **Criminal Law** Photographs and Other Pictures

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; photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome.

[27] **Criminal Law** Photographs arousing passion or prejudice; gruesomeness

Photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.

[28] **Criminal Law** Depiction of Injuries or Dead Bodies

Autopsy 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.

1 Case that cites this headnote

[29] **Criminal Law** Depiction of places; scene of crime

**Criminal Law** Purpose of admission

Crime-scene and autopsy photographs and the related testimony were relevant and admissible in capital murder prosecution to establish the injuries victim sustained.

1 Case that cites this headnote

[30] **Criminal Law** Photographs arousing passion or prejudice; gruesomeness

Photographs and testimony relating to postmortem animal and insect activity on murder victim's decomposing body were relevant and admissible in capital murder prosecution to distinguish between the injuries defendant caused and the injuries that he did not.

1 Case that cites this headnote

[31] **Double Jeopardy** What constitute lesser offenses

**Indictments and Charging Instruments** Multiple offenses

Offense of committing murder during a first-degree robbery was not a lesser included offense of committing a murder during a first-degree kidnapping, and thus defendant's convictions on both counts of capital murder did not violate double jeopardy; the intended purpose of the abduction, robbery, was not required to be completed on the capital murder/kidnapping count, while the felony of robbery was required to be completed in the capital murder/robbery count. U.S. Const. Amend. 5; Ala. Code §§ 13A-5-40(a)(1,2), 13A-6-43(a).

[32] **Criminal Law** Sufficiency of instructions as to proof beyond reasonable doubt

Reasonable doubt instruction indicating that not all doubts are sufficient to require acquittal was not improper in capital murder prosecution; instruction could not be reasonably interpreted to lower the State's burden of proof.

[33] **Sentencing and Punishment** Victim impact

**Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

Trial court presiding in penalty phase of capital murder prosecution committed plain error in allowing the State to elicit and argue the opinions of victim's family regarding their

  

characterization of defendant, his crime, and the appropriateness of the death penalty; trial court did not instruct the jury on how to consider such victim-impact testimony, State encouraged jurors to think about victim's family's desire for the death penalty when considering its recommended punishment, and defendant presented strong mitigation evidence, such that it was not clear that the improper victim-impact testimony had no influence on the jury's recommendation of death sentence.

1 Case that cites this headnote

***1090 Appeal from Calhoun Circuit Court (CC–11–494), Brian P. Howell, J.**

**Attorneys and Law Firms**

Randall S. Susskind, Alicia A. D'Addario, and Kathryn E . Miller, Montgomery; and George Allen Meighen, Jr., Jacksonville, for appellant.

Luther Strange, atty. gen., and Kristi Deason Hagood, deputy atty. gen., and James C. Crenshaw and John Selden, asst. attys. gen., for appellee.

**Opinion**

PER CURIAM.

Nicholas Noelani D. Smith appeals his capital-murder convictions and sentences of death. Smith was convicted of murder made capital for intentionally killing Kevin Thompson during a kidnapping, see § 13A–5–40(a)(1), Ala. Code 1975, and for intentionally killing Kevin Thompson during a robbery, see § 13A–5–40(a)(2), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death. The Calhoun Circuit Court accepted the jury's recommendation and sentenced Smith to death.

Facts

On the night of April 20, 2011, Kevin Thompson was speaking on the telephone to Chris Wilkerson, his friend, when he heard someone at his front door. Thompson opened the door. Wilkerson heard Thompson say, " 'I didn't know you was bringing all these people with you.' " (R. 1157.) Then, the telephone call was disconnected. Wilkerson dialed Thompson's telephone number and Thompson answered. The telephone call was brief, with Thompson telling Wilkerson that he would call him right back. A few hours passed without Thompson returning the telephone call. Worried, Wilkerson telephoned Thompson repeatedly around midnight, but Thompson did not answer.

Thompson's absence from his position as a teacher at Wellborn Elementary School was noticed early the following morning. Wendy Burns, a fellow teacher, became concerned when she saw that Thompson's classroom was dark as students were arriving. As Assistant Principal Jeanna Chandler testified, it was "just so out of character for Mr. Thompson not to be there, not to call." (R. 631.) Multiple individuals attempted to contact Thompson by telephone to no avail. Deputy Brendan Harris of the Calhoun County Sheriff's Office, the school's resource officer, was dispatched to an address to conduct a welfare check. The address, though, led Deputy Harris to the residence of Thompson's mother and sister, Frances and Rena Curry. Deputy Harris was able to make contact with Rena Curry and expressed to her the concern the staff at the elementary school had regarding Thompson's absence.

Rena Curry telephoned her mother and then drove to Thompson's apartment. Two things stood out to Rena Curry upon her arrival. First, Thompson's vehicle, a silver Honda Civic, was not in the parking lot. Second, and more peculiar, was a single shoe, which she believed belonged to Thompson, lying in the parking lot. The front door to Thompson's apartment was unlocked, and Rena Curry did not notice anything amiss inside.

Frances Curry telephoned the Jacksonville Police Department and asked that an ***1091** officer meet her at Thompson's apartment. An officer responded to Thompson's apartment and briefly investigated before leaving. In Frances Curry's opinion, law enforcement seemed unconcerned about Thompson's whereabouts.

Undeterred, Frances Curry continued her search for her son. Frances Curry telephoned Thompson's bank and learned that several withdrawals had been made from Thompson's account the previous night at various financial institutions. Frances Curry again contacted the Jacksonville Police Department to inform them of the account activity.

  

Officers obtained surveillance footage from the area credit unions and banks where withdrawals had been made that corresponded with the times of activity on Thompson's account. Video from the Jacksonville branch of the Farmers & Merchants Bank depicted a silver vehicle arriving at 10:19 p.m. A man wearing a baseball cap bearing a script "A" made multiple withdrawals from the bank's automatic-teller machine ("ATM"). In an apparent attempt to obscure his identity, the man held his left arm across his face; the attempt, though, made visible a distinct tattoo on the man's left hand. The video also appeared to depict a passenger in the front seat of the vehicle aiming a rifle toward the backseat of the vehicle. Photographs from the Jacksonville branch of the Ft. McClellan Credit Union depicted what appeared to be the same man make a withdrawal from the ATM at 10:26 p.m. Photographs from the Anniston branch of the Ft. McClellan Credit Union depicted a silver vehicle and a dark-colored sport-utility vehicle arrive at 12:13 a.m. on April 21. There, a man walked up to the ATM and made a withdrawal. Officers presented photographs generated from the surveillance footage to Frances Curry and Rena Curry to see if an identification could be made. Rena Curry was able to identify Tyrone Thompson. Rena Curry explained that Tyrone Thompson was a family acquaintance whom Thompson had known since the two were children. Thompson had recently made contact with Tyrone Thompson; after Tyrone Thompson's latest release from incarceration, Tyrone Thompson's mother had asked Thompson to provide guidance to her son.

Investigator Clint Parris of the Anniston Police Department located Tyrone Thompson, and he agreed to be interviewed. During an interview with Investigator Parris and Investigator Joseph Martin of the Jacksonville Police Department, Tyrone Thompson identified Smith as being involved with Thompson's disappearance.

Meanwhile, Cynthia Warf, who had been visiting her husband, Andrew Jones, at the hospital, returned to her residence to find multiple individuals in her husband's garage. Warf saw Jessica Foster, her daughter; Whitney Ledlow; Smith; and two other males, who were later identified as Blake Hamilton and Teddy Lee Smith, in the garage with a silver vehicle. Unbeknownst to Warf and Jones, the silver vehicle had been in the garage since early that morning. Smith had telephoned Ledlow at 3:00 a.m. that morning to ask Foster if he could park his friend's vehicle at Warf's house and Foster had agreed. When Smith met with Ledlow and Foster later that morning, Smith told them he needed someone to "chop" the vehicle. At Ledlow's request, Hamilton and Teddy Lee Smith agreed to take the vehicle apart for scrap.

Warf, assuming that the vehicle had been stolen, told the individuals to remove the vehicle from the garage and threatened to telephone law enforcement. As she walked back to her residence, the individuals fled; Ledlow, Foster, and Smith went in search of a trailer to remove the vehicle, which by this point was not operable. Warf ***1092** telephoned her husband about the silver vehicle in his garage and he telephoned law enforcement. When officers arrived at the garage, it was apparent that the silver vehicle was in the process of being dismantled. Assistant Chief Bill Wineman of the Jacksonville Police Department testified that the silver vehicle was registered to Thompson.

Ledlow, Foster, and Smith planned to return to Warf's house, tow the vehicle away, and burn it. That plan was abandoned, though, because they saw a number of police vehicles as they neared Warf's house. Smith told Ledlow and Foster that they "were deeper in it than [they] thought," so they drove away. (R. 849.) Ledlow and Foster decided to travel to Carrollton, Georgia, to give themselves time to consider their next step. Ledlow stated that she did not know what Smith had done to Thompson and described Smith's behavior during the trip to Carrollton as "perfectly fine." (R. 853.) In Carrollton, Ledlow rented a motel room for the night. There, Smith admitted to Ledlow and Foster that he had been involved in a murder with Tyrone Thompson and Jovon Dwayne Gaston. Smith detailed for them the crime and generally described the location of Thompson's body. Ledlow testified that she was initially incredulous because Smith was so calm. The three then went to a Walmart retail store to purchase clothes and toiletries. Ledlow playfully struck Smith in the arm while at the store, and Smith responded, "[D]on't you know you don't punch a killer." (R. 857.)

The following day, Warf contacted Investigator Parris and informed him that Smith's black Ford Explorer sport-utility vehicle was parked in a parking lot near her house. She also told Investigator Parris that Foster, Ledlow, and Smith were likely traveling in a GMC Yukon sport-utility vehicle that belonged to her son. Meanwhile, Smith was making arrangements to enter a drug-rehabilitation program in Florida. Ledlow, Foster, and Smith left the motel in Carrollton and traveled to the airport in Atlanta. On the way, Ledlow saw a number of police vehicles following them. When she parked near the taxi terminal at the airport, officers swarmed their vehicle and took the three into custody.

  

A search of the Yukon yielded a camera, which Foster admitted was taken from Thompson's vehicle. Officers also found a black baseball cap with a script "A," which appeared to match the hat that was captured by the ATM surveillance footage. Ledlow also admitted to taking a ring from Thompson's vehicle, which she pawned for $200. Ledlow and Foster provided lengthy statements to officers following their arrest, and Ledlow consented to a search of her property. Officers recovered several items of evidentiary value on Ledlow's property. From an exterior trash can, officers recovered: a pair of Nike Air Jordan basketball shoes, which had dried mud and vegetation stuck on the soles and several reddish-brown stains on the uppers; cardboard packaging for duct tape; a nearly expended roll of gray duct tape; and a t-shirt wrapped around a serrated steak knife, which appeared to bear a mixture of dried blood and mud on the blade and handle. Inside Ledlow's house, officers recovered: a pair of COOGI brand denim jeans, which bore dried mud; and a pair of boxer shorts, which bore red stains. Subsequent DNA testing established that the bloodstains found on the jeans, knife, and basketball shoes were consistent with Thompson's DNA. Smith was listed as a potential contributor for DNA found inside the basketball shoes, and DNA on the inside of the jeans was consistent with Smith's DNA.

***1093** Officers obtained information that Thompson's body had been disposed of down an embankment near a set of guardrails on U.S. Highway 278. Based on that description, Investigator Seth Rochester of the Cherokee County Sheriff's Office was able to locate Thompson's body in the early morning hours of April 23. Thompson's wrists were bound with duct tape, and a subsequent analysis of the tape revealed that the tape was consistent with the tape found in Ledlow's trash can.

The injuries suffered by Thompson were substantial. Dr. Emily Ward, a state medical examiner with the Alabama Department of Forensic Sciences, performed the autopsy on Thompson's body. Dr. Ward noted a cut across the front of the neck, which was deep enough to compromise the windpipe and left jugular vein. This injury caused blood to aspirate into Thompson's lungs. Thompson suffered four haphazard stab wounds to the left side of his chest—two pierced the heart and all four pierced the left lung. Dr. Ward stated that the orientation of the wounds suggested that Thompson's assailants were standing while Thompson was in a submissive position on the ground. Thompson sustained a contusion to the entire left side of his face, consistent with punching or kicking. In Dr. Ward's opinion, this injury was caused by a "tremendous" amount of force. (R. 753.) Thompson bore superficial abrasions on his extremities, which could have been caused by falling; bruises to his wrists, which were consistent with his wrists being bound by duct tape; and defensive wounds to his palms. Dr. Ward stated that, although the stab wounds and injury to the throat were severally fatal, Thompson's death was not quick because Thompson did not sustain arterial bleeding. In Dr. Ward's opinion, Thompson would have been aware of his injuries and would have experienced significant pain.

Shane Golden, a forensic scientist with the Alabama Department of Forensic Sciences, processed Smith's Explorer. Golden applied a luminol reagent, which reacts with iron in the hemoglobin of blood, to the interior of Smith's vehicle. The reagent revealed three areas of luminescence in the vehicle—the back of the rear seat, the rear driver's side door panel, and the armrest of the front driver's side door. Subsequent DNA testing of blood swabs taken from Smith's Explorer revealed that the samples were consistent with Thompson's DNA.

Golden noted a smell of cleaners in the Explorer. That odor was explained by John Robinson, who owned a detail shop. Robinson identified Smith as having come to his detail shop on the morning of April 21. Smith's visit was memorable to Robinson because Smith wanted only the interior of his vehicle cleaned and because Smith emphasized that he wanted the cleaning to be thorough. Robinson testified that he saw red spatter on the carpet in the back seat and around the console.

Smith was extradited to Alabama on April 27. Upon his return he waived his Miranda[1] rights and provided a statement to Investigator Parris and Investigator Martin, which gave the officers a horrifying glimpse into Thompson's final hours. Smith's statement included several versions, each more incriminating than the last. Smith stated that Tyrone Thompson had telephoned him around 10:00 to 10:30 p.m. on April 20 to "go get some money" and drink some beer. (State's Exhibit 60.) Tyrone Thompson picked up Gaston and Smith, and then the three went to Thompson's apartment. Tyrone Thompson, Gaston, and Smith walked up to the front door. Thompson met the men at the front door and Tyrone Thompson took a telephone from Thompson and smashed it. ***1094** Thompson was then taken to his vehicle. Gaston retrieved his rifle and all four men entered Thompson's vehicle.[2] Smith drove Thompson's vehicle to a bank where

  

he withdrew funds from Thompson's account. The men returned to Thompson's apartment, at which point Thompson was forced into the trunk of his vehicle. After picking up Smith's Explorer, the men took both vehicles to Tyrone Thompson's house, where they drank beer and discussed who would kill Thompson. Following an unsuccessful search for a chop shop in Coldwater, Alabama, the men traveled to Warf's house and then to a branch of the Ft. McClellan Credit Union. Thompson's debit card did not work at the credit union, so the men returned to Warf's house. After a brief trip to a Shell gasoline station to purchase duct tape, the men returned to Warf's house and used the tape to bind Thompson. Thompson, though, had broken some of his bindings and was screaming in the trunk, so he was moved to Smith's Explorer. The men traveled to Piedmont, Alabama, and found an isolated stretch of Highway 278. Thompson was escorted off the road. Tyrone Thompson handed Smith a knife and held Thompson's hands while Smith slit Thompson's throat. Thompson, who was crying and pleading for help at this point, was held down as a vehicle passed. Then Gaston took the knife from Smith and stabbed Thompson several times in the chest. Thompson was held down as another vehicle passed, and then was held up and again stabbed by Gaston. After pushing Thompson to the bottom of the embankment, Smith, Tyrone Thompson, and Gaston left the scene.

In his statement, Smith attempted to marginalize his role by suggesting that he unwittingly had become involved in Thompson's murder and that he had been a reluctant participant. This suggestion, however, was rebutted by other evidence offered at trial. For instance, Smith told Investigator Parris and Investigator Martin that he had become involved in the murder of Thompson when Tyrone Thompson telephoned him around 10:00 p.m. on the evening of April 20. However, Ledlow and Foster testified that Smith had telephoned them around 6:00 p.m. to 7:00 p.m. on April 20 to ask about the maximum amount that could be withdrawn from an ATM. In addition, it was Smith who was captured on security footage driving Thompson's vehicle, making withdrawals from Thompson's account, and purchasing the duct tape to bind Thompson, and it was Smith who arranged for Thompson's vehicle to be dismantled. Ledlow and Foster further testified to Smith's calmness following the murder and to Smith's apparent embracing of his role as a "killer." (R. 857.)

Standard of Review

This Court has explained:

> " 'When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' Ex parte Perkins, 646 So.2d 46, 47 (Ala. 1994); '[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence,' Bradley v. State, 494 So.2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So.2d 772 (Ala. 1986); and we make ' "all the reasonable inferences and credibility choices supportive of the decision of the trial court." ' Kennedy v. State, 640 So.2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley, 494 So.2d at 761."

State v. Hargett, 935 So.2d 1200, 1203 (Ala. Crim. App. 2005). A circuit court's ***1095** "ruling on a question of law[, however,] carries no presumption of correctness, and this Court's review is de novo." Ex parte Graham, 702 So.2d 1215, 1221 (Ala. 1997). Thus, "[w]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment." Ex parte Jackson, 886 So.2d 155, 159 (Ala. 2004).

Further, because Smith has been sentenced to death, this Court must search the record for plain error. Rule 45A, Ala. R. App. P., states:

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

(Emphasis added.)

**[1]** **[2]** In Ex parte Brown, 11 So.3d 933 (Ala. 2008), the Alabama Supreme Court explained:

> " ' "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations.' " Ex parte Bryant, 951 So.2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So.2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:

  

> " 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [(1936) ]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S. at 163, n.14.'
>
> "See also Ex parte Hodges, 856 So.2d 936, 947–48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

11 So.3d at 938. "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." Hall v. State, 820 So.2d 113, 121 (Ala. Crim. App. 1999). Although Smith's failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So.2d 343 (Ala. Crim. App. 1991).

I.

Smith argues that the circuit court erred in allowing the State to introduce victim-impact evidence during the guilt phase. Smith argues that the evidence lacked probative value and that it was intended only to inflame the jury. Smith cites testimony given by multiple witnesses as being improper victim-impact evidence. Thompson's mother, Frances Curry, was invited during direct examination to tell the jury about her son and his childhood. Frances Curry spoke of Thompson's love and their strong family and shared anecdotes about Thompson's saving money to buy her flowers and ***1096** Thompson's transferring funds into her bank account when she needed financial assistance. Frances Curry also explained to the jury that Thompson had a strong work ethic, was well mannered, and was passionate about his work as a teacher. Thompson's coworkers described their maternal relationship with the young teacher and the close bond they all shared as educators. Chris Wilkerson, Thompson's friend, disclosed Thompson's intention to pursue his doctorate and Thompson's plans to take leave from work to attend Wilkerson's graduation. Rena Curry, Thompson's sister, told the jury that Thompson was murdered while she was in the midst of taking her final examinations and that as a result of his murder she did not receive passing grades. Smith also argues that the State increased the prejudice by improperly relying on victim-impact evidence in its opening and closing arguments during the guilt phase.

This issue was raised at trial outside the hearing of the jury. To the extent Smith objected on the grounds now raised on appeal, Smith has no adverse ruling for this Court to review because the objection was sustained.[3] Therefore, this issue will be reviewed for plain error only. See Guthrie v. State, 616 So.2d 914, 929 (Ala. Crim. App. 1993) (citing Maul v. State, 531 So.2d 35, 36 (Ala. Crim. App. 1987)).

> "The Alabama Supreme Court has held that victim-impact statements
>
> " 'are admissible during the guilt phase of a criminal trial only if the statements are relevant to a material issue of the guilt phase. Testimony that has no probative value on any material question of fact or inquiry is inadmissible. See C. Gamble, McElroy's Alabama Evidence § 21.01 (4th ed. 1991), citing, inter alia, Fincher v. State, 58 Ala. 215 (1877) (a fact that is incapable of affording any reasonable inference in reference to a material fact or inquiry involved in the issue cannot be given in evidence). If the statements are not material and relevant, they are not admissible.'
>
> "Ex parte Crymes, 630 So.2d 125, 126 (Ala. 1993).
>
> " '[T]he introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error if the record indicates that it probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of the defendant based on the admissible evidence and the applicable law.' Ex parte Rieber, 663 So.2d 999, 1006 (Ala. 1995). The Court in Ex parte Rieber also said:

> " 'However, in Ex parte Crymes, 630 So.2d 125 (Ala. 1993), a plurality of this Court held in a capital murder case in which the defendant was sentenced to life imprisonment without parole that a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.'
>
> "663 So.2d at 1005."

Woodward v. State, 123 So.3d 989, 1021 (Ala. Crim. App. 2011) (emphasis in original).

**[3]** Some of the evidence cited by Smith as being inadmissible in the guilt ***1097** phase was properly admitted by the circuit court. Specifically, the witnesses' descriptions of Thompson's kindness, conscientiousness, dedication to his students and work, and responsible nature was properly admitted to show why his friends and family were insistent that Thompson's disappearance be investigated in the face of hesitance on the part of law enforcement. It was Thompson's family that generated the first lead in the case by contacting Thompson's bank, and this evidence explained why Thompson's family took that action. In other words, the evidence explained to the jury the early stages of the investigation. The evidence was also relevant to explain Thompson's involvement with Tyrone Thompson. Specifically, the evidence helped to explain why Tyrone Thompson's mother had asked Thompson to provide guidance to her son.

**[4]** Indeed, a portion of the evidence cited by Smith constituted improper victim-impact evidence. Namely, isolated portions of Wilkerson's and Rena Curry's testimony were not relevant to a material issue at trial. However, as the Alabama Supreme Court made in clear in Ex parte Rieber, 663 So.2d 999 (Ala. 1995), the admission of victim-impact evidence during the guilt phase is not a ground for reversal "if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant." Ex parte Rieber, 663 So.2d at 1005. See Scheuing v. State, 161 So.3d 245, 264–65 (Ala. Crim. App. 2013).

**[5]** Here, the admission of the victim-impact evidence was undoubtedly harmless. Smith did not deny his involvement in Thompson's murder, which is unsurprising given the State's overwhelming evidence. In addition to ample physical evidence, the State was armed with a recorded statement by Smith that included his admission that he had cut Thompson's throat. Instead, Smith's strategy, which was revealed during guilt-phase opening statements, was directed toward the penalty phase and avoiding the imposition of the death penalty:

> "There's a lot of things I'd like to tell you about Nick Smith, but I can't. That's not what this portion of the case is about.
>
> "....
>
> "In this case, I wish I could stand up here with a straight face and say Nicholas Smith had nothing to do with any of this. I wish I could tell you he wasn't with Tyrone Thompson and Jovon Gaston. ... It would be a lie, and it wouldn't be true, and I couldn't do it."

(R. 574–76.) Nor did Smith deny that Thompson's death was tragic. This aspect of Thompson's murder was acknowledged by Smith during guilt-phase opening statements: "This case is a tragedy. It's a tragedy because Kevin Thompson lost his life, and it's tragic because a family lost a loved one. There's no other way to describe it. There's no excuses, no justification, and absolutely no reason." (R. 574.)

When viewed in the light of the evidence of Smith's guilt and the defense strategy, this Court concludes that the victim-impact evidence " 'did not affect the outcome of the trial, that it did not prejudice [Smith's] substantial rights, and that it did not rise to the level of plain error.' " Scheuing, 161 So.3d at 265 (quoting Woodward v. State, 123 So.3d 989, 1021 (Ala. Crim. App. 2011)). As such, this issue does not entitle Smith to any relief.

II.

**[6]** **[7]** **[8]** **[9]** **[10]** Smith argues that the circuit court erred in failing to charge the jury on the lesser-included offenses of felony murder and manslaughter and in failing

  

to charge the jury on intoxication. Smith asserts ***1098** that there was "substantial, uncontested evidence" of his intoxication during the abduction, robbery, and murder of Thompson. (Smith's brief, at 26.) Consequently, he argues, he was entitled to the aforementioned jury instructions. Because Smith neither requested that the jury be instructed on lesser-included offenses or intoxication nor objected to the circuit court's jury instructions, this issue will be reviewed for plain error only.

> "Voluntary intoxication and manslaughter as a lesser included offense of intentional murder are interrelated and often overlapping subjects. 'Voluntary drunkenness neither excuses nor palliates crime.' Ray v. State, 257 Ala. 418, 421, 59 So.2d 582, 584 (1952). 'However, drunkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime.' Commentary to Ala. Code 1975, § 13A–3–2. Where the defendant is charged with a crime requiring specific intent and there is evidence of intoxication, ' "drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent." ' Silvey v. State, 485 So.2d 790, 792 (Ala. Cr. App. 1986) (quoting Chatham v. State, 92 Ala. 47, 48, 9 So. 607 (1891)). Consequently, when the crime charged is intentional murder ' "and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter." ' McNeill v. State, 496 So.2d 108, 109 (Ala. Cr. App. 1986) (quoting Gray v. State, 482 So.2d 1318, 1319 (Ala. Cr. App. 1985)).
>
> "It is clear that '[a] defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position.' Ex parte Oliver, 518 So.2d 705, 706 (Ala. 1987). This is true regardless of 'however weak, insufficient, or doubtful in credibility' the evidence concerning that offense. Chavers v. State, 361 So.2d 1106, 1107 (Ala. 1978). When there is evidence that would support a charge on a lesser included offense, the defendant is entitled to the charge 'even where "the defendant denies the charge," Ex parte Pruitt, 457 So.2d 456, 457 (Ala. 1984), and [where] "the evidence supporting the defendant's position is offered by the State." Silvey v. State, 485 So.2d 790, 792 (Ala. Cr. App. 1986). Accord, Ex parte Stork, 475 So.2d 623, 624 (Ala. 1985).' Starks v. State, 594 So.2d 187, 195 (Ala. Cr. App. 1991).
>
> "A charge on intoxication should be given if ' "there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt" ' on the element of intent. Coon v. State, 494 So.2d 184, 187 (Ala. Cr. App. 1986) (quoting Government of the Virgin Islands v. Carmona, 422 F.2d 95, 99 n.6 (3d Cir. 1970)). See also People v. Perry, 61 N.Y.2d 849, 473 N.Y.S.2d 966, 966–67, 462 N.E.2d 143, 143–44 (App. 1984) ('[a] charge on intoxication should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis')."

Fletcher v. State, 621 So.2d 1010, 1019 (Ala. Crim. App. 1993) (footnote omitted).

Smith points to testimony from Ledlow that on April 20, the day of Thompson's kidnapping and murder, she, Foster, and Smith woke up around 10:00 a.m. or 11:00 a.m. and purchased beer. Later that day, they purchased and consumed morphine pills. Ledlow also testified that Smith telephoned her at 3:00 a.m. on April 21 and stated that "he had gotten drunk" and asked if he could park his friend's vehicle at the house of Foster's mother. (R. 834–35.) During his statement to law ***1099** enforcement, Smith stated that he was already "high" when Tyrone Thompson telephoned him on the evening of April 20 and that he had been "riding around smoking and drinking all day." (State's Exhibit 60.) Smith also told law enforcement that following the abduction of Thompson, but before Thompson was murdered, he, Tyrone Thompson and Gaston purchased and consumed an 18–pack of beer.

Smith asserts that the timing of the consumption of the 18 beers also justified an instruction on felony murder. Smith argues that the jury could have reasonably believed that Smith became intoxicated after kidnapping and robbing Thompson but before Thompson's murder, thereby negating the specific intent to murder.

**[11]** **[12]** It is not merely, though, the consumption of intoxicating liquors or drugs that justifies an instruction on intoxication and the relevant lesser-included offenses. Pilley v. State, 930 So.2d 550, 562 (Ala. Crim. App. 2005). Instead, there must be evidence of "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." § 13A–3–2(e)(1), Ala. Code 1975. " 'The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form

  

the intent to kill.' " McGowan v. State, 990 So.2d 931, 985 (Ala. Crim. App. 2003) (quoting Ex parte Bankhead, 585 So.2d 112, 121 (Ala. 1991)). Stated differently, "the level of intoxication needed to negate intent must rise 'to the level of statutory insanity.' " Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (quoting Ware v. State, 584 So.2d 939, 946 (Ala. Crim. App. 1991)).

**[13]** Indeed, there was evidence presented indicating that Smith had consumed alcohol and drugs on the day of Thompson's murder. Nevertheless, the evidence was rarely specific as to the quantities consumed. See Windsor v. State, 683 So.2d 1027, 1037 (Ala. Crim. App. 1994) ("Although, there was evidence that the appellant had been drinking beer on the day of the robbery-murder, there was no evidence concerning the quantity of beer he consumed that day at the time of the murder. Evidence that someone was drinking an alcoholic beverage is not evidence that that person was intoxicated."). Further, much of the evidence cited by Smith involved the consumption of alcohol and drugs hours before the kidnapping and murder of Thompson occurred. When the evidence was specific, it cut against a level of intoxication that would merit instructions to the jury on intoxication and lesser-included offenses. For example, Smith told law-enforcement officers during his statement that he, Tyrone Thompson, and Gaston purchased and consumed an 18–pack of beer after kidnapping Thompson. Smith added, though, that he drank "maybe, like, two beers," and that Tyrone Thompson and Gaston drank "the majority of the beer." (State's Exhibit 60, 17:30.) Throughout his statement Smith consistently minimized his consumption of alcohol on the evening Thompson was murdered. See State's Exhibit 60, 26:40, 44:40, 62:45.

Smith relies heavily on his statement to law-enforcement officers as evidence of his intoxication, but it is the statement that gives the clearest indication that there was no reasonable theory from the evidence that Smith was intoxicated. Specifically, Smith's ability to recall in detail the kidnapping, robbery, and murder of Thompson is wholly inconsistent with being intoxicated to the point of insanity. See Ex parte McWhorter, 781 So.2d 330, 342 (Ala. 2000) ("The evidence offered by McWhorter as to his alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events occurring at the crime scene."). So too were Smith's attempt to hide his involvement ***1100** in the crime by having Thompson's vehicle "chopped" and fleeing Alabama. See Davis v. State, 740 So.2d 1115, 1121 (Ala. Crim. App. 1998) (recognizing that a defendant's attempt to hide his involvement in the crime is inconsistent with a level of intoxication sufficient to make the defendant unable to appreciate the criminality of his conduct).

The circuit court did not commit error, plain or otherwise, in failing to instruct the jury on intoxication or lesser-included offenses. As such, this issue does not entitle Smith to any relief.

III.

Smith argues that the circuit court erred in admitting his statement to law-enforcement officers because, he says, his Miranda waiver was not voluntary, knowing, or intelligent. Specifically, Smith argues a) that his statement was involuntary because Investigator Parris undermined his Miranda warnings; and b) that his statement was involuntary because Investigator Parris promised to seek mercy on his behalf. Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only.

In Wilkerson v. State, 70 So.3d 442 (Ala. Crim. App. 2011), this Court stated:

> " 'It has long been the law that a confession is prima facie involuntary and inadmissible, and that before a confession may be admitted into evidence, the burden is upon the State to establish voluntariness and a Miranda predicate.' Waldrop v. State, 859 So.2d 1138, 1155 (Ala. Crim. App. 2000), aff'd, 859 So.2d 1181 (Ala. 2002). To establish a proper Miranda predicate, the State must prove that 'the accused was informed of his Miranda rights before he made the statement' and that 'the accused voluntarily and knowingly waived his Miranda rights before making his statement.' Jones v. State, 987 So.2d 1156, 1164 (Ala. Crim. App. 2006). 'Whether a waiver of Miranda rights is voluntarily, knowingly, and intelligently made depends on the facts of each case, considering the totality of the circumstances surrounding the interrogation, including the characteristics of the accused, the conditions of the interrogation, and the conduct of the law-enforcement officials in conducting the interrogation.' Foldi v. State, 861 So.2d 414, 421 (Ala. Crim. App. 2002). 'To prove [the] voluntariness [of the confession], the State must

> establish that the defendant "made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him." ' Eggers v. State, 914 So.2d 883, 898–99 (Ala. Crim. App. 2004) (quoting Lewis v. State, 535 So.2d 228, 235 (Ala. Crim. App. 1988)). As with the Miranda predicate, 'when determining whether a confession is voluntary, a court must consider the totality of the circumstances surrounding the confession.' Maxwell v. State, 828 So.2d 347, 354 (Ala. Crim. App. 2000). The State must prove the Miranda predicate and voluntariness of the confession only by a preponderance of the evidence. See, e.g., McLeod v. State, 718 So.2d 727 (Ala. 1998) (State must prove voluntariness of confession by a preponderance of the evidence), and Smith v. State, 795 So.2d 788, 808 (Ala. Crim. App. 2000) (State must prove Miranda predicate by a preponderance of the evidence)."

70 So.3d at 460.

A.

**[14]** Smith argues that his statement was involuntary because, he says, Investigator Parris undermined his Miranda warnings. Before Smith's statement, Investigator Parris confirmed that Smith had ***1101** been informed of his Miranda rights by officers in Georgia. (State's Exhibit 60, 8:30.) Investigator Parris then repeated to Smith his Miranda rights. Specifically, Investigator Parris informed Smith:

> "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> "This is your waiver of rights. It says, 'I have read this statement of my rights and I understand what my rights are. I am willing to answer questions at this time. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'
>
> "Okay? If you want to tell me your side of it, sign right here by the 'X' and we'll get this thing rolling."

(State's Exhibit 60, 9:05–9:40.) Smith acknowledged his waiver of his Miranda rights by signing the waiver-of-rights form. (C. 868.)

Smith concedes that he was informed of his Miranda rights, but he asserts that the subsequent waiver was rendered involuntary by the statements of Investigator Parris that immediately preceded his informing Smith of his Miranda rights:

> Parris: "Got jammed up a little bit, huh?"
>
> Smith: "Yeah."
>
> Parris: "That's the reason we want to talk to you today, see if we can get some of this stuff straightened out, and get you back on the right road and get your life straightened back out. What you think about that?"
>
> Smith: "That's exactly what I need."
>
> Parris: "Listen to me Nick, okay. [Shackle waistband removed at Smith's request] We—we need to get this straight, okay? I think, Nick, man, I think this is the first time you and me has ever talked, is that right? I've never met you before, and I've been doing this for a long time, okay? Everything you've got right now is not [inaudible]. I'm going to be honest with you, that's what I'm going to do. I ain't here to beat you around the bush. I'm not here to treat you bad in any way whatsoever, okay? I'm here to shoot you straight. Let's get to the truth of all this, and let's put it behind us, okay? Let's get you on the right track but, uh, let's go with it from there, okay? You already spoke with Investigator Hartman and Investigator Thompson back in Georgia. Remember doing [inaudible] with them?"
>
> Smith: [Nods affirmatively]

  

> Parris: "We're going to kind of go over some things that y'all discussed with them too, alright? They read you your rights over there, is that correct?"
>
> Smith: "Yeah."
>
> Parris: "Okay, I'm going—I'm going to go over them again to make sure you understand them, okay? If you have any questions you just stop and ask me and I'll explain it to you. Once we get this out of the way I will let you tell your side of it and we'll get this taken care of and get you back on the right track."

(State's Exhibit 60, 7:20–9:05.)

Relying on Hart v. Attorney Gen. of the State of Fla., 323 F.3d 884 (11th Cir. 2003), and United States v. Beale, 921 F.2d 1412 (11th Cir. 1991), Smith contends that Investigator Parris suggested that, contrary to the Miranda warning that his statements could be used against him, Smith's ***1102** speaking with law enforcement would be helpful to him.

Hart and Beale are distinguishable from the instant case. In Hart, the suspect, having been informed of his Miranda rights, asked an officer he trusted about the pros and cons of having an attorney, which indicated that the suspect did not fully understand his rights. The officer answered that "the disadvantage of having a lawyer present was that the lawyer would tell [the suspect] not to answer incriminating questions"; in other words, the officer turned an advantage into a disadvantage. Hart, 323 F.3d at 894. The officer also told the suspect that "honesty wouldn't hurt him." Id. In Beale, officers told a Cuban-born suspect who had achieved only a fifth-grade education and who was unable to speak English or read Spanish that "signing the waiver form would not hurt him." Beale, 921 F.2d at 1435. The suspect gave unrebutted testimony that he signed the waiver form only after being "told that it would not hurt him." Id. In both cases, the United States Court of Appeals for the Eleventh Circuit held that the suspects' Miranda waivers had been rendered involuntary by the statements of the interrogating officers.

Unlike the suspect in Hart, Smith was not misled regarding the importance of an attorney, and he gave no indication that he did not understand his rights. Smith's understanding his rights is unsurprising given Smith's extensive experience with the criminal-justice system—at the time of his statement, Smith had already faced arrest multiple times and had been found guilty of two felonies. (C. 340–41.) See Jackson v. State, 562 So.2d 1373, 1381 (Ala. Crim. App. 1990) (noting that experience with the criminal-justice system is a factor to be considered in determining the voluntariness of a statement). Unlike the suspect in Beale, Smith was neither poorly educated nor had difficulty with the English language —there was evidence before the circuit court indicating that Smith had obtained his high-school-equivalency diploma and that he was enrolled in a local community college at the time his statement was given. (C. 342.) See Lewis v. State, 535 So.2d 228, 235–36 (Ala. Crim. App. 1988) (noting that intellect and education are factors to be considered in determining the voluntariness of a statement). Further distinguishing the instant case from Hart and Beale is the fact that there was no direct promise to Smith that a confession would be harmless.

Smith was provided food and water during his statement; Smith had received his high-school-equivalency diploma and was enrolled in a community college at the time he made the statement; Smith had had extensive experience with the criminal-justice system; and Investigator Parris's informing Smith of his Miranda rights was at least the second time Smith had been informed of his rights since he was arrested in Georgia. Based on the totality of the circumstances, the State carried its burden of showing that Smith made a voluntary waiver of his Miranda rights. See Hosch v. State, 155 So.3d 1048, 1093 (Ala. Crim. App. 2013). As such, the circuit court did not commit error, plain or otherwise, in admitting Smith's statement, and this issue does not entitle him to relief.

B.

**[15]** Smith argues that his statement was involuntary because, he says, Investigator Parris promised to seek mercy on his behalf. Smith's statement to Investigator Parris included several versions of the events culminating in Thompson's murder. Smith contends that his full confession was coaxed by Investigator Parris's promising to seek mercy on his behalf:

  

Parris: "Right now is your time to tell your side of it and not leave anything ***1103** out. Because right now, you know [Tyrone Thompson and Gaston] are going to testify against you. That's what both of them is going to want to do because they know how this is going to go down. They know this was a sloppy, sloppy crime that happened. We've got probably some of our best evidence people around on it. I'm getting—I'm getting phone calls every other hour with just more and more and more evidence, not counting what Tyrone [Thompson] and [Gaston] is telling me, so I need to hear your side of it and have this happen from your perspective. I know you were there when all this went down. I know you were there. At least give me the opportunity, Nick, of telling this DA's office over here, hey, Nick screwed up: Nick got a drug problem. You—you admit that right? Now when you're on drugs, don't that make you do things you normally wouldn't do? Would you agree? Whether it be alcohol, whether it be marijuana, any other drugs you use or just them two?"

Smith: "Um, I popped a couple pills. I don't even pop pills."

Parris: "You know, pills, it make you do shit you normally wouldn't do. Right now, Nick, right now is the time to make things right, to tell your side of it, and I think some things you told me were the truth but you're leaving out part of it."

Smith: "Can I please get something to drink?"

Parris: "Yeah."

[Investigator Martin leaves to retrieve a bottle of water for Smith]

Parris: "We've got to hear your side of it."

Smith: "I was just so scared."

Parris: "Listen to me, listen to me, listen to me. How—how do you want this to go down? Do you want me standing up there going, hey this is what Nick told me. You watch TV don't you? You know how this is about to go. Or do you want us sitting up there and saying, hey Nick screwed up? He made a bad decision. He's got this problem. He was honest with us. He laid it out there for us. He's asking for mercy. Which way you want it to roll?"

Smith: "That's exactly what I'm looking for."

Parris: "Well, you need to tell me the truth, the whole truth from beginning to the end. So start me back over and you walk me through everything."

(State's Exhibit 60, 22:55–25:00). After Investigator Parris confronted Smith with evidence that Smith had told others that he had cut Thompson, the following occurred:

Parris: "I got to get to the whole truth, here, okay? If you cut [Thompson], but didn't kill him I need to know. Because that's what, right now, is what everything is telling me, but you. We've got to be 100 percent truthful here, Nick. We've got to be. That's the only thing that's going to help you. Did you cut him and it didn't kill him? Where did you cut him at?"

Smith: "His throat."

(State's Exhibit 60, 53:15–53:45.) Smith argues that the preceding excerpt is evidence that Investigator Parris conditioned his previous promise to seek mercy on Smith's further inculpating himself.

As the record makes clear, Investigator Parris did not offer to seek mercy or leniency for Smith. On the contrary, Investigator Parris offered only to inform the district attorney's office of Smith's cooperation, Smith's drug problem and that Smith was asking for mercy. Based on the totality of the circumstances, Smith's statement was not rendered involuntary by ***1104** Investigator Parris's offer. As such, the circuit court did not commit error, plain or otherwise, in admitting Smith's statement, and this issue does not entitle him to relief.

IV.

Smith argues that the circuit court erred in failing to exclude improper character evidence and evidence of prior bad acts. Specifically, Smith argues that it was error for the circuit court to admit: a) photographs of him that depicted his tattoos; b) photographs of him that depicted him in restraints; c) evidence indicating that he previously had been incarcerated and that he was serving a term of probation at the time Thompson was murdered; and d) evidence in the form of 9mm ammunition and a receipt for a 9mm pistol that was unconnected to Thompson's murder. Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only.

  

**[16]** **[17]** Rule 404(b), Ala. R. Evid., provides, in relevant part, that "[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." Rule 404(b) acts as a general exclusionary rule:

> " ' "On the trial of a person for the alleged commission of a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative function of such evidence is to show his bad character, inclination or propensity to commit the type of crime for which he is being tried. This is a general exclusionary rule which prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question." ' Pope v. State, 365 So.2d 369, 371 (Ala. Cr. App. 1978), quoting C. Gamble, McElroy's Alabama Evidence § 69.01. (3d ed. 1977). ' "This exclusionary rule is simply an application of the character rule which forbids the State to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors." ' Ex parte Arthur, 472 So.2d 665, 668 (Ala. 1985), quoting McElroy's supra, § 69.01(1). Thus, the exclusionary rule serves to protect the defendant's right to a fair trial. ' "The jury's determination of guilt or innocence should be based on evidence relevant to the crime charged." ' Ex parte Cofer, 440 So.2d 1121, 1123 (Ala. 1983); Terrell v. State, 397 So.2d 232, 234 (Ala. Cr. App. 1981), cert. denied, 397 So.2d 235 (Ala. 1981); United States v. Turquitt, 557 F.2d 464, 468 (5th Cir. 1977)."

Robinson v. State, 528 So.2d 343, 347 (Ala. Crim. App. 1986).

A.

**[18]** Smith argues that it was error for the circuit court to admit photographs of him that showed his tattoos. State's Exhibit 94 consisted of 28 photographs of Smith that were taken following Smith's statement to Investigator Parris. Smith describes the photographs as follows:

> "In one close up photo, along the lower side of his right forearm, is the word "gangsta" in large, graffiti-like block letters. (C. 657.) The shoulders and upper area of both arms are covered with gang-related tattoos, signifying membership in the Gangster Disciples. These include two hands forming a gang sign with the letters 'BOS' for 'Brothers of the Struggle,' a trident with the letters G, D, and N for 'Gangster Disciple Nation,' and a small six-pointed star (C. 653–54), as well as a large six-pointed ***1105** star with the letters 'GD' (C. 658). Additional Gangster Disciples tattoos included 'MMM'—an abbreviation for "money, macks, murder"—and '74,' which represents G and D—the seventh and fourth letters of the alphabet. (C. 653–54.)
>
> "Two photos depicted a tattoo taking up the entirety of Mr. Smith's right lower leg, where the words 'looks like $ $ $' appear in large block letters on a backdrop of stacks of 100 dollar bills and several large diamonds. (C. 648.) On Mr. Smith's right hand is the word 'dirty,' and on his left is the word 'south.' (C. 647, 653–55.) In nearly all the photos, Mr. Smith is shirtless and wearing baggy jeans that fit low on his waist such that several inches of his underwear are visible. (See, e.g., C. 659–60.)"

(Smith's brief, at 43–44.)

One of the photographs does indeed depict the word "gangsta" on Smith's right forearm. This Court would have to rely on Smith's brief on appeal for the interpretation of the remaining tattoos because the record contains no explanation of their meaning or significance—which is to say that there is no evidence the jury was aware or made aware of the meaning or significance of tattoos such as "MMM" or "74."

Even if this Court were to hold that the photographs constituted evidence of other crimes, wrongs, or acts, the photographs would not violate Rule 404(b) because they were admissible for another purpose. "The general rule excluding character evidence does not bar evidence of specific acts when that evidence is offered for some purpose other than the impermissible one of proving action in conformity with a particular character." Committee Comments to Rule 404(b), Ala. R. Evid. Specifically, the photographs were relevant to identify Smith as the individual who appeared in the security footage obtained from various ATMs and stores.

The circuit court did not commit error, plain or otherwise, in admitting State's Exhibit 94. As such, this issue does not entitle Smith to any relief.

  

B.

Smith argues that the circuit court erred in admitting photographs of him that depicted him in restraints. Smith also appeared in restraints for portions of his recorded statement to law enforcement. Smith argues that the images undermined the presumption of innocence he should have been accorded and the formal dignity of the circuit court. See Deck v. Missouri, 544 U.S. 622, 630–31, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), abrogated on other grounds by Fry v. Pliler, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007).

"This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial." Shaw v. State, 207 So.3d 79, 97 (Ala. Crim. App. 2014). In Doster v. State, 72 So.3d 50 (Ala. Crim. App. 2010), this Court stated:

> " ' "The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice." United States v. Dawson, 563 F.2d 149, 151 (5th Cir. 1977) (citations omitted). A government entity violates that presumption of innocence when it "compels an accused to stand trial before a jury while dressed in identifiable prison garb." United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985).'

"United States v. Pryor, 483 F.3d 309, 311 (5th Cir. 2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is ***1106** in handcuffs. As the United States Court of Appeals for the Eleventh Circuit stated in Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989):

> " 'Gates' other challenge to the videotaped confession is that its admission was unduly prejudicial because it portrayed him in handcuffs. As we have noted previously, although the handcuffs are not always visible, it is evident throughout the fifteen-minute tape that the defendant is handcuffed. We are aware of no cases which address the propriety of handcuffing during a videotaped confession. Nonetheless, the resolution of the issue is apparent from earlier cases addressing handcuffing in and around trials.
>
> " 'The principal difficulty arising from shackling or handcuffing a defendant at trial is that it tends to negate the presumption of innocence by portraying the defendant as a bad or dangerous person. The Supreme Court has referred to shackling during trial as an "inherently prejudicial practice" which may only be justified by an "essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 569, 106 S.Ct. 1340, 1346, 89 L.Ed.2d 525 (1986). See also Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). This court recently has extended the general prohibition against shackling at trial to the sentencing phase of a death penalty case. Elledge v. Dugger, 823 F.2d 1439, 1450–52 (11th Cir. 1987), modified, 833 F.2d 250 (1987), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988).
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> " 'On the other hand, a defendant is not necessarily prejudiced by a brief or incidental viewing by the jury of the defendant in handcuffs. Allen v. Montgomery, 728 F.2d 1409, 1414 (11th Cir. 1984); United States v. Diecidue, 603 F.2d 535, 549–50 (5th Cir. 1979), cert. denied sub nom. Antone v. United States, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781, 446 U.S. 912, 100 S. Ct. 1842, 64 L.Ed. 2d 266 (1980); Wright v. Texas, 533 F.2d 185, 187–88 (5th Cir. 1976); Jones v. Gaither, 640 F.Supp. 741, 747 (N.D.Ga.1986), aff'd without opinion, 813 F.2d 410 (11th Cir. 1987). The new fifth circuit is among those circuits which adhere to this rule. King v. Lynaugh, 828 F.2d 257, 264–65 (5th Cir. 1987), vacated on other grounds, 850 F.2d 1055 (5th Cir. 1988); see also United States v. Williams, 809 F.2d 75, 83–86 (1st Cir. 1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1959, 2469, 2484, 95 L.Ed.2d 531, 877, 96 L.Ed. 2d 377 (1987); United States v. Robinson, 645 F.2d 616, 617–18 (8th Cir. 1981), cert. denied, 454 U.S. 875, 102 S.Ct. 351, 70 L.Ed.2d 182 (1981). In these latter cases, the courts generally have held that the defendant must make some showing of actual prejudice before a retrial is required.
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> " 'Thus, the case law in this area presents two ends of a spectrum. This case falls closer to the "brief viewing" end of the spectrum and requires a showing of actual

  

prejudice before a retrial is required. The prosecution showed the fifteen-minute tape twice during several days of trial. The handcuffs were only visible during short portions of the tape.

" 'Gates has made no attempt to show that he suffered actual prejudice because the jury saw him in handcuffs. Our independent examination of the record also persuades us that he did not suffer any prejudice. Although defense counsel strenuously objected to the admission of the videotape, he did not object to the handcuffing in particular. He did not ask for a cautionary ***1107** instruction or a poll of the jury. Furthermore, the videotape at issue here was taken at the scene of the crime, not at the police station. Thus, jurors likely would infer that handcuffing was simply standard procedure when a defendant is taken outside the jail. The viewing of the defendant in handcuffs on television rather than in person further reduces the potential for prejudice. In light of the foregoing facts, and the fact that Gates sat before the jury without handcuffs for several days during his trial, we conclude that the relatively brief appearance of the defendant in handcuffs on the videotape did not tend to negate the presumption of innocence or portray the defendant as a dangerous or bad person. We therefore conclude on the particular facts of this case that the handcuffing of Gates during the videotaped confession does not require a new trial.'

"863 F.2d at 1501–02. See also Barber v. State, 952 So.2d 393 (Ala. Crim. App. 2005)."

Doster, 72 So.3d at 85–86.

**[19]** At the beginning of State's Exhibit 60, Smith enters the interrogation room while wearing leg irons, which are not visible, and handcuffs that are attached to a waistband. The handcuffs were removed while Investigator Parris introduced himself and the waistband was removed soon thereafter. The restraints were placed on Smith at the conclusion of State's Exhibit 60. Four photographs in State's Exhibit 94 depict Smith in leg irons.

The jury's view of Smith's restraints was brief, and the jurors likely believed that the restraints were " 'simply standard procedure.' " Doster, 72 So.3d at 86 (quoting Gates, 863 F.2d at 1502). Further, Smith's presumption of innocence was likely dispelled during his opening statement when he conceded his role in Thompson's murder. (R. 574–76) ("In this case, I wish I could stand up here with a straight face and say Nicholas Smith had nothing to do with any of this. ... It would be a lie, and it wouldn't be true, and I couldn't do it."). There is no indication that Smith suffered any prejudice as a result of the circuit court's admitting the depictions of him in restraints. As such, this issue does not entitle him to any relief.

C.

**[20]** Smith argues that the circuit court erred in admitting evidence indicating that he previously had been incarcerated and that he was serving a term of probation at the time Thompson was murdered. Taesha Pulliam, the mother of Gaston's children, testified that she "met [Smith] when he first got out of jail. I think he was just maybe a day or two out of jail." (R. 1195.) Investigator Brian Thompson stated that Smith was detained in Georgia based on an arrest warrant issued in connection with a probation violation. There was also a reference to Smith's arrest warrant for a probation violation during Smith's statement to law enforcement. Smith argues that, in violation of Rule 404(b), Ala. R. Evid., this evidence alerted the jury that "had previously been arrested, jailed, convicted, and put on probation for some prior act." (Smith's brief, at 47.) See Spradley v. State, 128 So.3d 774, 789–92 (Ala. Crim. App. 2011).

Initially, this Court points out that the jury was not informed in the guilt phase of the nature of the conviction for which Smith was on probation.[4] Additionally, the references were brief and neither sought ***1108** nor belabored by the State. With the backdrop of the overwhelming evidence of Smith's guilt and Smith's trial strategy, " '[i]t is inconceivable that a jury could have been influenced, under the circumstances here, to convict [Smith] of crimes of the magnitude charged here because of [ ] oblique reference[s] to a prior criminal record.' " Belisle v. State, 11 So.3d 256, 293 (Ala. Crim. App. 2007) (quoting Thomas v. State, 824 So.2d 1, 20 (Ala. Crim. App. 1999), overruled on other grounds, Ex parte Carter, 889 So.2d 528 (Ala. 2004)).

Any error in the admission of the references to Smith's criminal record did not rise to the level of plain error. As such, this issue does entitle Smith to any relief.

D.

  

**[21]** Smith argues that the circuit court erred in admitting evidence of 9mm ammunition and a receipt for a 9mm pistol that was unconnected to Thompson's murder. The receipt and ammunition were recovered from a trash can used by Cheryl Bush, Tyrone Thompson's girlfriend. The items were referenced at trial as part of an inventory of items collected from the trash can that were sent for forensic testing.

As Smith argues, the evidence was neither connected to Smith nor to Thompson's murder. The evidence was simply mentioned to the jury as part of an inventory of items collected during a search. It is inconceivable that Smith was prejudiced by the admission of this evidence. Any error in the admission of the evidence did not rise to the level of plain error. As such, this issue does entitle Smith to any relief.

V.

**[22]** **[23]** Smith argues that the circuit court erred in admitting statements of his nontestifying codefendants that implicated him in Thompson's murder. Smith argues that the statements were inadmissible hearsay and that the admission of the statements violated his right to confront the witnesses against him. See Rule 802, Ala. R. Evid.; U.S. Const. Amend. VI. Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only.

> " 'The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." ' Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, 'the Sixth Amendment [prohibits the admission of] testimonial hearsay [statements offered for the truth of the matter asserted], ... and interrogations by law enforcement officers fall squarely within that class.' Crawford, 541 U.S. at 53; see also Id. at 59 n.9; (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (explaining that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted')). Similarly, under the Alabama Rules of Evidence:
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> > " ' "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. " '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(c), Ala. R. Evid.'
>
> "Hillard v. State, 53 So.3d 165, 167 (Ala. Crim. App. 2010). Accordingly,
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> > " 'It is well settled that[, when offered for the truth of the matter asserted,] a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible ***1109** against the accused; it does not fall within any recognized exception to the hearsay rule and ... [it] violates the accused's confrontation rights. See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); R.L.B. v. State, 647 So.2d 803 (Ala. Crim. App. 1994); Ephraim v. State, 627 So.2d 1102 (Ala. Crim. App. 1993).'
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> > "Jackson v. State, 791 So.2d 979, 1024 (Ala. Crim. App. 2000). See also Lilly v. Virginia, 527 U.S. 116, 139, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (holding that the admission of an accomplice's out-of-court confession violated the petitioner's Confrontation Clause rights); Hillard, 53 So.3d at 169 (holding that a codefendant's statement to police was inadmissible hearsay under Rule 802, Ala. R. Evid.)."
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> Turner v. State, 115 So.3d 939, 943–44 (Ala. Crim. App. 2012).

**[24]** At trial, Investigator Martin testified to Tyrone Thompson's implicating Smith:

> State: "Don't tell me what [Tyrone Thompson] said or what his involvement may or may not have been, but during the process of talking to Tyrone Thompson early on in this investigation did he name any people other than himself that may be involved?"

  

Martin: "Yes, sir."

State: "Do you remember what those names were?"

Martin: "He gave us the name of Nick, Castro, Nick Smith."

(R. 1117.) Investigator Martin gave similar testimony about Gaston's statement to law enforcement:

State: "Don't tell me anything [Gaston] said but did he like the question with [Tyrone] Thompson, did he indicate any other people that might have [been] involved in the crime other than himself?"

Martin: "Yes, sir."

State: "Who was that?"

Martin: "He said Nick. He didn't know—he called him Ricky or Nicky, I think is what he said in the interview, and Tyrone Thompson."

(R. 1130–31.) Investigator Parris made the following statement during Smith's statement:

"I talked to Dwayne [Gaston]. Dwayne's in jail, okay? Dwayne's laid it out there for us. I talked to Tyrone. Tyrone's in jail. Tyrone's laid it out there for us, okay? Here's the problem we're running into, Nick. I've got all kinds of evidence, all right? All kinds. Right now, I know you were involved a lot more than what you're telling me, okay? Just by their statements, just by the evidence I got, all right? You're not helping yourself by leaving this out because you want to know what Dwayne and Tyrone told me? They're throwing you under the bus. They're trying to save their asses.

"Listen to me—listen to me. Right now is your time to tell your side of it and not leave anything out. Because right now, you know they are going to testify against you. That's what both of them is going to want to do because they know how this is going to go down. They know this was a sloppy, sloppy crime, that happened, okay? We got probably some of our best evidence people around on it. I'm getting phone calls every other hour with just more and more and more evidence, okay? Not counting what Tyrone and Dwayne is telling me. So I need to hear your side of it and have this happen from your perspective. Nick, I ***1110** know you were there when all this went down."

(State's Exhibit 60, 22:00–23:45.)

Smith relies on Turner for his conclusion that the admission of the aforementioned statements by Investigator Martin and Investigator Parris constituted reversible error. In Turner, this Court stated:

"Here, the State offered evidence establishing that Turner's accomplices gave confessions to police officers and, in those confessions, stated that, during the commission of the crime, Shah 'grabbed the phone[, and Turner] said f*** this and ... shot [Shah].' ... The State also offered evidence that the accomplices told the police officers that Turner murdered Shah. The confessions of Turner's accomplices to police officers were, without a doubt, testimonial. ... Further, during closing arguments, the State used the accomplices' statements to show that Turner intended to kill Shah. ... The State's use of the accomplices' statements during closing argument leaves no room to doubt that the statements were offered for the truth of the matter asserted."

Turner, 115 So.3d at 944 (citations omitted).

The circumstances here are distinguishable from those in Turner; Investigator Martin and Investigator Parris did not reveal the content of Tyrone Thompson's or Gaston's statements. Instead, the investigators used vague references to Tyrone Thompson's and Gaston's statements. Additionally, the testimony of Investigator Martin was not hearsay because it was not offered to prove the truth of the matter asserted; rather, the testimony was offered to explain the course of the investigation. See Jackson v. State, 169 So.3d 1, 106–07 (Ala. Crim. App. 2010); Robitaille v. State, 971 So.2d 43, 58–59 (Ala. Crim. App. 2005); D.R.H. v. State, 615 So.2d 1327, 1330 (Ala. Crim. App. 1993). This Court has considered statements similar to those made by Investigator Parris and held:

"The references in Revis's interrogation to the statements of his uncle and brother were harmless error, if error at all. The investigators' allusions to a statement by Revis's uncle were a tactic used to elicit a confession from Revis and were interwoven in Revis's confession. These references were introduced to explain the circumstances of the confession and could be considered by the jury in weighing Revis's statements."

Revis v. State, 101 So.3d 247, 277 (Ala. Crim. App. 2011). Finally, "[n]either [Tyrone Thompson] nor [Gaston] testified ... nor were any statements made by them received into evidence; thus, [Smith] had no right to confront or to cross-examine either of these two individuals." D.R.H., 615 So.2d at 1330.

Any error in the circuit court's admitting references to Tyrone Thompson's and Gaston's statements did not rise to the level of plain error. As such, this issue does not entitle Smith to any relief.

VI.

**[25]** Smith argues that the circuit court erred in admitting what he characterizes as irrelevant, cumulative, and highly prejudicial photographs of the crime scene and the autopsy. Smith contends that the photographs were irrelevant because he did not challenge Thompson's injuries or the manner of his death. In addition, some of the photographs depicted the decomposition of Thompson's body and face, replete with insect larvae. Smith asserts that the larvae caused injuries that could not be attributable to him and that the images of the decomposition were gory and inflammatory. Smith likewise argues that the photographs of Thompson's autopsy were gruesome and irrelevant. Finally, ***1111** Smith argues that it was improper for the prosecutor to reference a photograph of Thompson's body during guilt-phase closing argument: "This is from State's Exhibit 114. This is Kevin Thompson after spending about six hours with Nick Smith. Think about that as you make your decision." (R. 1926.) Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only.

**[26]** **[27]** **[28]** This Court has repeatedly held:

" '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 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 (2002), on remand to, 851 So.2d 453 (Ala. 2002)."

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

**[29]** **[30]** This Court has reviewed the crime-scene and autopsy photographs and the related testimony. The photographs were relevant and admissible to establish the injuries Thompson sustained. See Gobble v. State, 104 So.3d 920, 963–64 (Ala. Crim. App. 2010) (holding that autopsy photographs were gruesome yet necessary to demonstrate to the jury the extent of the victim's injuries (quoting Dabbs v. State, 518 So.2d 825, 829 (Ala. Crim. App. 1987))). "The photographs and testimony relating to postmortem animal and insect activity were also relevant and admissible to distinguish between the injuries [Smith] caused and the injuries that he did not." Kelley v. State, 246 So.3d 1032,

  

1051 (Ala. Crim. App. 2014), rev'd in part on unrelated grounds by Ex parte Kelley, 246 So.3d 1068 (Ala. 2015). Although unpleasant, the photographs and testimony were not unduly gruesome or unfairly prejudicial. Consequently, this Court holds that the prejudicial effect of the evidence was not substantially outweighed by its prejudicial effect. Id.; see also Rule 403, Ala. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

***1112** With respect to the prosecutor's referencing a picture of Thompson's body during closing argument, we have held that such argument, when viewed in the context of the entire trial, "constituted appropriate comments about the evidence presented at trial." Peraita v. State, 897 So.2d 1161, 1201–02 (Ala. Crim. App. 2003).

The circuit court did not commit error, plain or otherwise, in admitting photographs of the crime scene and the autopsy. As such, this issue does not entitle Smith to any relief.

VII.

**[31]** Smith argues that he was convicted of two counts of capital murder and given multiple punishments based on a single robbery in violation of the Double Jeopardy Clause. In count 1 of the indictment against him, Smith was charged with and convicted of murder made capital because it was committed during a first-degree kidnapping "with the intent to accomplish or aid the commission of any felony, to wit: a Robbery or flight therefrom."[5] In count 2, Smith was charged with and convicted of murder made capital because it was committed during a first-degree robbery. "[T]he Double Jeopardy Clause, as a general rule, prohibits the State from subjecting a defendant to multiple punishments for the same offense." Ex parte Rice, 766 So.2d 143, 148 (Ala. 1999). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (citations omitted). Smith argues that his capital-murder convictions fail the Blockburger test because "both charges required the State to establish Murder during a Robbery. Only Count 1 contained the extra element of abducting a victim." (Smith's brief, at 77.) Thus, Smith argues, capital murder/robbery is a lesser-included offense of capital murder/kidnapping under the counts in this case. Because Smith did not object on the grounds he now raises on appeal, this issue will be reviewed for plain error only.

This Court has previously considered and rejected Smith's argument:

> "Pursuant to § 13A–6–43(a), [Ala. Code 1975,] kidnapping in the first degree requires the abduction of another person coupled with one of six different goals of criminal intent: to hold the victim for ransom; to use him as a shield or a hostage; to accomplish or aid in the commission of a felony or flight therefrom; to inflict injury or to abuse sexually the victim; to terrorize the victim or a third person; and to interfere with any governmental or political function. In the present case, the goal of the appellant's criminal intent in committing the abduction was to accomplish or aid in the commission of a felony, specifically, robbery. The commentary to this kidnapping statute states as follows:
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> " 'Note that none of the purposes listed in § 13A–6–43(a)(1)–(6) must be actually accomplished in order for the crime of kidnapping to be committed; the crime is complete when there is an "abduction," i.e., intentional or knowing restraint, coupled with an intent to secrete or to hold the victim where he is not likely to be found, or use, or threaten to use deadly physical force. Section 13A–6–40(1) and (2). Proof of any one of the additional purposes increases the gravity of the offense. ***1113** All of these criminal purposes pose substantial danger to the life of the victim or afford a strong incentive to kill him in order to avoid identification or apprehension.'
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> "Thus, because the intended purpose of the abduction need not be completed, while the felony of robbery was required to be completed in the first count, Count one was not a lesser-included offense of Count two, and the appellant's rights against double jeopardy were not violated."

Smith v. State, 838 So.2d 413, 468–69 (Ala. Crim. App. 2002).

  

Based on this Court's holding in Smith, no error, plain or otherwise, occurred with respect to charging and convicting Smith of both capital murder/kidnapping and capital murder/robbery. As such, this issue does not entitle Smith to any relief.

VIII.

Smith argues that the circuit court failed to adequately charge the jury on reasonable doubt. Smith argues that the instructions of the circuit court emphasized that not all doubts are sufficient to require acquittal, which, he says, lessened the State's burden of proof. Because Smith did not object on the ground he now raises on appeal, this issue will be reviewed for plain error only.

This Court has explained:

> " ' "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) .... [T]he Court 'made it clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it.' Victor v. Nebraska, 511 U.S. 1, 6, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994) (quoting Estelle v. McGuire, 502 U.S. 62, 72–73, and n.4, 112 S.Ct. 475, 482 and n.4, 116 L.Ed.2d 385 (1991), emphasis in original). Thus, the constitutional question presented here is whether there is a reasonable likelihood that the jury understood the instructions to allow the conviction based on proof insufficient to meet the Winship reasonable doubt standard. Victor v. Nebraska; Ex parte Kirby, 643 So.2d 587 (Ala.), cert. denied, [513] U.S. [1023], 115 S.Ct. 591, 130 L.Ed.2d 504 (1994); Cox v. State, 660 So.2d 233 (Ala. Cr. App. 1994).
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> " ' "In reviewing the reasonable doubt instruction, we do so in the context of the charge as a whole. Victor v. Nebraska; Baker v. United States, 412 F.2d 1069 (5th Cir. 1969), cert. denied, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509 (1970); Williams v. State, 538 So.2d 1250 (Ala. Cr. App. 1988). So long as the definition of 'reasonable doubt' in the charge correctly conveys the concept of reasonable doubt, the charge will not be considered so prejudicial as to mandate reversal. Victor v. Nebraska; Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954)." ' "

Lewis v. State, 24 So.3d 480, 518–19 (Ala. Crim. App. 2006) (quoting Lee v. State, 898 So.2d 790, 841–42 (Ala. Crim. App. 2001), quoting in turn Knotts v. State, 686 So.2d 431, 459 (Ala. Crim. App. 1995)).

**[32]** During guilt-phase instructions to the jury, the circuit court gave the following instruction on reasonable doubt:

> "Before a conviction can be had in this case, the State must satisfy each and every member of the jury of the defendant's ***1114** guilt beyond a reasonable doubt. Even if the State demonstrates a probability of guilt, if it does not establish it beyond a reasonable doubt, it would be your obligation to acquit the defendant. The phrase reasonable doubt is self-explanatory. Efforts to define it don't always clarify it. Sometimes it's easier to tell you initially what it's not then tell you what it is.
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> > "First, it's not a mere possible doubt because everything related to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror, honestly seeking the truth, after careful and impartial consideration of all the evidence in the case. It's the doubt based on reason and based on common sense. It doesn't mean a vague or arbitrary notion. It's an actual doubt based upon the evidence, lack of evidence, a conflict in the evidence or combination of all those. It's a doubt that remains after going over in your mind the entire case and giving consideration to all the testimony. It's distinguishable from a doubt arising from mere possibility for bare imagination or fanciful conjecture."

(R. 1964–66.) The circuit court gave a similar instruction to the jury during the penalty phase. (R. 2424–25.)

This Court holds that the instruction on reasonable doubt could not be reasonably interpreted to lower the State's burden of proof. See Albarran v. State, 96 So.3d 131, 190–91 (Ala. Crim. App. 2011) (holding that there was no reasonable likelihood that the jury applied substantially similar instructions in a manner that would unconstitutionally lower the State's burden of proof). No error, plain or otherwise, resulted from the circuit court's instruction on reasonable doubt. As such, this issue does not entitle Smith to any relief.

IX.

**[33]** Smith argues that the circuit court erred by allowing the State to elicit and argue the opinions of Thompson's family to persuade the jury to recommend a sentence of death. Specifically, Smith argues that the State improperly elicited testimony from Frances Curry and Rena Curry regarding their characterization of Smith, his crime, and the appropriate punishment. Smith did not object to the Currys' testimony at trial; therefore, this issue will be reviewed for plain error only. Rule 45A, Ala. R. App. P.

During the penalty phase, the State asserted in its opening argument to the jurors that Thompson's mother, Frances Curry, wanted Smith to be put to death: "[The death penalty is] what his mother[, Frances Curry,] wants, and we'll put her on the stand to tell you that." (R. 2014.) The State called Curry to testify and specifically asked Curry how she wanted Smith punished. Frances Curry not only told the jury that she wanted Smith to be put to death but also told the jury that it was her opinion that Smith's killing her son was not an "accident"; that it was her opinion that the killing was not merely "a bad choice"; that it was her opinion that Smith's taking Thompson's life was Smith's "conscious choice"; that it was her characterization and opinion that "her baby" had "suffered"; that it was her opinion that "if you murder" you must be executed; and that it was her opinion that even if the jury punishes Smith with death, "[Smith] will still live longer than my baby did." (R. 2045–46.)

> State: "What punishment are you asking me to pursue here in this case?"
>
> Frances: "Death."
>
> State: "And can you tell me why?"
>
> Frances: "I believe if you take a life and no one is doing anything to you, that you must give your life. I believe that ***1115** God said, 'Thou shall not kill.' And if you murder, you shall be murdered. I believed all those things all of my life. I'm not going to change them now. I believe this wasn't an accident. It wasn't a bad choice. It was a conscious choice. I know my baby suffered. I also believe that in death, he will still live longer than my baby did."

(R. 2045–46.)

The State also called Rena Curry, the victim's sister, and specifically asked Rena to tell the jury how she wanted Smith to be punished. Rena testified that she not only wanted Smith to be executed, but also she essentially told the jury that despite mitigating evidence reflecting that Smith had had a terrible childhood, it was her opinion that Smith was not thinking about his childhood when he murdered Thompson; and, she essentially told the jury that if you murder you must be murdered.

> State: "And it would be pretty fair to say you and I have had some pretty in depth conversations getting ready for trial."
>
> Rena: "Yes, sir."
>
> State: "But a question I'm going to ask you—a decision I don't want to make on my own. I'm going to ask for a punishment in this case, what punishment do you want me to ask for?"
>
> Rena: "The death penalty."
>
> State: "Can you tell me why?"
>
> Rena: "My Bible says an eye or an eye, tooth for a tooth. Not only that, I know that he's had a terrible childhood, but I also know that he wasn't thinking about his childhood when he took away my best friend and my big brother."

(R. 2039–40.)

The State then told the jury during its penalty-phase closing argument that in obtaining Smith's execution the State was "trying to do what [Thompson's] mother and sister asked [the State] to do." (R. 2379–80.) The State further implored the

  

jurors to "[t]hink about Francis [sic] and Rena when you make that decision [regarding the appropriate sentence]." (R. 2414–15.)

> "In Booth v. Maryland, 482 U.S. 496, 502, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that a defendant's Eighth Amendment rights were violated by the sentencing authority's consideration of any victim-impact evidence. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court partially overruled Booth to allow the sentencing authority to consider evidence of the effect of the victim's death upon family and friends. Payne, 501 U.S. at 830 n.2, 111 S.Ct. 2597 ('Our holding today is limited to the holdings of [Booth] ... that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.').
>
> "In Ex parte McWilliams, 640 So.2d 1015 (Ala. 1993), this Court noted that Payne had only partially overruled Booth and that it had left intact the proscription against victim-impact statements containing 'characterizations or opinions of the defendant, the crime, or the appropriate punishment.' 640 So.2d at 1017. The Court in McWilliams held that a trial court errs if it 'consider[s] the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment.' Id."

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

The appellate courts of this State have found plain error in cases where the family members of the victim were allowed to present in the penalty phase their characterizations ***1116** or opinions of the defendant, the crime, or the appropriate punishment. For example, in Ex parte Washington, "the victim's parents told the jury that Washington's crime was 'brutal, evil, terrible,' that Washington was 'someone without a conscience,' and that death was the appropriate punishment." Ex parte Washington, 106 So.3d at 446. The Alabama Supreme Court held those comments to constitute plain error. In Wimberly v. State, 759 So.2d 568 (Ala. Crim. App. 1999), the stepdaughter of one of the victims read a statement into evidence in which she characterized the defendant as a "predator," a "coward," and a "murdering thief"; commented on his remorselessness; described in positive terms the life he would face in prison if he avoided a sentence of death; and asked that the defendant "be given the sentence that he has handed out: Give him death." Wimberly, 759 So.2d at 572–73. Reviewing the comments in Wimberly, this Court

> "recognize[d] the emotional devastation and loss the family members ... have suffered. Nevertheless, reviewing the remarks made by the family member to the jury during the sentencing hearing, [this Court found] the cumulative effect of [those] improper comments to be plain error. Had the prosecutor made these same comments in argument, [this Court] would find them to be a textbook example of prosecutorial misconduct. The fact that the these same comments were read to the jury by a bereaved family member only magnifies the impact such comments surely had on the jury as it closed to deliberate on its sentence recommendation. We find that these comments were calculated to incite an arbitrary response from the jury and that they should have been excluded. Barbour v. State, 673 So.2d 461, 469 (Ala. Crim. App. 1994). If [this Court] were not already reversing this case for a new trial, [it] would set aside the sentence and remand this case to the trial court for a new sentencing phase before the jury and a new sentencing hearing before the trial court based on the admission of improper victim impact evidence. Gillespie v. State, 549 So.2d 640, 644 (Ala. Cr. App. 1989)."

Wimberly v. State, 759 So.2d 568, 573–74 (Ala. Crim. App. 1999).

Similarly, Frances Curry and Rena Curry provided the jury with their characterization of Smith and his crime, as well as their desire for the jury to recommend a sentence of death. They testified directly to their characterization and/or and opinion of Smith, the crime, and the appropriate punishment. Moreover, the trial court did not instruct the jury on how to consider this victim-impact testimony. In a case with strong mitigation,[6] such as this case, it is not clear that the improper victim-impact testimony had no influence on the jury's recommendation. Therefore, absent assurances that this testimony did not influence the jury in recommending a

  

death sentence, it is necessary to remand this case for a new sentencing proceeding.

For the foregoing reasons, Smith's capital-murder convictions are affirmed but his sentences of death are reversed and the cause remanded with instructions for the circuit court to conduct a new penalty proceeding.

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

Welch, Kellum, and Joiner, JJ., concur; Windom, P.J., concurs in part and dissents in part, with opinion; Burke, J., concurs in part and dissents as to Part IX.

WINDOM, Presiding Judge, concurring in part and dissenting in part.

***1117** I agree with the majority's decision to affirm Nicholas Noelani D. Smith's capital-murder convictions. I, however, disagree with its decision to reverse his sentences of death. I agree with the majority that the State erroneously presented testimony from Frances Curry and Rena Curry regarding their characterization of Smith, his crime, and the appropriate punishment; however, these errors did not rise to the level of plain error. Rule 45A, Ala. R. Crim. P. Therefore, I respectfully dissent.

Initially, it is important to note that "[t]he standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." Hall v. State, 820 So.2d 113, 121 (Ala. Crim. App. 1999). "[T]he plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). As the Supreme Court of the United States has noted, the appellant's burden to establish plain error "is difficult, 'as it should be.' " Puckett v. United States, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83, n.9, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)).

To rise to the level of plain error, the alleged error must be a "particularly egregious error[ ]," Frady, 456 U.S. at 163, and it "must be obvious on the face of the record," Ex parte Walker, 972 So.2d 737, 753 (Ala. 2007). See also Young, 470 U.S. at 15 ("The [plain-error] Rule authorizes the Courts of Appeals to correct only particularly egregious errors." (citations and quotations omitted)). Only an error that is "so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings," rises to the level of plain error. Ex parte Womack, 435 So.2d 766, 769 (Ala. 1983) (quoting United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir. 1981)). See also Ex parte Price, 725 So.2d 1063, 1071–72 (Ala. 1998) (holding that appellate courts should not reverse a conviction or sentence under the plain-error doctrine unless the error is "so egregious ... that [it] seriously affects the fairness, integrity or public reputation of judicial proceedings"); Puckett, 556 U.S. at 135, 129 S.Ct. at 1429 (explaining that appellate courts should exercise their discretion and reverse a waived error under the plain-error doctrine "only if the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" ' " (quoting United States v. Olano, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), quoting in turn, United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936))). If the propriety, legality, or correctness of a claimed error is "subject to reasonable dispute," then the appellant cannot establish plain error. Puckett, 556 U.S. at 135 (citing Olano, 507 U.S. at 734) (holding that appellate courts cannot find plain error unless "the [alleged] legal error [is] clear or obvious, rather than subject to reasonable dispute").

Even an obvious, indisputable error will not " ' "rise to the level of plain error, ***1118** [unless it] ... not only seriously affect[ed] a defendant's 'substantial rights,' but ... also ha[d] an unfair prejudicial impact on the jury's deliberations." ' " Ex parte Brown, 11 So.3d 933, 938 (Ala. 2008) (quoting Ex parte Bryant, 951 So.2d 724, 727 (Ala. 2002), quoting in turn Hyde v. State, 778 So.2d 199, 209 (Ala. Crim. App. 1998)). Although the "failure to object does not preclude [appellate] review in a capital case, it does weigh against any claim of prejudice." Ex parte Kennedy, 472 So.2d 1106, 1111 (Ala. 1985) (citing Bush v. State, 431 So.2d 563, 565 (1983)). Further, the appellant has the burden to establish that an alleged error had an unfair prejudicial impact on the

  

jury's deliberations. See Ex parte Walker, 972 So.2d at 752 (recognizing that the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error). Accordingly, to obtain a reversal based on a waived error, the appellant must establish that the alleged error affected the outcome of the trial. See Thomas v. State, 824 So.2d 1, 13 (Ala. Crim. App. 1999), overruled on other grounds, Ex parte Carter, 889 So.2d 528 (Ala. 2004).

Under the unique facts of this case, Smith has not, and cannot, meet his burden to show that Frances Curry's and Rena Curry's testimony in the penalty phase had an unfair prejudicial impact on the jury's deliberations or affected the outcome of the penalty phase of his trial. As detailed by the majority's opinion, Smith's crime was particularly heinous and overwhelmingly aggravated. Smith, a violent felon who was under a sentence of imprisonment at the time, accompanied his accomplices to Thompson's home and kidnapped him. See § 13A–5–49(1)–(2), (4), Ala. Code 1975. After kidnapping Thompson, Smith and his accomplices tortured him both physically and mentally while robbing him. § 13A–5–49(4) and (8), Ala. Code 1975. When Thompson was of no further use to Smith, Smith cut Thompson's throat with a serrated steak knife. While Thompson's lungs and stomach filled with his own blood, one of Smith's accomplices stabbed Thompson in the chest multiple times. Thompson was then thrown to the bottom of an embankment where he was left to die. Smith's character, his past, and the facts of his crime established five aggravating circumstances: 1) that he was under a sentence of imprisonment, see § 13A–5–49(1), Ala. Code 1975; 2) that he had been previously convicted of a felony involving the use or threat of violence to a person, see § 13A–5–49(2), Ala. Code 1975; 3) that his capital offense was committed while he was engaged in a kidnapping, see § 13A–5–49(4), Ala. Code 1975; 4) that his capital offense was committed while he was engaged in a robbery, see § 13A–5–49(4), Ala. Code 1975; and 5) that his capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A–5–49(8), Ala. Code 1975. Although, as the majority notes, Smith presented some evidence in mitigation, the force of the aggravating circumstances in this case mightily outweighed that mitigating evidence. See Schwab v. Crosby, 451 F.3d 1308, 1330 (11th Cir. 2006) (holding that a penalty-phase error does not require reversal when the aggravating circumstances far outweigh the mitigating circumstances); Randolph v. McNeil, 590 F.3d 1273, 1277 (11th Cir. 2009); Vining v. Secretary of Dep't of Corr., 610 F.3d 568, 573 (11th Cir. 2010).

Further, and more compelling, the circuit court correctly instructed the jury on the process of weighing the aggravating circumstances and the mitigating circumstances. Specifically, the circuit court instructed the jury that an "aggravating circumstance is a circumstance which is specified by law" and "that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable ***1119** doubt, and, if so, whether the aggravating circumstances outweigh the mitigating circumstances." (R. 2418.) The circuit court then identified and defined for the jury the five aggravating circumstances that it could consider. (R. 2420–22.) Presuming, as this Court must, that the jury followed the circuit court's instructions, it did not consider Frances Curry's and Rena Curry's testimony when deciding whether to sentence Smith to death. See Ex parte Belisle, 11 So.3d 323, 333 (Ala. 2008) ("[A]n appellate court 'presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary.' " (quoting Cochran v. Ward, 935 So.2d 1169, 1176 (Ala.2006)); Thompson v. State, 153 So.3d 84, 158 (Ala. Crim. App. 2012). Likewise, the circuit court did not mention Frances Curry's and Rena Curry's testimony when reweighing the aggravating circumstances and mitigating circumstances and when sentencing Smith to death.

Finally, this Court must presume that the "jurors [did] not leave their common sense at the courthouse door." Ex parte Rieber, 663 So.2d 999, 1006 (Ala. 1995). The jury had already found, beyond a reasonable doubt, that Smith had committed his offense in the manner described by the Currys, i.e., intentionally. Moreover, the State's desired outcome in the penalty phase was the imposition of the death penalty. Consequently, by virtue of the fact that Frances Curry and Rena Curry took the stand to testify for the State in the penalty phase of Smith's trial, the jury should have been well aware that the Currys wanted Smith to be sentenced to death. Further, any impact the Currys' testimony conceivably could have had was tempered by Smith's Aunt Arleen Pollard's impassioned plea to the jury for it to recommend a sentence of life in prison without the possibility of parole.

In light of all these factors, I am of the firm conviction that the improper admission of the Currys' testimony did not influence the jury's or the court's sentencing determination, and Smith has not met his burden to show otherwise. Therefore, I

  

disagree with the majority's decision to reverse Smith's sentences of death, and I respectfully dissent.

**All Citations**

246 So.3d 1086

## Footnotes

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

2 The rifle, which was later retrieved from the vehicle of Gaston's girlfriend, was apparently used only for intimidation. The weapon lacked a percussion cap, which rendered it incapable of firing.

3 During the testimony of Frances Curry, defense counsel stated: “Judge, as far as victim impact, I won't object to victim impact at this point, but it's obviously part of what comes in mitigation, but it comes—I object to anything as far as how it's affecting Ms. Curry and how—.” (R. 596–97.) At that point, the State offered to “move on,” and the circuit court sustained Smith's objection. (R. 597.)

4 Because Smith's being on probation at the time of Thompson's murder was an aggravating factor, the jury was informed during the penalty phase of the nature of Smith's prior convictions.

5 Smith's indictment offered several alternative methods of proving a kidnapping in the first degree. The State, though, proceeded only under the alternative listed.

6 Smith presented a significant amount of mitigating evidence during the penalty phase; evidence of what can only be described as Smith's horrific childhood was chronicled. His childhood was a haze of neglect, physical abuse, sexual abuse beginning when he was very young, abandonment, beatings, starvation, drug use beginning when his older brother “shotgunned” marijuana into Smith's mouth when Smith was two years old, alcohol use beginning when he was six years old, and criminal activity. There was testimony that he matured into a person with psychological problems.

# EXHIBIT 2

2024 WL 3212264
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Nicholas Noelani D. SMITH
v.
STATE of Alabama

CR-2022-0504
|
June 28, 2024

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Calhoun County, No. CC–11–494, Brian P. Howell, J., of capital murder and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 246 So,3d 1086, affirmed in part, reversed in part, and remanded with instructions. The Circuit Court conducted a new sentencing proceeding and sentenced defendant to death. Defendant appealed.

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

[1] circuit court's admission of numerous photographs of murder victim's body at the crime scene and during victim's autopsy did not constitute plain error;

[2] circuit court denial of defendant's motion for a continuance of second penalty-phase proceeding was not an abuse of discretion;

[3] district attorney's office's hiring of attorney, who had been the lead attorney for the defense during guilt and penalty pases of defendant's initial capital murder trial, did not impute a conflict of interest on the entire district attorney's office;

[4] circuit court's act of allowing the State to reintroduce into evidence medical examiner's testimony from defendant's guilt-phase proceeding by reading the transcript of her testimony to the second penalty-phase jury was not plain error; and

[5] use of defendant's first-degree robbery conviction, which was committed when defendant was 16 years old, as an aggravating factor that made defendant eligible to receive the death penalty did not violate defendant's right to be free from cruel and unusual punishment.

Affirmed.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (31)

[1] **Criminal Law** Necessity of Objections in General

Standard of review in reviewing claim under plain-error doctrine is stricter than standard used in reviewing an issue that was properly raised in the trial court or on appeal.

[2] **Criminal Law** Necessity of Objections in General

"Plain error" is error that is so obvious that failure to notice it would seriously affect fairness or integrity of judicial proceedings.

[3] **Criminal Law** Necessity of Objections in General

To rise to level of plain error, claimed error must not only seriously affect defendant's substantial rights, but it must also have unfair prejudicial impact on jury's deliberations.

[4] **Criminal Law** Necessity of Objections in General

Plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has prejudiced the defendant.

[5] **Criminal Law** Necessity of Objections in General

Plain error must be obvious on the face of the record; a silent record, that is a record that on its

  

face contains no evidence to support the alleged error, does not establish an obvious error.

[6] **Criminal Law** Necessity of Objections in General

Under the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial.

[7] **Criminal Law** Necessity of Objections in General

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.

[8] **Criminal Law** Documentary evidence

The circuit court's admission of numerous photographs of murder victim's body at the crime scene and during victim's autopsy did not constitute plain error, during second penalty-phase proceeding on remand; the photographs showed the extent of the brutal injuries victim sustained when attacked by defendant and co-defendants, and the photographs were probative of the aggravating circumstance that the offense was especially heinous, atrocious or cruel when compared to other capital offenses. Ala. Code § 13A-5-45(c); Ala. R. App. P. 45A.

[9] **Criminal Law** Photographs and Other Pictures

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.

[10] **Criminal Law** Cumulative evidence in general

Photographic exhibits are admissible even though they may be cumulative.

[11] **Criminal Law** Photographs arousing passion or prejudice; gruesomeness

Photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.

[12] **Criminal Law** Purpose of admission

**Criminal Law** Photographs arousing passion or prejudice; gruesomeness

**Criminal Law** Cumulative evidence in general

Autopsy 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.

[13] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

The circuit court did not commit plain error when it allowed the State to introduce non-statutory aggravating factors to the jury through its cross-examination of psychological expert, during capital murder penalty-phase proceeding on remand.

[14] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

Trial court's failure to sua sponte instruct the jury not to consider defendant's IQ of 128 or the absence of evidence that defendant was "clinically insane" in reaching their sentence was not plain error, during capital murder penalty-phase proceeding on remand.

  

[15] **Criminal Law** Discretion of court

**Criminal Law** Time of trial; continuance

A motion for a continuance is addressed to the discretion of the court and the court's ruling on it will not be disturbed unless there is an abuse of discretion.

[16] **Criminal Law** Absence of Witness or Evidence in General

If the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence.

[17] **Constitutional Law** Adequacy of time to prepare; continuance

There are no mechanical tests for deciding when a denial of a continuance in a criminal case is so arbitrary as to violate due process; rather, the answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. U.S. Const. Amend. 14.

[18] **Sentencing and Punishment** Discretion of lower court

**Sentencing and Punishment** Harmless and reversible error

Reversal of death sentence because trial court denied motion to continue requires a positive demonstration of abuse of judicial discretion.

[19] **Sentencing and Punishment** Conduct of Hearing

Circuit court denial of defendant's motion for a continuance of second penalty-phase proceeding, which alleged counsel's ability to develop defendant's mitigation case and prepare for sentencing was inhibited by inadequate access to defendant and second inmate, who was defendant's half brother, as a result of COVID-19 and related restrictions, was not an abuse of discretion; defense counsel did not explain why he could not have accessed defendant and second inmate in the nearly three years between Court of Criminal Appeals returning jurisdiction to circuit court for second penalty-phase proceeding and start of COVID-19 pandemic in March 2020, court indicated video conferencing options were available during COVID-19 to access inmates, and second inmate was being moved to county jail for easier access.

[20] **Sentencing and Punishment** Conduct of Hearing

Circuit court denial of defendant's motion for a continuance of second penalty-phase trial, which alleged a continuance was necessary to permit mitigation specialist sufficient time to complete her investigation and assessment, which had been impeded by COVID-19 and her need to limit exposure in order to protect her hospitalized husband, was not an abuse of discretion; mitigation specialist had already generated a report with her findings at the time continuance motion was filed, and defense counsel did not explain why mitigation expert could not have completed a mitigation investigation in the nearly three years between Court of Criminal Appeals returning jurisdiction to circuit court for defendant's second penalty-phase proceeding and the start of COVID-19 pandemic in March 2020.

[21] **Criminal Law** Grounds of review in general

It is appellant's duty to provide Court of Criminal Appeals with complete record on appeal.

[22] **Criminal Law** Disqualification of one prosecutor affecting or imputed to the rest of the office

  

The district attorney's office's hiring of attorney, who had been the lead attorney for the defense during guilt and penalty pases of defendant's initial capital murder trial, did not impute a conflict of interest on the entire district attorney's office, during second penalty phase trial on remand; defendant never alleged his former attorney had breached the attorney-client relationship by disclosing any information to the district attorney's office, and district attorney explained the safeguards in place in the district attorney's office to ensure that attorney did not make such a disclosure.

[23] **Criminal Law** Disqualification of one prosecutor affecting or imputed to the rest of the office

There is not a per se rule that a district attorney's office must recuse itself when one assistant attorney has previously represented a defendant.

[24] **Criminal Law** Procedure

Trial court had no obligation to conduct a meaningful inquiry into whether and what information had been disseminated from attorney, who had been the lead attorney for the defense during guilt and penalty phases of defendant's initial capital murder trial and was later hired by district attorney's office, when denying defendant's motion to recuse entire district attorney's office, during second penalty phase trial on remand; defendant never alleged that attorney engaged in any improper conduct, but, rather, defendant merely made speculative assertions about the possibility that attorney could have disclosed confidential information, and because defendant never alleged that attorney engaged in any improper behavior, the presumption was that attorney had not engaged in such conduct.

[25] **Sentencing and Punishment** Unanimity

Jury was not required to unanimously agree to impose a death sentence before the trial court could sentence defendant to death, and thus defendant's death sentence, which was imposed after the jury recommended by a vote of ten to two that defendant be sentenced to death, did not violate Alabama or United States Constitutional provisions requiring a unanimous verdict in order to convict defendant of a serious offense. U.S. Const. Amends. 6, 14.

[26] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

The circuit court's alleged failure to adequately address improper juror conduct and shield the jury from extraneous and/or prejudicial information, which allegedly occurred on the second day of sentencing trial when juror informed court that he had previously undisclosed connections to two key State witnesses, did not constitute plain error, during second penalty phase trial on remand, even though the court took no steps to ascertain whether juror shared any extraneous knowledge with remaining members of the jury; juror was removed from the jury. Ala. R. App. P. 45A.

[27] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

Circuit court's act of allowing the State to reintroduce into evidence medical examiner's testimony from defendant's guilt-phase proceeding by reading the transcript of her testimony to the second penalty-phase jury was not plain error, where defendant argued that the court's actions violated his rights under the Confrontation Clause, yet it was not "obvious" or "indisputable" that the Confrontation Clause applied to a penalty phase proceeding, given that the Court of Criminal Appeals had expressed doubt that the Confrontation Clause applied at sentencing. U.S. Const. Amend. 6.

[28] **Sentencing and Punishment** Expert evidence

  

State medical examiner's guilt-phase testimony was admissible during the penalty phase of capital murder trial pursuant to statute providing that "Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing"; medical examiner's testimony addressed the extent of victim's injuries and the manner in which he died, it established that victim would not have died quickly, that he would have been aware of his injuries, and that he would have experienced significant pain, and thus the testimony was relevant to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Ala. Code § 13A-15-45(c).

**[29] Sentencing and Punishment** Juvenile record

Use of defendant's first-degree robbery conviction, which was committed when defendant was 16 years old, as an aggravating factor that made defendant eligible to receive the death penalty did not violate defendant's right to be free from cruel and unusual punishment under the Eighth Amendment; defendant was tried and convicted as an adult. U.S. Const. Amend. 8.

**[30] Sentencing and Punishment** Dual use of evidence or aggravating factor

No constitutional or statutory provision prohibited the circuit court from double-counting circumstances both as an element of the offense and as an aggravating circumstance.

**[31] Sentencing and Punishment** Mode of execution

Alabama's use of lethal injection as a method of execution did not constitute cruel and unusual punishment. U.S. Const. Amend. 8.

**Appeal from Calhoun Circuit Court (CC-11-494.80)**

**Opinion**

COLE, Judge.

***1** Nicholas Noelani D. Smith appeals the death sentence imposed on him after his second penalty-phase proceeding.

Facts and Procedural History

The facts presented in support of Smith's conviction have been summarized by this Court, in part, as follows:

"On the night of April 20, 2011, Kevin Thompson was speaking on the telephone to Chris Wilkerson, his friend, when he heard someone at his front door. Thompson opened the door. Wilkerson heard Thompson say, ' "I didn't know you was bringing all these people with you." ' (R. 1157.) Then, the telephone call was disconnected. Wilkerson dialed Thompson's telephone number and Thompson answered. The telephone call was brief, with Thompson telling Wilkerson that he would call him right back. A few hours passed without Thompson returning the telephone call. Worried, Wilkerson telephoned Thompson repeatedly around midnight, but Thompson did not answer.

"Thompson's absence from his position as a teacher at Wellborn Elementary School was noticed early the following morning.... Multiple individuals attempted to contact Thompson by telephone to no avail. Deputy Brendan Harris of the Calhoun County Sheriff's Office, the school's resource officer, was dispatched to an address to conduct a welfare check. The address, though, led Deputy Harris to the residence of Thompson's mother and sister, Frances and Rena Curry. Deputy Harris was able to make contact with Rena Curry and expressed to her the concern the staff at the elementary school had regarding Thompson's absence.

"Rena Curry telephoned her mother and then drove to Thompson's apartment. Two things stood out to Rena Curry upon her arrival. First, Thompson's vehicle, a silver Honda Civic, was not in the parking lot. Second, and more peculiar, was a single shoe, which she believed belonged to Thompson, lying in the parking lot. The front door to Thompson's apartment was unlocked, and Rena Curry did not notice anything amiss inside.

  

"Frances Curry telephoned the Jacksonville Police Department and asked that an officer meet her at Thompson's apartment. An officer responded to Thompson's apartment and briefly investigated before leaving. In Frances Curry's opinion, law enforcement seemed unconcerned about Thompson's whereabouts.

"Undeterred, Frances Curry continued her search for her son. Frances Curry telephoned Thompson's bank and learned that several withdrawals had been made from Thompson's account the previous night at various financial institutions. Frances Curry again contacted the Jacksonville Police Department to inform them of the account activity.

"Officers obtained surveillance footage from the area credit unions and banks where withdrawals had been made that corresponded with the times of activity on Thompson's account. Video from the Jacksonville branch of the Farmers & Merchants Bank depicted a silver vehicle arriving at 10:19 p.m. A man wearing a baseball cap bearing a script 'A' made multiple withdrawals from the bank's automatic-teller machine ('ATM'). In an apparent attempt to obscure his identity, the man held his left arm across his face; the attempt, though, made visible a distinct tattoo on the man's left hand. The video also appeared to depict a passenger in the front seat of the vehicle aiming a rifle toward the backseat of the vehicle. Photographs from the Jacksonville branch of the Ft. McClellan Credit Union depicted what appeared to be the same man make a withdrawal from the ATM at 10:26 p.m. Photographs from the Anniston branch of the Ft. McClellan Credit Union depicted a silver vehicle and a dark-colored sport-utility vehicle arrive at 12:13 a.m. on April 21. There, a man walked up to the ATM and made a withdrawal. Officers presented photographs generated from the surveillance footage to Frances Curry and Rena Curry to see if an identification could be made. Rena Curry was able to identify Tyrone Thompson. Rena Curry explained that Tyrone Thompson was a family acquaintance whom Thompson had known since the two were children. Thompson had recently made contact with Tyrone Thompson after Tyrone Thompson's latest release from incarceration....

***2** "Investigator Clint Parris of the Anniston Police Department located Tyrone Thompson, and he agreed to be interviewed. During an interview with Investigator Parris and Investigator Joseph Martin of the Jacksonville Police Department, Tyrone Thompson identified Smith as being involved with Thompson's disappearance.

"Meanwhile, Cynthia Warf, who had been visiting her husband, Andrew Jones, at the hospital, returned to her residence to find multiple individuals in her husband's garage. Warf saw Jessica Foster, her daughter; Whitney Ledlow; Smith; and two other males, who were later identified as Blake Hamilton and Teddy Lee Smith, in the garage with a silver vehicle.... Smith had telephoned Ledlow at 3:00 a.m. that morning to ask Foster if he could park his friend's vehicle at Warf's house and Foster had agreed. When Smith met with Ledlow and Foster later that morning, Smith told them he needed someone to 'chop' the vehicle. At Ledlow's request, Hamilton and Teddy Lee Smith agreed to take the vehicle apart for scrap.

"Warf, assuming that the vehicle had been stolen, told the individuals to remove the vehicle from the garage and threatened to telephone law enforcement. As she walked back to her residence, the individuals fled; Ledlow, Foster, and Smith went in search of a trailer to remove the vehicle, which by this point was not operable. Warf telephoned her husband about the silver vehicle in his garage and he telephoned law enforcement. When officers arrived at the garage, it was apparent that the silver vehicle was in the process of being dismantled. Assistant Chief Bill Wineman of the Jacksonville Police Department testified that the silver vehicle was registered to Thompson.

"Ledlow, Foster, and Smith planned to return to Warf's house, tow the vehicle away, and burn it. That plan was abandoned, though, because they saw a number of police vehicles as they neared Warf's house. Smith told Ledlow and Foster that they 'were deeper in it than [they] thought,' so they drove away. (R. 849.) Ledlow and Foster decided to travel to Carrollton, Georgia, to give themselves time to consider their next step. Ledlow stated that she did not know what Smith had done to Thompson and described Smith's behavior during the trip to Carrollton as 'perfectly fine.' (R. 853.) In Carrollton, Ledlow rented a motel room for the night. There, Smith admitted to Ledlow and Foster that he had been involved in a murder with Tyrone Thompson and Jovon Dwayne Gaston. Smith detailed for them the crime and generally described the location of Thompson's body. Ledlow testified that she was initially incredulous because Smith was so calm. The three then went to a Walmart retail store to purchase clothes and toiletries. Ledlow playfully struck Smith in the arm while at the store, and Smith responded, '[D]on't you know you don't punch a killer.' (R. 857.)

  

"The following day, Warf contacted Investigator Parris and informed him that Smith's black Ford Explorer sport-utility vehicle was parked in a parking lot near her house. She also told Investigator Parris that Foster, Ledlow, and Smith were likely traveling in a GMC Yukon sport-utility vehicle that belonged to her son. Meanwhile, Smith was making arrangements to enter a drug-rehabilitation program in Florida. Ledlow, Foster, and Smith left the motel in Carrollton and traveled to the airport in Atlanta. On the way, Ledlow saw a number of police vehicles following them. When she parked near the taxi terminal at the airport, officers swarmed their vehicle and took the three into custody.

***3** "A search of the Yukon yielded a camera, which Foster admitted was taken from Thompson's vehicle. Officers also found a black baseball cap with a script 'A,' which appeared to match the hat that was captured by the ATM surveillance footage. Ledlow also admitted to taking a ring from Thompson's vehicle, which she pawned for $200. Ledlow and Foster provided lengthy statements to officers following their arrest, and Ledlow consented to a search of her property. Officers recovered several items of evidentiary value on Ledlow's property. From an exterior trash can, officers recovered: a pair of Nike Air Jordan basketball shoes, which had dried mud and vegetation stuck on the soles and several reddish-brown stains on the uppers; cardboard packaging for duct tape; a nearly expended roll of gray duct tape; and a tshirt wrapped around a serrated steak knife, which appeared to bear a mixture of dried blood and mud on the blade and handle. Inside Ledlow's house, officers recovered: a pair of COOGI brand denim jeans, which bore dried mud; and a pair of boxer shorts, which bore red stains. Subsequent DNA testing established that the bloodstains found on the jeans, knife, and basketball shoes were consistent with Thompson's DNA. Smith was listed as a potential contributor for DNA found inside the basketball shoes, and DNA on the inside of the jeans was consistent with Smith's DNA.

"Officers obtained information that Thompson's body had been disposed of down an embankment near a set of guardrails on U.S. Highway 278. Based on that description, Investigator Seth Rochester of the Cherokee County Sheriff's Office was able to locate Thompson's body in the early morning hours of April 23. Thompson's wrists were bound with duct tape, and a subsequent analysis of the tape revealed that the tape was consistent with the tape found in Ledlow's trash can.

"The injuries suffered by Thompson were substantial. Dr. Emily Ward, a state medical examiner with the Alabama Department of Forensic Sciences, performed the autopsy on Thompson's body. Dr. Ward noted a cut across the front of the neck, which was deep enough to compromise the windpipe and left jugular vein. This injury caused blood to aspirate into Thompson's lungs. Thompson suffered four haphazard stab wounds to the left side of his chest -- two pierced the heart and all four pierced the left lung. Dr. Ward stated that the orientation of the wounds suggested that Thompson's assailants were standing while Thompson was in a submissive position on the ground. Thompson sustained a contusion to the entire left side of his face, consistent with punching or kicking. In Dr. Ward's opinion, this injury was caused by a 'tremendous' amount of force. (R. 753.) Thompson bore superficial abrasions on his extremities, which could have been caused by falling; bruises to his wrists, which were consistent with his wrists being bound by duct tape; and defensive wounds to his palms. Dr. Ward stated that, although the stab wounds and injury to the throat were severally fatal, Thompson's death was not quick because Thompson did not sustain arterial bleeding. In Dr. Ward's opinion, Thompson would have been aware of his injuries and would have experienced significant pain.

"Shane Golden, a forensic scientist with the Alabama Department of Forensic Sciences, processed Smith's Explorer. Golden applied a luminol reagent, which reacts with iron in the hemoglobin of blood, to the interior of Smith's vehicle.... Subsequent DNA testing of blood swabs taken from Smith's Explorer revealed that the samples were consistent with Thompson's DNA.

"Golden noted a smell of cleaners in the Explorer. That odor was explained by John Robinson, who owned a detail shop. Robinson identified Smith as having come to his detail shop on the morning of April 21. Smith's visit was memorable to Robinson because Smith wanted only the interior of his vehicle cleaned and because Smith emphasized that he wanted the cleaning to be thorough. Robinson testified that he saw red spatter on the carpet in the back seat and around the console.

"Smith was extradited to Alabama on April 27. Upon his return he waived his Miranda[ v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),] rights and provided a statement to Investigator Parris and Investigator Martin, which gave the officers a horrifying glimpse

  

into Thompson's final hours. Smith's statement included several versions, each more incriminating than the last. Smith stated that Tyrone Thompson had telephoned him around 10:00 to 10:30 p.m. on April 20 to 'go get some money' and drink some beer. (State's Exhibit 60.) Tyrone Thompson picked up Gaston and Smith, and then the three went to Thompson's apartment. Tyrone Thompson, Gaston, and Smith walked up to the front door. Thompson met the men at the front door and Tyrone Thompson took a telephone from Thompson and smashed it. Thompson was then taken to his vehicle. Gaston retrieved his rifle and all four men entered Thompson's vehicle. Smith drove Thompson's vehicle to a bank where he withdrew funds from Thompson's account. The men returned to Thompson's apartment, at which point Thompson was forced into the trunk of his vehicle. After picking up Smith's Explorer, the men took both vehicles to Tyrone Thompson's house, where they drank beer and discussed who would kill Thompson. Following an unsuccessful search for a chop shop in Coldwater, Alabama, the men traveled to Warf's house and then to a branch of the Ft. McClellan Credit Union. Thompson's debit card did not work at the credit union, so the men returned to Warf's house. After a brief trip to a Shell gasoline station to purchase duct tape, the men returned to Warf's house and used the tape to bind Thompson. Thompson, though, had broken some of his bindings and was screaming in the trunk, so he was moved to Smith's Explorer. The men traveled to Piedmont, Alabama, and found an isolated stretch of Highway 278. Thompson was escorted off the road. Tyrone Thompson handed Smith a knife and held Thompson's hands while Smith slit Thompson's throat. Thompson, who was crying and pleading for help at this point, was held down as a vehicle passed. Then Gaston took the knife from Smith and stabbed Thompson several times in the chest. Thompson was held down as another vehicle passed, and then was held up and again stabbed by Gaston. After pushing Thompson to the bottom of the embankment, Smith, Tyrone Thompson, and Gaston left the scene.

> ***4** "In his statement, Smith attempted to marginalize his role by suggesting that he unwittingly had become involved in Thompson's murder and that he had been a reluctant participant. This suggestion, however, was rebutted by other evidence offered at trial."

Smith v. State, 246 So. 3d 1086, 1090-94 (Ala. Crim. App. 2017) (footnotes omitted).

Smith was convicted of two counts of capital murder -- one count for intentionally killing Kevin Thompson during a kidnapping, a violation of § 13A-5-40(a)(1), Ala. Code 1975, and one count for intentionally killing Thompson during a robbery, a violation of § 13A-5-40(a)(2), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death. The Calhoun Circuit Court ("the trial court") followed that recommendation. Smith appealed.

On March 17, 2017, this Court issued an opinion affirming Smith's capital-murder convictions, but we remanded Smith's case to the trial court for that court to conduct a new penalty-phase proceeding. [1] Id. This Court found plain error during the penalty phase of Smith's trial when the trial court allowed "the State to elicit and argue the opinions of Thompson's family to persuade the jury to recommend a sentence of death." Smith, 246 So. 3d at 1114.

On remand, the trial court followed this Court's instructions and conducted a second penalty-phase proceeding. During the second penalty-phase proceeding, the State presented its evidence of aggravating circumstances to the jury, and Smith presented his mitigating circumstances. Specifically, Smith called Colby Kalani, Elaine Young, Dr. Henry Griffith, and Joanne Terrell (his mitigation specialist), and had the prior testimony of Smith's mother, Chrisandra Smith, read to the jury.

Kalani, who is Smith's half-brother and who is 10 years older than Smith, testified about them growing up in Hawaii and their "chaotic" home life, which he described as more chaotic than being in a prison. (R. 584, 593.) Kalani said that there was no structure and that, when he was 10 years old, he would be left to watch Smith. (R. 586.) Kalani also said that their mother was "extremely violent," and had stabbed both him and Smith and had run over him with her car. (R. 588.) Kalani explained that their mother "could also be the sweetest too though." (R. 592.) Kalani admitted that he had physically and sexually abused Smith. (R. 595.) As the trial court's sentencing order explained, Smith's mother's testimony also outlined "the physical, mental, emotional abuse that was persistent throughout Mr. Smith's life. Testimony of Elaine

  

Young, Children's advocacy Center Director, discussed the nature of his abuse and the failure of the system to adequately protect Mr. Smith as a child." (C. 238.)

At the conclusion of Smith's second penalty-phase proceeding, the jury, in addition to the two aggravating factors proved beyond a reasonable doubt at Smith's guilt-phase proceeding (i.e., that the capital offense was committed during the course of a first-degree kidnapping and that the capital offense was committed during the course of a first-degree robbery), found that three other aggravating circumstances were proved beyond a reasonable doubt -- namely, that Smith committed the capital offenses after having been previously convicted of a felony involving the use or threat of violence to a person, that Smith committed the capital offenses while under a sentence of imprisonment, and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. (C. 222-24.) In all, the jury found five aggravating circumstances to exist beyond a reasonable doubt. The jury then recommended by a vote of 10 to 2 that Smith be sentenced to death. (C. 225.) The trial court, finding that "the aggravating circumstances outweigh the mitigating circumstances,"[2] followed the jury's recommendation and sentenced Smith to death. (C. 236-38; R. 781-83.) This appeal follows.

Standard of Review

***5** Rule 45A, Ala. R. App. P., currently provides that,

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

Before the current version of Rule 45A, the rules of preservation did not apply in cases in which the death penalty had been imposed, and this Court had to review the entire record for plain error. Although no longer required, this Court recently explained that it would continue to review the entire record for plain error in all cases in which the death penalty has been imposed. See Iervolino v. State, [Ms. CR-21-0283, August 18, 2023] ––– So. 3d ––––, –––– (Ala. Crim. App. 2023).

Because this Court already conducted plain-error review of Smith's guilt-phase proceeding and affirmed his convictions for capital murder, our plain-error review in this case is limited to Smith's second penalty-phase proceeding. See Jerry Jerome Smith v. State, [Ms. CR-17-1014, Sept. 2, 2022] ––– So. 3d ––––, –––– n. 2 (Ala. Crim. App. 2022) ("This Court has already affirmed Smith's capital-murder conviction; thus, it has already reviewed the guilt phase of Smith's trial for plain error. Consequently, we do not review for plain error anything that occurred during the guilt phase of his trial. Instead, our plain-error review is limited to Smith's sixth penalty-phase proceeding.").

**[1] [2] [3] [4] [5] [6] [7]** In conducting plain-error review of Smith's second penalty-phase proceeding, we apply the following standard:

> " 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Plain error is 'error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997), modified on other grounds, Ex parte Wood, 715 So. 2d 819 (Ala. 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.' Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So. 2d 237 (Ala. 2000). 'The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant.' Ex parte Trawick, 698 So. 2d at 167. '[P]lain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error.' Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007). Thus, '[u]nder the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial.' Wilson v. State, 142 So. 3d 732, 751 (Ala. Crim. App. 2010). '[T]he plain error exception to the contemporaneous-objection rule is to be

  

"used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982))."

***6** DeBlase v. State, 294 So. 3d 154, 182-83 (Ala. Crim. App. 2018).

Discussion

I.

**[8]** Smith first argues that the circuit court erred when it admitted, during Smith's second penalty-phase proceeding, "numerous photographs of Kevin Thompson's body at the crime scene, as well as graphic photographs taken at Mr. Thompson's autopsy." (Smith's brief, p. 11.) Because Smith did not object to the State's presenting these complained-of photographs to the jury during Smith's second penalty-phase proceeding, this Court reviews Smith's argument for plain error only. See Rule 45A, Ala. R. App. P. We find no error, plain or otherwise, in the admission of the complained-of photographs.

**[9]** **[10]** **[11]** **[12]** Indeed, Smith raised a similar argument in his original direct appeal to this Court, which this Court also reviewed for plain error, claiming that the admission of crime-scene and autopsy photographs at the guilt phase of his trial was error because the photographs were "irrelevant, cumulative, and highly prejudicial." Smith, 246 So. 3d at 1110. This Court explained:

" ' ' "Generally, photographs are admissible into evidence in a criminal prosecution 'f 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 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).' "

Smith v. State, 246 So. 3d 1086, 1111 (Ala. Crim. App. 2017) (quoting Brooks v. State, 973 So. 2d 380, 393 (Ala. Crim. App. 2007)). This Court rejected Smith's argument in his direct appeal, holding:

"The photographs were relevant and admissible to establish the injuries Thompson sustained. See Gobble v. State, 104 So. 3d 920, 963-64 (Ala. Crim. App. 2010) (holding that autopsy photographs were gruesome yet necessary to demonstrate to the jury the extent of the victim's injuries (quoting Dabbs v. State, 518 So. 2d 825, 829 (Ala. Crim. App. 1987))). 'The photographs and testimony relating to postmortem animal and insect activity were also relevant and admissible to distinguish between the injuries [Smith] caused and the injuries that he did not.' Kelley v. State, 246 So. 3d 1032, 1051 (Ala. Crim. App. 2014), rev'd in part on unrelated grounds by Ex parte Kelley, 246 So. 3d 1068 (Ala. 2015). Although unpleasant, the photographs and testimony were not unduly gruesome or unfairly prejudicial. Consequently, this Court holds that the prejudicial effect of the evidence was not substantially outweighed by its prejudicial effect. Id.; see also Rule 403, Ala. R. Evid. ('Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.')."

***7** Smith, 246 So. 3d at 1111.

  

The only difference between Smith's argument on direct appeal and his present argument is the proceeding at which the complained-of photographs were admitted. The State merely reintroduced during the second penalty-phase proceeding the same complained-of photographs that were admitted during Smith's guilt-phase proceeding. Regarding the admission of evidence at a penalty-phase proceeding, § 13A-5-45(c), Ala. Code 1975, provides that

> "evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51, and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a trial judge other than the one before whom the defendant was tried or a jury other than the trial jury before which the defendant was tried."

In other words, because the State presented these complained-of photographs during the guilt phase of Smith's trial, the State could re-introduce the photographs to his new penalty-phase jury as long as the photographs were "relevant to the aggravating and mitigating circumstances."

This Court, as it did in Smith's previous appeal, has again reviewed the complained-of photographs, and to be sure, some of the photographs are graphic and unpleasant. But the photographs show the extent of the brutal injuries that Thompson sustained when Smith and his colleagues murdered Thompson. The complained-of photographs are also probative of the aggravating circumstance that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses when they are considered in conjunction with Dr. Emily Ward's testimony about the extent of Thompson's injuries and what he would have experienced as he was being murdered, and her testimony that Thompson would not have died quickly. Thus, the photographs were relevant to the State's proving the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, and, thus, were properly admitted. See Haney v. State, 603 So. 2d 368, 396 (Ala. Crim. App. 1991) ("The photographs depict the location of the crimes, the manner in which it was carried out, and its viciousness, all of which were highly relevant to the issues in the case. Moreover, the photographs were relevant to corroborate or disprove other evidence in the case. They were probative in proving the aggravating circumstance that the crimes were committed in an especially heinous, atrocious, or cruel manner as compared to other capital offenses.").

Accordingly, Smith is due no relief on this claim.

II.

**[13]** **[14]** Next, Smith argues that the trial court erred "when it allowed the State to introduce non-statutory aggravating factors to the jury through its cross-examination of [his] psychological expert, Dr. Henry Griffith, on subjects that exceeded the scope of any relevant issue in this case." (Smith's brief, p. 17.) Smith also argues that the trial court "erred by failing to instruct the jury not to consider [his] IQ of 128 or the absence of evidence that [he] was 'clinically insane' in reaching their sentence." (Smith's brief, p. 21.) But Smith neither objected to the State's questions posed to Dr. Griffith nor to the trial court's "failure to instruct" the jury about his IQ or lack of evidence of him being "clinically insane." Thus, Smith's arguments are reviewed for plain error only. After reviewing the record and the arguments presented by Smith and the State, we hold that there was no plain error either in the State's cross-examination of Dr. Griffith or in the trial court's failing to sua sponte instruct the jury not to consider Smith's IQ or the absence of evidence that he was "clinically insane."

***8** Accordingly, Smith is due no relief on these claims.

III.

Smith argues that the trial court erred when it denied his motion to continue his penalty-phase trial from March 14, 2022, "until a date early in May" because, he says, "COVID-19 and related restrictions had impeded the defense's ability to prepare its mitigation case in advance of [his] sentencing." (Smith's brief, p. 23.)

**[15]** **[16]** **[17]** It is well settled that

> " ' " '[a] motion for a continuance is addressed to the discretion of the court and the court's ruling on it will not be disturbed unless there is an abuse of discretion. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973). If

the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence. Knowles v. Blue, 209 Ala. 27, 32, 95 So. 481, 485-86 (1923).' "

" 'Fortenberry v. State, 545 So. 2d 129, 138 (Ala. Crim. App. 1988).'

> "Ex parte Clark, 728 So. 2d 1126, 1134 (Ala. 1998) (quoting Ex parte Saranthus, 501 So. 2d 1256, 1257 (Ala. 1986)). See also Scott v. State, 937 So. 2d 1065, 1076 (Ala. Crim. App. 2005)."

Eatmon v. State, 992 So. 2d 64, 68 (Ala. Crim. App. 2007). " ' "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process" ' "; rather, " ' "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." ' " Id. at 68 (quoting Glass v. State, 557 So. 2d 845, 848 (Ala. Crim. App. 1990), quoting in turn Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 850, 11 L. Ed. 2d 921 (1964)).

**[18]** Moreover, reversing a death sentence because a trial court denied a motion to continue " ' "requires 'a positive demonstration of abuse of judicial discretion.' Clayton v. State, 45 Ala. App. 127, 129, 226 So. 2d 671, 672 (1969)." Beauregard v. State, 372 So. 2d 37, 43 (Ala. Cr. App.), cert. denied, 372 So. 2d 44 (Ala.1979).' " Eatmon, 992 So. 2d at 68 (quoting McGlown v. State, 598 So. 2d 1027, 1029 (Ala. Crim. App. 1992)). And " ' "[n]ormally, a reviewing court determines the correctness of a trial court's ruling 'as of the time when it was made and according to what the record shows was before the lower court at that time.' " Henry v. State, 468 So. 2d 896, 899 (Ala. Cr. App. 1984), cert. denied, 468 So. 2d 902 (Ala. 1985).' " Eatmon, 992 So. 2d at 68 (quoting Dozier v. State, 630 So. 2d 137, 140 (Ala. Crim. App. 1993)).

**[19]** **[20]** On appeal, Smith argues that the trial court erred when it denied his motion to continue for two reasons: (1) his "trial counsel's ability to develop [his] mitigation case and prepare for his sentencing was inhibited by their inadequate access to [him] and Mr. Kalani as a result of COVID-19 and related restrictions" (Smith's brief, p. 25); and (2) "the short continuance requested by [him] was necessary to permit [his] mitigation specialist, Joanne Terrell, sufficient time to complete her investigation and assessment, which had been impeded by COVID and her need to limit exposure to COVID in order to protect her hospitalized husband" (Smith's brief, p. 26). Smith's arguments are without merit.

***9** To provide context to Smith's motion to continue his second-penalty phase proceeding, we first set out some additional procedural history to this case: Smith was arrested for murdering Thompson in April 2011, and he was indicted for capital murder in May 2011. Smith was subsequently convicted of capital murder and sentenced to death. Smith's sentences of death, however, were reversed on March 17, 2017, Smith v. State, 246 So. 3d 1086 (Ala. Crim. App. 2017), and this Court issued a certificate of judgment on August 25, 2017, returning jurisdiction of Smith's case to the trial court for that court to conduct a second penalty-phase proceeding. (C. 89.) Over two years later, on September 25, 2019, Smith filed a "Motion for Expenses to Hire a Mitigation Expert," in which he asked the trial court to give him $15,000 "to obtain the services of Joanne Terrell." (C. 194.) The next day, the trial court granted Smith's motion. (C. 91.)

**[21]** Smith's second penalty-phase proceeding was set for trial on March 14, 2022. A little over three weeks before his trial was set to begin, Smith moved to continue his trial, apparently setting out "five reasons that the motion to continue should be granted." [3] (R. 17.) On February 14, 2022, the trial court set Smith's motion to continue for a hearing on February 16, 2022. (C. 201.)

At the outset of the hearing on his motion, the circuit court informed the parties that it was granting Smith's motion to have Colby Kalani, who was an inmate in the Alabama Department of Corrections, "made available to counsel for the defendant in this matter." (R. 14.) The court then told Smith's counsel that it was further ordering that Kalani be put in the Cleburne County jail and that "it may be easier to get in and out of there." (R. 15.) The court told Smith's counsel that it had already "called the Sheriff to give him a heads up ... [a]nd [the circuit court] told him to make him available to y'all who need to talk to him." (R. 15.) Smith's counsel then told the circuit

  

court that they had not been able to have in-person contact with Smith "in two years" and that they wanted to be in the room with him. (R. 16.) The circuit court told Smith's counsel, "We can make that happen. That's not a big deal. That's easy. They may have to disinfect and spray stuff. I don't know what their COVID protocol is down there. I mean, they'll take care of whatever it is." (R. 16-17.)

Smith's counsel then addressed the motion to continue, and counsel explained that the current "COVID spike" was "the largest COVID spike in two years." (R. 17.) Smith's counsel noted to the court that "this is the first time the defense team has met in entirety with Mr. Smith." (R. 18.) Smith's counsel further argued that, because of this rise in COVID-19 cases, Smith's trial should be postponed for a short time due to his concern that black jurors "will not be well-represented." (R. 21.) Specifically, Smith's counsel said that Smith's trial is

> "set for 23 days from today. And we'll be picking a jury. We've been close before, 30 days out in September of 2019, before Judge Howell called an index. This -- and I wanted to preserve for the record if the judge doesn't grant this motion for a continuance and you sentence Mr. Smith to death I believe there's an inaccessibility to client followed by -- which could lead to ineffective assistance of counsel, which I'll admit to not being able to get my team in to see Mr. Smith.
>
> "I didn't get an infectious disease specialist or epidemiologist in here. We're going to be in close quarters with -- and I have talked to Kim McCarson, and I may have played a hand. I asked her about how many people will be summoned for jury duty. And I have attempted to watch two jury trials, murder trials. I was escorted out of one under the guise of COVID.
>
> ***10** "....
>
> > "Not you, Judge. In another circuit. And in the previous -- in the other case, it was a murder case, there were 14 white jurors seated and it ended up in mistrial. It was an abortion. It was in Judge Jones' class or courtroom in December, I believe. There's going to be a dearth of -- I won't know for 23 days. We expect a dearth of black jurors from the pool. The population here is 23 percent black, and we won't know until that date whether to move for striking or doing away with the impaneling of the jury. But that's what we expect is that blacks in particular will not be well-represented in this particular trial, and we would ask for some time to let COVID lapse. Maybe this summer. Maybe May. But those are about all of the items I wanted to put on the record."

(R. 20-21.)

The State responded to Smith's argument and maintained that it was ready to proceed to trial and argued that there should not be any concern about accessibility to inmates, explaining:

> "[A]s far as access to inmates, there have been numerous things done by the Department of Corrections to make their inmates accessible. They've done Zoom [video conferences]. We've had hearings where defendants have been made available through Zoom. In particular this defendant's codefendant has been made available through Zoom in a hearing that we have had regarding his counsel. That would be Mr. Jovon Gaston, Your Honor. So there are ways to visit with capital murder defendants. It can be done through Zoom.
>
> > "I was present when the request was made to have Mr. Smith brought up from Department of Corrections to make him available for Dr. Griffith for him to be able to interview him. That was done for defense counsel at their request. The Court has made him available to them."

(R. 22-23.) As far as Smith's argument about whether black jurors would be underrepresented, the State argued:

> "And as relating to potential jurors or lack of or discrepancy in number, Your Honor, those things are not ripe until we get ready for trial. That's a chance we take every time we move to try a case even pre-pandemic. Our sister county when we go to strike juries over there the numbers are not always what you would hope they would be, but that is

  

representative of that county. Our numbers here represent this county.

> "So it is not an issue that becomes ripe until we try to select that jury. And if at the time we're not able to get one and the Court believes that it can't be done, then measures will be taken. But as far as I'm concerned, Your Honor, we're ready to move forward and have been for quite some time."

(R. 24-25.)

Thereafter, Smith's counsel added a new reason why the trial court should grant his motion to continue -- namely, Smith's mitigation expert, Joanne Terrell, "has expressed concerns regarding COVID." (R. 26.) Smith's counsel argued:

> "[A]nother concern that we've got which I think may or may not have been laid out in the motion is our mitigation specialist, Joanne Terrell, has expressed concerns regarding COVID. Her husband is currently hospitalized. I believe he's got heart and lung conditions. So she's trying to be extremely cautious about not exposing him to COVID. And that caution has made it more difficult for her to do her job as well. Her job is not one that can really be done over Zoom or be done in any way other than meeting with people in person. So we have to make her concerns known as well because even though she's just one member of this team she's arguably the most important one. I would almost rather -- and I think [co-counsel] would agree with me -- I would almost rather lose a lawyer from this team than to lose her. Without her there's not much we can do. So her concerns have to be taken into account as well, Judge."

***11** (R. 25-26.) The State countered that "[w]e all have family" that we do not want to expose to COVID-19, but "I anticipate being here March 14th and everyone else should be as well." (R. 28.) The State also argued that its

> "understanding is Ms. Terrell has already generated a report and her findings as relating to her encounters with Mr. Smith and probably any of the other persons that she's also spoken with. So I would ask the Court to have the defense produce that report to the Court as well as any timeline or anything that may be available and that -- I mean, she has -- we all have health concerns, Your Honor."

(R. 27.) Smith's counsel then told the trial court that Terrell's "job doesn't stop once she generates that report," and that she "still does work up to and throughout the trial." (R. 28.) Thereafter, the trial court found as follows: "All right. The Court has considered the motion to continue and arguments of counsel on behalf of the defendant in this case [by both defense counsel] and corresponding response by the State of Alabama in this case. Motion to continue will be denied." (R. 30-31.) On February 17, 2022, the trial court memorialized its denial of Smith's motion to continue in a written order. (C. 204.) A few days later, on February 24, 2022, Smith asked the trial court for an additional $15,000 to pay Joanne Terrell. (C. 208-10.) The trial court granted Smith's motion. (C. 211.) The jury-selection process for Smith's second penalty-phase proceeding began on March 10, 2022, and, as set out above, both Colby Kalani and Joanne Terrell testified in Smith's mitigation case.

On appeal, Smith maintains that the circuit court erred when it denied his motion to continue his second penalty-phase proceeding because, he says, the circuit court "ignored compelling reasons to grant Mr. Smith's motion for a continuance." (Smith's brief, p. 24.) Smith highlights two "compelling reasons" for granting his motion.

First, Smith says that his motion to continue should have been granted because his "trial counsel's ability to develop [his] mitigation case and prepare for his sentencing was inhibited by their inadequate access to Mr. Smith and Mr. Kalani as a result of COVID-19 and related restrictions." (Smith's brief, p. 25.) Second, Smith says that "the short continuance requested by [him] was necessary to permit [his] mitigation specialist, Joanne Terrell, sufficient time to complete her investigation and assessment, which had been impeded by COVID and her need to limit exposure to COVID in order to protect her hospitalized husband." (Smith's brief, p. 26.) Neither reason shows that the circuit court abused its considerable discretion here when it denied Smith's motion to continue.

As set out above, Smith was arrested for capital murder in 2011, he was convicted of capital murder and sentenced to death the first time in 2013, his death sentence was reversed on March 17, 2017, and this Court issued a certificate of judgment on August 25, 2017, which returned jurisdiction of Smith's case to the circuit court for that court to conduct a second penalty-phase proceeding. Smith did not move for a continuance of his second penalty-phase proceeding until February 2022. Although Smith's counsel mentioned

  

difficulties with accessing Kalani and Smith because of COVID-19-related issues and noted Terrell's concerns about COVID-19, Smith's counsel did not explain why he could not have accessed Kalani and Smith and why a mitigation expert could not have completed a mitigating investigation in the nearly three years between this Court's returning jurisdiction to the circuit court for Smith's second penalty-phase proceeding and the start of the COVID-19 pandemic in March 2020.

***12** What is more, as to Smith's argument on appeal about having access to Kalani and Smith, the circuit court made it clear to Smith's counsel at the hearing on his motion to continue that Smith's counsel would not have an issue accessing Kalani and could have in-person contact with Smith. Smith's counsel expressed no disagreement or concern with the court's assurance of access to Kalani and Smith, and Smith's counsel expressed no further concerns about accessing either Smith or Kalani and made no further argument about needing a continuance based on their access to Smith. As to Smith's argument about Terrell's mitigation investigation, the State correctly points out that Terrell "had already generated a report on January 30, 2022 with her findings regarding Smith." (State's brief, p. 18.) Although Smith's counsel explained that Terrell's mitigation investigation was on-going, Smith's counsel did not explain to the circuit court what additional mitigation evidence Terrell was hoping to uncover in the event the court granted his motion. Although Terrell expressed a concern about testifying at trial due to a rise in COVID-19 cases because a family member had been hospitalized, Terrell did testify and her hesitancy to testify at trial did not require the circuit court to grant Smith's motion to continue. Her hesitancy certainly does not establish that the court abused its discretion in denying Smith's motion to continue.

In short, the circuit court did not abuse its considerable discretion when it denied Smith's motion to continue his second penalty-phase proceeding.

Accordingly, Smith is due no relief on this claim.

IV.

Smith argues that the trial court erred when it denied his motion to have the entire Calhoun County District Attorney's Office recused from his case. (Smith's brief, p. 29.) According to Smith, after his first trial, the "lead counsel [from] his first trial (Timothy Burgess) joined the Calhoun County District Attorney's office." (Smith's brief, p. 29.) In his brief on appeal, Smith explains:

> "Mr. Burgess was Mr. Smith's lead counsel in the guilt and penalty phases of his initial trial in 2013. During the course of his representation of Mr. Smith, from 2011 through 2013, Mr. Burgess acquired confidential information relating to Mr. Smith's case. Most notably, as the attorney who examined the majority of Mr. Smith's witnesses at his first trial and during his first sentencing -- including Mr. Smith's mitigation expert --and delivered the penalty-phase closing statement on behalf of Mr. Smith, Mr. Burgess acquired confidential information regarding Mr. Smith's mitigation evidence, which was the subject of his re-sentencing. Following that first trial, Mr. Burgess became an Assistant District Attorney with the Calhoun County District Attorney's office in 2015, and served in that capacity until 2021, at which point he became a circuit court judge in Calhoun and Cleburne Counties. Mr. Burgess' work at the Calhoun County District Attorney's office presented a conflict of interest that should have precluded the Calhoun County District Attorney's office from prosecuting Mr. Smith in his re-sentencing proceeding. At a minimum, the trial court should have conducted an inquiry into the existence of a conflict."

(Smith's brief, pp. 29-30.) Smith raises two arguments on appeal concerning the trial court's denial of his motion to have the entire district attorney's office recused from his case. Neither argument entitles him to any relief.

Before we address Smith's arguments, we must provide context to Smith's argument by setting out the procedural history surrounding his motion to recuse: On January 30, 2020, Smith moved the trial court to recuse the entire district attorney's office from his second penalty-phase proceeding because Burgess had been hired to work in that office. Smith alleged that "it could appear the members of the District Attorney's Office have acquired such information and thereby such an interest in this case that they shall not be able to discharge their duties impartially in regard to this case." (C. 191 (emphasis added).)

The next day, the State responded to Smith's motion. The State alleged that, "[s]ince his hire, Tim Burgess has been advised to avoid working on cases that involve any potential conflicts with prior cases, and has been advised not to discuss with any member of this Office any information that he may have derived from prior cases." (C. 189.) The

  

State further explained that, with Burgess, it had followed the National District Attorney's Association's guidelines for addressing potential conflicts of interest within the office by "firewalling" him from the case. The State said that it believed that recusal was not necessary in this case because "there are adequate firewalls in place to protect this Office and the Defendant from any disclosure of information that would be detrimental to either party." (C. 190.)

***13** On February 7, 2020, the trial court issued an order denying Smith's motion to recuse, finding that it "is satisfied with the response of the State of Alabama and that appropriate steps have been taken in compliance with the 'best practices' to prevent conflicts from arising." (C. 186.)

On February 28, 2020, Smith filed a "Request for Evidentiary Hearing Date," in which Smith asked the circuit court to conduct a hearing to determine whether there existed "a direct or imputed conflict with the Calhoun County District Attorney's Office prosecution of Smith." (C. 105.) The trial court granted Smith's request for an evidentiary hearing on his motion to recuse. (C. 115.) Later, the trial court set the hearing on Smith's motion for January 8, 2021. (C. 159.)

At the hearing, Smith's counsel argued that, despite the State's assertion that it had taken measures to ensure that Burgess did not discuss or work on Smith's case, the appearance of impropriety was enough to require the entire office to recuse. Smith's counsel conceded that he was "not saying that there's any nefarious action by [the district attorney] or by Mr. Burgess or that there's some sort of underhanded thing going on." (Supp. R. 6.) Smith's counsel argued:

> "Now, I understand what the rules of professional conduct say about moving from private work to government work, and I understand that it doesn't say that every conflict is automatically -- you wouldn't want the DA's office to be prevented from hiring quality prosecutors. I get that. That makes total sense. If I were Mr. McVeigh, [the district attorney,] I would say, wow, this guy is a great lawyer, he tries a good case, I want to hire him. We wouldn't want to discourage that. But asking them to recuse off of one specific case where the man has been sentenced to death already and by their own admission, there's a transcript, the evidence is going to be the same, there's nothing to worry about. Okay. Well, then there's no problem.
>
> "Out of an abundance of caution it's not like we're asking to try the case again. We're not asking to introduce new evidence. The evidence is closed, so the only thing that we're doing is presenting a different strategy at sentencing, one which they may very well be aware of by virtue of the fact that his trial counsel had 1,200 days in their office before he even needed to be screened off of anything. Okay? That's it."

(Supp. R. 9-10.)

The district attorney responded by explaining the office procedures that are in place when the district attorney -- both past and present -- has hired an attorney who has previously tried criminal defense cases as follows:

> "[W]hen we have the ability to hire people -- I have hired some new lawyers that don't have any experience, but most of my hires for people who are going to be trying cases have been experienced criminal lawyers. They're going to have to, in a small county like this, have tried cases before, and Mr. Johnston and Mr. Burgess specifically have tried capital cases. I would say the bulk of capital cases.
>
> "So when you're talking about recusing -- and he's right. The easiest thing in the world for me to do would be to come in here and say, no, let somebody else have it, and that's going to affect every capital case that I have that those two men touched. And that goes back to when Joe Hubbard was the district attorney and Tim Burgess was trial counsel for Ellis Mashburn.
>
> ***14** "So the idea that when somebody comes in because a capital murder case is on appeal, then, well, we don't need to screen people. We say if you have tried a capital murder under Joe Hubbard and you're hired in this office, you never talk about that case, we never ask you any questions, you never disclose anything to us. You don't look anything up on the computer. Those are the rules.
>
> "That's what has been the case since Mr. Field was the DA. It was the case

> when Joe Hubbard was the DA. It's the case under me. So to say that there was 1,000-some odd days when he wasn't screened is false on its face. From the moment he was hired in this office, he was screened from any case he's handled in the past."

(Supp. R. 10-12.) The district attorney continued:

"If we were to say any time we hire an experienced lawyer that that lawyer is somehow conflicted on all cases involving all people in our county of 120,000 people, we wouldn't try very much of anything. We would conflict it all the time, especially on capital cases, so your choice would be don't hire the experienced lawyers that have criminal history. I was a three-year-experienced criminal defense lawyer when I was hired, and I had some cases that I tried on the other side. You know, there are potential issues there. That's why the firewall is put into place.

"I don't think we're required to step away from a case just because the allegation is made. I understand why the allegation is made. It's because of what I did in the other case. I would do that again. It has created some issues for me, which again is not just wiping it away. The easiest thing to do is say take me off of every capital case. I'm not doing that.

"I'm saying our office is shielded. I'm saying this defendant in this particular set of facts has been tried three times. Obviously it's been different in each case. There may be witnesses related to one defendant that aren't with another. This case has been tried to a verdict. What we're talking about coming back for is sentencing, so all the evidence will come in through a couple of witnesses. It will be a truncated trial. The majority of stuff being done will be done by them, and we will argue the same thing.

"I wouldn't be here if I wasn't asking for death. If I didn't want death, I could say, we'll ask for life without and just not try the case, and I believe that would [be] his sentence. So the family is asking us to ask for death. We're asking for death.

"But this Court has seen the trial. They've got transcripts of the other trial. If all the sudden I started coming out with evidence and saying, well, what about this or what about that, they wouldn't know that and could say how would he have known this. So there are mechanisms there to protect this young man who is being charged and who has been tried and who has been convicted.

"The question is his sentence. It's either death or life without. I believe that we can abide by all the rules that govern our conduct, and I believe that we have. And I believe it would be wrong to punish me for doing the right thing on another case, to then take me off of this and I would say any and all capital cases that Burgess or David Johnston or who knows who else that I have employed that has touched anybody else out there. It will have a domino effect on other cases.

"....

> "So I would argue that everything he alleged was wrong. We ought to be allowed to stay on the case, but as in every case, the Court is here to monitor our behavior and to control if we stray. Okay. Thank you."

***15** (Supp. R. 16-18.)

On May 18, 2021, after the original trial judge retired, the trial court set Smith's motion to recuse for another hearing on June 22, 2021. (C. 166.) At that hearing, the trial court and the parties agreed that the new trial judge would review the transcript from the January 8, 2021, hearing and the parties agreed that "there are no additions or supplements that should be made to that argument." (R. 4.) On August 31, 2021, the trial court issued an order denying Smith's motion to recuse. (C. 173.)

As set out above, Smith raises two arguments on appeal about the trial court's denial of his motion to recuse the entire district attorney's office from his second penalty-phase proceeding.

**[22]** **[23]** First, Smith argues that the district attorney's hiring of Burgess imputed a conflict of interest on the entire district attorney's office. Smith is incorrect.

"In Alabama, there is not a per se rule that a district attorney's office must recuse itself when one assistant attorney has previously represented a defendant. See Smith v. State, 639 So. 2d 543 (Ala. Crim. App. 1993); Terry v.

  

State, 424 So. 2d 710 (Ala. Crim. App. 1982); Hannon v. State, 48 Ala. App. 613, 266 So. 2d 825 (Ala. Crim. App. 1972). In Smith, we stated:

> " '[Defense counsel] did not breach the attorney-client relationship because he abstained from any participation in the prosecution of the appellant and he revealed no confidential information regarding his former client to anyone at the district attorney's office.'

"639 So. 2d at 548. In Hannon, we stated:

> " 'The public interest demanded that the prosecution go forward. There has been no breach of the attorney-client relationship, the privilege against disclosure has been preserved, and professional ethics, painstakingly observed, and the constitutional guarantee of a fair and impartial trial was not infringed.'

"48 Ala. App. at 618, 266 So. 2d at 829."

Sneed v. State, 1 So. 3d 104, 122 (Ala. Crim. App. 2007).

In his motion to recuse and at the hearing on his motion, Smith never alleged that Burgess had breached the attorney-client relationship by disclosing any information to the district attorney's office. At best, Smith made speculative assertions that his former trial counsel might have made such disclosures after he was hired by the district attorney. But the district attorney explained the safeguards in place in the district attorney's office to ensure that Burgess did not make such a disclosure. Because Smith failed to even allege that his former trial counsel breached the attorney-client relationship, the trial court did not err when it denied Smith's motion to recuse the entire district attorney's office on an imputed conflict of interest.

**[24]** Second, Smith, citing Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), argues that, "[i]n denying [his] motion to disqualify the district attorney's office, the trial court failed to conduct any meaningful inquiry into whether and what information had been disseminated from Mr. Burgess to others in the district attorney's office." (Smith's brief, p. 33.) Cuyler, however, does not support Smith's argument in this case.

***16** "In Cuyler, the United States Supreme Court stated:

> " 'Holloway [v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)] requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in Holloway, supra, at 485-486, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' " 435 U.S. at 485, quoting State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.'

"446 U.S. at 346-47, 100 S. Ct. at 1717 (footnotes omitted). See also Hannon v. State, 48 Ala. App. 613, 620, 266 So. 2d 825, 831 (1972) (' "Nor is there basis for recusation in the charge that there is a possibility that Mr. Ware has violated the confidential relationship existing between attorney and client. Indeed, it is to be presumed that he, as a member of the bar in good standing, has and will respect the defendant's confidence." ')."

Sneed v. State, 1 So. 3d 104, 122 (Ala. Crim. App. 2007).

Again, neither in his motion to recuse nor at the hearing on his motion to recuse did Smith ever allege that Burgess engaged in any improper conduct. Rather, Smith merely made speculative assertions about the possibility that Burgess could have disclosed confidential information. Because Smith never alleged that Burgess engaged in any improper behavior, the presumption is that Burgess did not engage in such conduct; thus, the trial court was free to presume that no such improper behavior occurred and had no obligation to conduct any further inquiry. In addition, the trial court could

  

rely upon the assertions of the Calhoun County District Attorney that Smith's former counsel was "screened" from the case from the "moment he was hired" so that he did not reveal any confidential information that he learned through his representation of Smith.

Accordingly, Smith is due no relief on this claim.

V.

**[25]** Smith, relying primarily on Ramos v. Louisiana, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), argues that his "death sentence violates the Alabama and United States Constitutions because the jury did not return a unanimous verdict in favor of death." (Smith's brief, p. 35.) According to Smith, because his "jury did not return a[ ] unanimous verdict in favor of the death penalty, his death sentence must be reversed." (Smith's brief, p. 36.) Smith's argument has no merit.

***17** We have held that

> " ' "Alabama law does not require that the jury's advisory verdict be unanimous before it can recommend death," ' Thompson [v. State], 153 So. 3d [84,] at 179 [(Ala. Crim. App. 2012)] (quoting Miller v. State, 913 So. 2d 1148, 1169 n.4 (Ala. Crim. App. 2004)), and Keaton cites no case from the United States Supreme Court that requires such unanimity. See State v. Poole, 297 So. 3d 487, 504 (Fla. 2020), cert. denied 592 U.S. ——, 141 S. Ct. 1051, 208 L. Ed. 2d 521 (2021) (holding that the 'requirement of a unanimous jury' for the imposition of the death penalty 'finds no support in' caselaw from the United States Supreme Court). See also Lane [v. State], 327 So. 3d [691,] at 776-77 [(Ala. Crim. App. 2020)] (noting that ' "both this Court and the Alabama Supreme Court have upheld death sentences imposed after the jury made a less-than-unanimous recommendation that the defendant be sentenced to death" ' (quoting Brownfield v. State, 44 So. 3d 1, 39 (Ala. Crim. App. 2007))). Keaton's reliance on Ramos v. Louisiana, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), is misplaced because Ramos held only that the United States Constitution requires a unanimous verdict to support a conviction, not a sentence. See Ruiz v. Davis, 819 F. App'x 238, 246 n.9 (5th Cir. 2020) (noting that the United States Supreme Court held in Ramos that ' "the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction," not a sentence' (quoting Ramos, 590 U.S. at 93, 140 S. Ct. at 1397))."

Keaton v. State, 375 So. 3d 44, 136-37 (Ala. Crim. App. 2021). Because there is no requirement that a jury unanimously agree to impose a death sentence, Smith's argument that his death sentence is unconstitutional because the jury "did not return a unanimous verdict in favor of death" (Smith's brief, p. 35) is without merit.

Accordingly, Smith is due no relief on this claim.

VI.

**[26]** Smith also argues that the trial court erred when it failed "to adequately address improper juror conduct and shield the jury from extraneous and/or prejudicial information." (Smith's brief, p. 44.) According to Smith,

> "[d]uring a break on the second day of [his] sentencing hearing, juror [J.B.] informed the trial court that he had previously-undisclosed connections to Cynthia Warf and Jessica Foster -- two key State witnesses at the guilty phase, whose conduct was the subject of testimony by the State's investigator. (R. 560-61.) Although [J.B.] was removed from the jury, the trial court took no steps to ascertain the extent of [J.B.'s] extraneous knowledge of the crime and its participants, or whether he shared such knowledge with any other remaining members of the jury."[4]

(Smith's brief, pp. 44-45.) Smith's argument, which was not first raised in the trial court, is reviewed for plain error. See Rule 45A, Ala. R. App. P. We find no plain error.

VII.

***18** **[27]** Smith argues that the trial court erred when it allowed the State to reintroduce into evidence Dr. Emily Ward's testimony from Smith's guilt-phase proceeding by reading the transcript of her testimony to the second penalty-phase jury because, he says, it "undermined [his] rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution." (Smith's brief, pp. 46-47.) Smith did not object to the State's reading of Dr. Ward's

trial testimony to the jury during the second penalty-phase proceeding, nor did he expressly raise a Confrontation Clause argument in the trial court. Therefore, Smith's argument on appeal is reviewed for plain error. We find no error, plain or otherwise, with the trial court's allowing the State to read Dr. Ward's guilt-phase testimony to the jury during the second penalty phase of Smith's trial.

Indeed, this Court has

> " 'express[ed] doubt that the Confrontation Clause applies at sentencing, even in capital cases,' Lockhart [v. State], 163 So. 3d [1088,] at 1133 [(Ala. Crim. App. 2023)], and some federal appellate courts have unequivocally concluded that a defendant's right to confrontation does not apply at the penalty phase of a capital trial. See, e.g., Muhammad v. Secretary, Florida Dep't of Corr., 733 F.3d 1065, 1074 (11th Cir. 2013) (holding that the United States Supreme Court's decisions in Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), and Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), 'together stand for the proposition that a defendant does not have a right to confront hearsay declarants at a capital sentencing hearing'); and Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002) ('[T]he Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty.' (citing Williams v. New York, supra))."

Keaton v. State, 375 So. 3d at 115-16. To prevail on his plain-error argument, Smith must "establish an obvious, indisputable, and egregious error that adversely affected the outcome of his sentencing." Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013). Because it is far from "obvious" and "indisputable" that the Confrontation Clause applies to a penalty-phase proceeding, we certainly cannot hold that the trial court's allowing the State to reintroduce Dr. Ward's guilt-phase testimony during Smith's second penalty-phase proceeding was plain error.

**[28]** In any event, Smith's argument is meritless because Dr. Ward's guilt-phase testimony, which was subject to cross-examination by Smith's counsel during the guilt phase of his trial, was admissible during the penalty phase of Smith's trial pursuant to § 13A-15-45(c), Ala. Code 1975, which provides:

> "At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51, and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a trial judge other than the one before whom the defendant was tried or a jury other than the trial jury before which the defendant was tried."

Here, as Smith notes in his argument on appeal, Dr. Ward's testimony that was read into the record during Smith's second penalty-phase proceeding was the testimony that she gave to the jury during Smith's guilt-phase proceeding. As set out above, Dr. Ward's testimony addressed the extent of Thompson's injuries and the manner in which he died. Dr. Ward's testimony also established that Thompson would not have died quickly, that he would have been aware of his injuries, and that he would have experienced significant pain. Because Dr. Ward's testimony was a part of the State's evidence at Smith's guilt-phase proceeding, because it was relevant to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, and because the State had to reintroduce Dr. Ward's testimony to the new penalty-phase jury for it to consider the testimony, the trial court properly admitted Dr. Ward's guilt-phase testimony pursuant to § 13A-5-45(c), Ala. Code 1975.

***19** Accordingly, the trial court did not commit any error, plain or otherwise, when it admitted Dr. Ward's testimony during Smith's second penalty-phase proceeding.

VIII.

**[29]** Smith next argues that "the use of a conviction for [his] juvenile conduct as an aggravating factor making him eligible to receive the death penalty violated [his] right to be free from cruel and unusual punishment under the Eighth Amendment." (Smith's brief, p. 51.) According to Smith, "the prosecution presented evidence regarding [his] prior conviction for robbery in the first degree when he was sixteen, and the jury determined that [his] prior conviction was an aggravating factor supporting the imposition of a

death sentence." (Smith's brief, p. 51.) Smith, citing Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), argues that, "though Roper does not require that courts 'wipe clean' individuals' records, ... it does insist that individuals not be executed for conduct they engaged in as children." (Smith's brief, pp. 51-52.) But Smith's "juvenile conduct" -- as he calls it -- resulted in an "adult" criminal conviction for first-degree robbery. The record on appeal shows that Smith committed the first-degree robbery about two months before he turned 17 years old and that he was tried and convicted as an adult offender in Calhoun Circuit Court. (C. 1010-11.)

In Jackson v. State, 305 So. 3d 440, 496 (Ala. Crim. App. 2019), this Court rejected an argument identical to the one Smith raises here. In Jackson, this Court held that "[n]othing in Roper forbids using the prior adult conviction that occurred when Jackson was a juvenile as an aggravating circumstance to support the death penalty, and Roper does not bar Jackson's sentence of death." So, just as in Jackson, nothing prohibits the use of Smith's prior adult conviction for first-degree robbery as an aggravating circumstance to support his death sentence.

Accordingly, Smith is not entitled to any relief on this claim.

IX.

**[30]** Smith argues that "double-counting murder during the commission of a robbery and murder during the commission of a kidnapping at the guilt and penalty phases violated state and federal law." (Smith's brief, p. 53.) Yet this Court and the Alabama Supreme Court have consistently rejected this argument and recognized that there is no constitutional or statutory prohibition on " 'double counting' circumstances both as an element of the offense and as an aggravating circumstance." Hicks v. State, 378 So. 3d 1071, 1127 (Ala. Crim. App. 2019). Accordingly, Smith is not entitled to any relief on this claim.

X.

**[31]** Smith next argues that "Alabama's method of execution [by lethal injection] constitutes cruel and unusual punishment in violation of the Eighth Amendment." (Smith's brief, p. 55.) Smith's argument was not first presented in the trial court. Smith did argue generally at the close of the State's penalty-phase case that "the death penalty is cruel and unusual punishment." (R. 576.) Smith, however, did not raise the specific argument that the method by which Alabama carries out the death penalty is cruel and unusual punishment. Thus, his argument is due to be reviewed for plain error only. But regardless of whether the specific argument was raised below, we find no error, plain or otherwise, because Smith's argument is without merit. Indeed, the Alabama Supreme Court has held that lethal injection does not constitute cruel and unusual punishment. See Ex parte Belisle, 11 So. 3d 323, 349 (Ala. 2008) (holding "that Alabama's use of lethal injection as a method of execution does not violate the Eighth Amendment to the United States Constitution"). [5] Accordingly, Smith is not entitled to any relief on this claim.

XI.

***20** Finally, pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Smith's capital-murder conviction and death sentence.

As set out above, Smith was convicted of two counts of capital murder -- one count for intentionally killing Thompson during a kidnapping, a violation of § 13A-5-40(a)(1), Ala. Code 1975, and one count for intentionally killing Thompson during a robbery, a violation of § 13A-5-40(a)(2), Ala. Code 1975. The jury's guilty verdicts established the existence of two aggravating circumstances -- namely, that the capital murder was committed during a first-degree kidnapping and that the capital murder was committed during a first-degree robbery. See § 13A-5-49(4), Ala. Code 1975. At the conclusion of his second penalty-phase proceeding, the jury found three additional aggravating circumstances to exist beyond a reasonable doubt -- namely, that Smith committed the capital offenses after having been previously convicted of a felony involving the use or threat of violence to a person, that Smith committed the capital offenses while under a sentence of imprisonment, and that the capital offense was especially heinous, atrocious, or cruel. (C. 222-24.) Thus, five aggravating circumstances were found to exist beyond a reasonable doubt. The jury then recommended by a vote of 10 to 2 that Smith be sentenced to death. (C. 225.) After conducting a judicial-sentencing hearing, the trial court followed the jury's recommendation and sentenced Smith to death.

  

After examining the record on appeal, this Court finds nothing to show that Smith's death sentence was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

Additionally, § 13A-5-53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances to determine whether Smith's sentence of death is appropriate. In so doing, we are mindful of the following:

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

***21** Collins v. State, 363 So. 3d 1, 63 (Ala. Crim. App. 2019) (opinion on return to second remand) (quoting Stanley v. State, 143 So. 3d 230, 333 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court)).

Here, the trial court, in its sentencing order, found the existence of the five aggravating circumstances found by the jury -- "two aggravating factors that carried over from the guilt phase, Murder during a Kidnapping in the First Degree and Murder during a Robbery in the First Degree" and the three aggravating circumstances the jury found to exist beyond a reasonable doubt. (C. 237.) The trial court also "consider[ed] all of these mitigating circumstances":

> "The defense offered testimony and evidence that the following statutory mitigators were applicable: (1) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance pursuant to Section 13A-5-51(2); (2) The Defendant acted under extreme duress or under the substantial domination of another person pursuant to Section 13A-5-51(5); and (3) The Defendant did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> "The defense further offered evidence and testimony under Section 13A-5-52. This evidence and testimony consisted of multiple reports of the horrendous upbringing that the defendant endured. Testimony from his mother and brother consisted of the physical, mental, emotional, and sexual abuse that was persistent throughout Mr. Smith's life. Testimony of Elaine Young, Children's Advocacy Center Director, discussed the nature of his abuse and the failure of the system to adequately protect Mr. Smith as a child.
>
> > "All of the mitigating evidence was summarized by JoAnn Terrell. Ms. Terrell is an expert in the field of Mitigation and provided compelling testimony about the mitigating circumstances present in this case."

(C. 237-38.) The trial court then sentenced Smith to death, concluding:

> "After considering the evidence presented, the arguments of counsel, the report prepared by Pardons and Paroles, the jury's verdict, and after weighing the aggravating circumstances against the mitigating circumstances, this Court finds that the aggravating circumstances outweigh the mitigating circumstances.

  

> "This Court has sworn to uphold the law of this State, and this is a duty that it does not take lightly. It is never easy to recommend the taking of the life of another person; however, the law requires it in this case."

(C. 238.)

The trial court's findings are correct, and this Court, after independently weighing the aggravating circumstances found to exist and all the mitigating circumstances found to exist, holds that Smith's sentence of death is appropriate.

Next, as required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must determine whether Smith's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. It is not. Again, Smith was convicted of intentionally killing Thompson during a kidnapping, a violation of § 13A-5-40(a)(1), Ala. Code 1975, and for intentionally killing Thompson during a robbery, a violation of § 13A-5-40(a)(2), Ala. Code 1975. As noted above, five aggravating circumstances were proved to exist beyond a reasonable doubt -- namely, that the capital murder was committed during a first-degree kidnapping; that the capital murder was committed during a first-degree robbery; that Smith committed the capital offenses after having been previously convicted of a felony involving the use or threat of violence to a person; that Smith committed the capital offenses while under a sentence of imprisonment; and that the capital offense was especially heinous, atrocious, or cruel. (C. 222-24.) Sentences of death have been imposed for similar crimes in Alabama. See Gaddy v. State, 698 So. 2d 1100, 1150 (Ala. Crim. App. 1995) ("Two-thirds of all death cases in Alabama involve murders that occur during the course of a robbery."). See also Shanklin v. State, 187 So. 3d 734 (Ala. Crim. App. 2014) (robbery and burglary); Mills v. State, 62 So. 3d 553 (Ala. Crim. App. 2008) (robbery); Sale v. State, 8 So. 3d 330 (Ala. Crim. App. 2008) (kidnapping); Lewis v. State, 24 So. 3d 480 (Ala. Crim. App. 2006) (kidnapping); and Wilson v. State, 142 So. 3d 732 (Ala. Crim. App. 2010) (especially-heinous-atrocious-or-cruel capital murder committed during a robbery and burglary). Therefore, this Court holds that Smith's death sentence is neither excessive nor disproportionate when compared to the penalty imposed in similar cases.

***22** Lastly, this Court has searched the record for any error that may have adversely affected Smith's substantial rights and has found none. See Rule 45A, Ala. R. App. P.

Conclusion

Based on these reasons, Smith's death sentence is affirmed.

AFFIRMED.

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

**All Citations**

--- So.3d ----, 2024 WL 3212264

## Footnotes

1 The Alabama Supreme Court denied certiorari review on August 25, 2017, and this Court issued a certificate of judgment that same day, which returned jurisdiction over Smith's case to the trial court. (C. 89.)

2 The trial court did not find any additional aggravating circumstances to exist. (C. 237.)

3 Although Smith's counsel and the trial court referenced the motion to continue at the hearing on the motion (see R. 17), the motion does not appear in the record on appeal. " '[I]t is the appellant's duty to provide this Court with a complete record on appeal.' " Belcher v. State, 341 So. 3d 237, 264 n.9 (Ala. Crim. App. 2020) (quoting Knight v. State, 621 So. 2d 394, 395 (Ala. Crim. App. 1993)).

  

4 Neither the State nor Smith revealed either Warf's or Foster's names to the venire during voir dire. When testimony during the second penalty phase revealed those names to the seated jury, Juror J.B. (who was an alternate juror) immediately disclosed to the court that he was familiar with both Warf and Foster. Juror J.B. explained that he has not "had contact with [Warf and her husband] in over 10 years, but I know them. And on top of that, if it's who I think it is, Jessica Foster has been a client at the rehab where my wife is a program manager." (R. 563-64.) Juror J.B. made clear that he "just figured all that out today" and he "just didn't make the connection." (R. 564.) Neither Smith nor the State made any arguments about Juror J.B.'s disclosure.

5 Although Smith's argument on appeal attacks the constitutionality of lethal injection as a method of execution, Smith's argument fails to recognize that Alabama has other available methods of execution, having recently adopted nitrogen hypoxia as a method of execution. This Court has explained that, even "if lethal injection is held unconstitutional by the United States Supreme Court or by the Alabama Supreme Court, 'all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.' " Saunders v. State, 10 So. 3d 53, 112 (Ala. Crim. App. 2007) (quoting § 15-18-82.1(c), Ala. Code 1975). In other words, even if this Court agreed with Smith's argument (and we do not), he would not be entitled to a reversal of his death sentence because the State could carry out his execution via nitrogen hypoxia. See § 15-18-82.1(h), Ala. Code 1975 ("In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.").

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# EXHIBIT 3

# ALABAMA COURT OF CRIMINAL APPEALS

November 1, 2024

**CR-2022-0504**
Nicholas Noelani D. Smith v. State of Alabama (Appeal from Calhoun Circuit Court: CC-11-494.80)

## NOTICE

You are hereby notified that on November 1, 2024, the following action was taken in the above-referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk

# EXHIBIT 4

# IN THE SUPREME COURT OF ALABAMA

February 21, 2025

**SC-2024-0759**

Ex parte Nicholas Noelani D. Smith PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Nicholas Noelani D. Smith v. State of Alabama) (Calhoun Circuit Court: CC-11-494.80; Criminal Appeals: CR-2022-0504).

## 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 February 21, 2025:

**Writ Denied. No Opinion.** Cook, J. -- Stewart, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur. McCool, J., recuses himself.

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**