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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2016-2017

CR-13-1416

James Osgood

v.

State of Alabama

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

BURKE, Judge.

James Osgood was convicted of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. The jury unanimously

recommended that Osgood be sentenced to death. The trial court accepted the jury's recommendation and sentenced Osgood to death. This appeal follows.

Facts

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

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

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

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

with Brown from behind. Osgood stated to Lockhart that he and Vandyke had agreed to lie about the sexual encounter because Vandyke and Brown were cousins and Vandyke was ashamed of their behavior.

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

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

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

Osgood then began to give Lockhart details about Brown's murder. Osgood stated that after he, Brown, and Vandyke finished running errands, the three returned to Brown's

trailer and engaged in conversation. A short time later, Brown and Vandyke went into the hallway near the bathroom, at which point Vandyke slapped Brown in the face. According to Osgood, the slap was a pre-planned signal for him and Vandyke to set their plan in motion.

Osgood stated that he approached Brown from behind and put her in a choke hold until she was almost unconscious. Osgood and Vandyke then took Brown into the bedroom where Osgood forced Brown to perform oral sex on him while Vandyke pointed a gun at her. Osgood stated that he told Vandyke to shoot Brown if Brown bit his penis. Brown then asked if she could use the bathroom at which point Osgood followed her into the bathroom while she defecated. When the two returned to the bedroom, Vandyke undressed and sat at the head of the bed and told Brown to perform oral sex on her. Osgood explained that he was having both vaginal and anal sex with Brown while she was performing oral sex on Vandyke.

According to Osgood, Brown asked to use the bathroom again. Osgood stated that he again accompanied Brown to the bathroom and made her perform oral sex on him while she was defecating. Osgood told the detectives that, after Brown

finished using the bathroom, she attempted to escape by running out of the back door of the trailer. Osgood stated that he prevented the escape by grabbing Brown's hair and dragging her back into the bedroom.

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

Osgood raises several issues in his brief to this Court, some of which were not raised at trial and are consequently not preserved for appellate review. However, because Osgood

was sentenced to death, his failure to object at trial does not preclude this Court from reviewing those issues for plain error. Rule 45A, Ala. R. App. P., provides:

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

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

> "'[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)). 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999). Under the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial. See Ex parte Walker, 972 So. 2d 737, 752 (Ala. 2007)(recognizing that the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error); Thomas v. State, 824 So. 2d 1, 13 (Ala. Crim. App. 1999)(recognizing that to rise to the level of plain error, an error must have affected

> the outcome of the trial), overruled on other grounds, Ex parte Carter, 889 So. 2d 528 (Ala. 2004). That is, the appellant must establish that an alleged error, '"'not only seriously affect[ed] [the appellant's] "substantial rights," but ... also ha[d] an unfair prejudicial impact on the jury's deliberations.'"' Ex parte Brown, 11 So. 3d 933, 938 (Ala. 2008)(quoting Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002), quoting in turn Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). Only when an error is 'so egregious ... that [it] seriously affects the fairness, integrity or public reputation of judicial proceedings,' will reversal be appropriate under the plain-error doctrine. Ex parte Price, 725 So. 2d 1063, 1071-72 (Ala. 1998)(internal citations and quotations omitted). Although the 'failure to object does not preclude [appellate] review in a capital case, it does weigh against any claim of prejudice.' Ex parte Kennedy, 472 So. 2d 1106, 1111 (Ala. 1985)(citing Bush v. State, 431 So. 2d 563, 565 (1983))(emphasis in original). As the United States Supreme Court has noted, the appellant's burden to establish that he is entitled to reversal based on an unpreserved error 'is difficult, "as it should be."' Puckett v. United States, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)(quoting United States v. Dominquez Benitez, 542 U.S. 74, 83, n. 9, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004))."

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

Guilt-Phase Issues

For clarity, this Court will address Osgood's arguments relating to the guilt phase of his trial separately from his arguments regarding the penalty phase. Thus, Osgood's issues

will not be addressed in the order they are presented in his brief on appeal.

I.

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

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

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

A.

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

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

> "'Review on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992). '"[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof."' McKinney v. State, 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (citation omitted). 'The statement of specific grounds of objection waives all grounds not

> specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). 'The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury.' Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994)."

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

B.

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

In Edwards, the United States Supreme Court held that once a defendant has invoked his right to counsel, police are not permitted to engage in further questioning until counsel

is present or until the defendant reinitiates contact with law enforcement. 451 U.S. at 484-85 ("We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.") Osgood claims that he did not speak with his attorney at any point between October 18, 2010 -- the date he claims to have invoked his right to counsel -- and November 16, 2010, when, without his attorney present, Osgood admitted to the charged crimes. Therefore, Osgood argues, the trial court erred when it refused to suppress the statements he made during the latter interview.

A defendant's invocation of his right to counsel is the first inquiry under Edwards. Thus, before determining whether Osgood reinitiated contact with law enforcement before giving his confession in the interview conducted on November 16, 2010, this Court must first determine whether Osgood actually invoked his right to counsel on October 18, 2010, after waiving that right at the beginning of the interview. In Ex

parte Cothren, 705 So. 2d 861, 863-65 (Ala. 1997), the Alabama Supreme Court, quoting Davis v. United States, 512 U.S. 452, 458-61 (1994), discussed that inquiry as follows:

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

-- is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." Connecticut v. Barrett, [479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987)].

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

"'Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Smith v. Illinois, 469 U.S., at 97–98 [105 S.Ct., at 494] (brackets and internal quotation marks omitted). Although a suspect need not "speak

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

"'We decline petitioner's invitation to extend Edwards and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. See Arizona v. Roberson, supra, at 688 [108 S.Ct., at 2101–2102] (Kennedy, J., dissenting) ("[T]he rule of Edwards is our rule, not a constitutional command; and it is our obligation to justify its expansion."). The rationale underlying Edwards is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity," Michigan v. Mosley, 423 U.S. 96, 102 [96 S.Ct. 321, 326, 46 L.Ed.2d 313] (1975), because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. Nothing in Edwards requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer. In Miranda itself, we expressly rejected the

suggestion "that each police station must have a 'station house lawyer' present at all times to advise prisoners," 384 U.S., at 474 [86 S.Ct., at 1628], and held instead that a suspect must be told of his right to have an attorney present and that he may not be questioned after invoking his right to counsel. We also noted that if a suspect is "indecisive in his request for counsel," the officers need not always cease questioning. See id., at 485 [86 S.Ct., at 1633].

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

"'In considering how a suspect must invoke the right to counsel, we must consider the other side of the Miranda equation: the need for effective law enforcement. Although the courts ensure compliance with the Miranda requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The Edwards rule -- questioning must cease if the suspect asks for a lawyer -- provides a

> bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.'"

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

> "In Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994), cert. denied, 514 U.S. 1086, 115 S.Ct. 1801,

131 L.Ed.2d 727 (1995), the Eleventh Circuit Court of Appeals, addressing a similar issue, set out the general dictionary definitions of 'equivocal,' as that word was used in Davis:

> "'[Equivocal] is defined as: "Having different significations equally appropriate or plausible; capable of double interpretation; ambiguous," 5 Oxford English Dictionary 359 (2d ed., J.A. Simpson & E.S.C. Weiner, eds., 1989); and as: "Having two or more significations; capable of more than one interpretation; of doubtful meaning; ambiguous," Webster's Third International Unabridged Dictionary 769 (1986).'

"30 F.3d at 1425. Based on our review of the record, we conclude that Cothren's statement to Meyers is capable of equally plausible, differing interpretations and, therefore, that it is equivocal. The record indicates that Cothren had been fully apprised of his Miranda rights and that he was responding to Capt. Meyers's questions just before Meyers asked him when he had last possessed the .25 caliber pistol that had been used to commit the murder. In response to that particular question, Cothren stated, 'I think I want to talk to an attorney before I answer that.' It is, of course, impossible for us to glean from a cold record the intonations of Cothren's voice as he made the statement. Capt. Meyers testified that Cothren made the statement in a 'normal voice.' However, Meyers also testified that he did not understand Cothren's statement to be a blanket refusal to speak further to the police without the presence of an attorney. Without being privy to the manner in which Cothren made the statement, i.e., without knowing whether Cothren had an equivocal tone in his voice, we find two aspects of the statement that suggest to us that Capt. Meyers could reasonably have believed that Cothren was willing to talk

further without the assistance of an attorney. First, Cothren stated, 'I think I want to talk to an attorney ....' Although the word 'think,' in and of itself, is of sufficiently clear import, its use here tends to diminish the forcefulness of the statement. In this respect, we agree with the conclusion reached by the Arizona Supreme Court in State v. Eastlack, 180 Ariz. 243, 883 P.2d 999 (Ariz. 1994), cert. denied, 514 U.S. 1118, 115 S.Ct. 1978, 131 L.Ed.2d 866 (1995). In that case, the court concluded that the statement 'I think I better talk to a lawyer first' was not an unequivocal request for an attorney. Cothren's use of the word 'think' could have led Capt. Meyers to conclude that Cothren was not certain as to what he should do. Second, Cothren stated, 'I think I want to talk to an attorney before I answer that.' Capt. Meyers could have reasonably concluded from Cothren's use of the word 'that' that Cothren was hesitant to respond to the specific question asked about the .25 caliber pistol, but that he might be willing to submit to other questions at a later time. The Davis Court made it very clear that it was unwilling to adopt a rule that would force police officers in 'the real world of investigation and interrogation,' 512 U.S. at 461, 114 S.Ct. at 2356, to make difficult judgment calls about whether a suspect in fact wants an attorney before speaking to the police. The Court succinctly noted that 'if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.' 512 U.S. at 459, 114 S.Ct. at 2355. (Emphasis original.) We recognize that reasonable judges and attorneys may have differing opinions as to what Cothren actually meant by his statement. However, as we read Davis, the proper standard to be used in resolving this issue is an objective one -- whether a police officer in the field reasonably could have concluded from the

> circumstances that a suspect was not absolutely refusing to talk without the assistance of an attorney."

Cothren, 705 So. 2d at 866-67.

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

For approximately 45 minutes, Osgood answered Investigator Cobb's questions about the events surrounding Brown's murder. Osgood admitted that he had previously lied to police officers about whether he had had sex with Brown but still denied killing her. Although the interview began amicably, Osgood's demeanor began to change, and Osgood stated

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

that he was getting "pissed" because the officers did not believe him. In response, Investigator Cobb stood up, pushed his chair under the table and said, "Look, Taz,[4] you're talking about getting pissed. That's fine." (State's Exhibit 3) Investigator Cobb then implored Osgood to tell the truth and to show some sympathy. The following exchange then occurred:

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

(State's Exhibit 3.)

When viewed in the context of the entire interview, Osgood's statement regarding his attorney, like the

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

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

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

Because Osgood did not unequivocally invoke his right to counsel at any point during the investigation, Edwards is inapplicable, and we need not determine whether Osgood reinitiated contact with investigators prior to his confession

on November 16, 2010. Accordingly, the trial court's decision to deny Osgood's motion to suppress his statements did not constitute error, much less plain error.

II.

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

A review of the above-mentioned interviews reveals the following. During the interview on October 14, 2010, Investigator Smitherman told Osgood that Osgood had two options: "One, you can say hey, me and her got in a fight,

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

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

During the interview on November 16, 2010, Investigator Lockhart read a statement to Osgood that had been written by a woman named Tiffany Matthews, who was incarcerated with Vandyke. Matthews claimed that Vandyke described her and Osgood's involvement in Brown's murder. However, Investigator Lockhart changed the wording of the statement to make it appear as if Vandyke wrote the statement herself.

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

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

> "For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. Ex parte Singleton, 465 So. 2d 443, 445 (Ala. 1985). The initial determination is made by the trial court. Singleton, 465 So. 2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. Marschke v. State, 450 So. 2d 177 (Ala. Crim. App. 1984)....
>
> "The Fifth Amendment to the Constitution of the United States provides in pertinent part: 'No person ... shall be compelled in any criminal case to be a witness against himself....' Similarly, § 6 of the Alabama Constitution of 1901 provides that 'in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself.' These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); Hubbard v. State, 283 Ala. 183, 215 So.2d 261 (1968).
>
> "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In Culombe, 367 U.S. at 602, 81 S.Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own

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

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

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

> "The Court in McLeod focused on the 'totality of the circumstances' surrounding McLeod's confession rather than merely the interrogator's statement. McLeod, 718 So. 2d at 729. Under this analysis,

implied and/or vague promises, absent coercive conditions and given a defendant whose personal characteristics do not make him unusually susceptible to inducement, are not sufficient to render a confession involuntary. McLeod, 718 So. 2d at 724....

> "'A statement made by a law enforcement agent to an accused that the accused's cooperation would be passed on to judicial authorities and would probably be helpful to him is not a sufficient inducement so as to render a subsequent incriminating statement involuntary.'

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

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

> enforcement] used any means of intimidation or any other improper methods of interrogation. [The law enforcement officer] was merely giving his opinion to the appellant regarding the appropriateness of his confessing. Given the totality of the circumstances, the State met its burden of proving that the appellant's confession was voluntary."

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

In reviewing the testimony presented at Osgood's suppression hearing as well as the video recordings of each of the above-mentioned interviews, we cannot say that the trial court abused its discretion by denying Osgood's motion to suppress. At no point did law enforcement tell Osgood that admitting his involvement in Brown's murder would have no adverse consequences nor did they promise him any specific outcome contingent on his cooperation. Rather, the interrogating officers suggested to Osgood that he might receive a more favorable sentence if his cooperation and remorse were made known to the trial court and the jury. See Hosch v. State 155 So. 3d 1048, 1093 (Ala. Crim. App. 2013)("Telling Hosch that he could not make things worse for himself by telling the truth and that, if he told admitted his role in the crime, he could tell the prosecutor that he had taken responsibility did not constitute illegal

inducements."). None of the statements made by law enforcement were coercive in nature, and our review of the record does not convince the Court that Osgood's will was overborne.

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

> "'A misrepresentation which prompts inculpatory statements is only one factor to be considered in determining the voluntariness of the resulting statements.' People v. Kashney, 111 Ill. 2d 454, 466, 95 Ill. Dec. 835, 840, 490 N.E.2d 688, 693 (1986). 'Trickery or deception does not make a statement involuntary unless the method [is] calculated to produce an untruthful confession or was offensive to due process.' Creager v. State, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997). See also C.T. Drechsler, Admissibility of Confession as Affected by its Inducement Through Artifice, Deception, Trickery, or Fraud, 99 A.L.R.2d 772 (1965).
>
> > "'"[C]ourts have found waivers to be voluntary even in cases where officers employed deceitful tactics." Soffar v. Cockrell, 300 F.3d 588, 596 (5th Cir. 2002) (en banc). See also [Colorado v.] Spring, 479 U.S. [564] at 575-77, 107 S.Ct. 851 [93 L.Ed.2d 954 (1987)]; United States v. Tapp, 812 F.2d 177, 179 (5th Cir. 1987). "[T]rickery or deceit is only prohibited to the extent it deprives the suspect 'of knowledge essential to his ability to

> understand the nature of his rights and the consequences of abandoning them.'" Soffar, 300 F.3d at 596 (quoting Moran [v. Burbine], 475 U.S. [412] at 424, 106 S.Ct. 1135 [89 L.Ed.2d 410 (1986)]). See also [United States v.] Farley, 607 F.3d [1294] at 1327 [(11th Cir. 2010)]. "Of course, trickery can sink to the level of coercion, but this is a relatively rare phenomenon." United States v. Flemmi, 225 F.3d 78, 91 n. 5 (1st Cir. 2000). "Generally, courts have held statements involuntary because of police trickery only when other aggravating circumstances were also present." Farley, 607 F. 3d at 1328 (citing [United States v.] Castaneda-Castaneda, 729 F.2d [1360] at 1363 [(Fla. 1984)]). For example, "statements have been held involuntary where the deception took the form of a coercive threat ... or where the deception goes directly to the nature of the suspect's rights and the consequences of waiving them." Id. at 1328-29 (citations omitted).'
>
> "United States v. Degaule, 797 F. Supp.2d 1332, 1380 (N.D.Ga.2011)."

Walker v. State, 194 So. 3d 253, 273 (Ala. Crim. App. 2013).

In the present case, police officers had a statement from one of Vandyke's cellmates, who claimed that Vandyke had admitted to the details of the crime to her. Thus, Investigator Lockhart's technique in which he led Osgood to believe that the statement was actually written by Vandyke was not calculated to produce an untruthful confession. There

were no other aggravating factors in the techniques employed by law enforcement that lead this Court to believe that Osgood's will was overborne or that he was otherwise deprived of his Constitutional rights when he confessed to the crimes. Accordingly, we hold that Osgood's statements were voluntary and therefore admissible. Thus, the trial court was correct in denying Osgood's motion to suppress.

III.

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

> "'"'A trial judge's finding on whether or not a particular juror is biased "is based upon determination of demeanor and credibility that are peculiarly within a trial judge's province." [Wainwright v.] Witt, 469 U.S. [412] 429, 105 S.Ct. [844] 855 [(1985)]. That finding must be accorded proper deference on appeal. Id. "A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of

> discretion." Nobis v. State, 401 So. 2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So. 2d 204 (Ala. 1981).'"'

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

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

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

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

A.

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

In support of his argument that A.S. should have been removed for cause, Osgood cites Hunter v. State, 585 So. 2d 220 (Ala. Crim. App. 1991), in which this Court held that a trial court committed reversible error by failing to remove for cause a prospective juror who gave an equivocal answer to a question regarding her ability to render an impartial verdict. In Hunter, a case in which the appellant was ultimately convicted of child abuse, the prospective juror in question stated that she was "an emotional person when it

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

comes to children being abused." Id. at 221. When asked if she could "listen to the evidence and make a decision based on the evidence of the case" the prospective juror stated, "I don't know." Id. No further questions were asked of that particular juror.

In finding reversible error, this Court held that "[t]he trial court should have questioned the prospective juror further to ascertain whether she could be impartial. It did not do so, and in the posture in which the matter was left, the trial court should have granted the appellant's challenge for cause." Id. at 222. In the present case, A.S. was questioned further about her potential biases. A.S. did not state that she had any type of absolute bias against people charged with rape nor did she indicate that she would be unable to set her opinions aside and try the case fairly and impartially. As noted, A.S. stated that she did not know any of the facts of Osgood's case and would only be inclined to find Osgood guilty and to recommend a death sentence "if there was compelling evidence." (R. 602.) Thus, A.S.'s answers did not suggest that she was prejudiced against defendants like Osgood. The trial court was in the best position to evaluate

A.S.'s responses as well as her demeanor and its decision to deny Osgood's challenge for cause is due great deference on appeal. See Nobis v. State, 401 So. 2d 191 (Ala. Crim. App. 1981). In reviewing A.S.'s responses during voir dire, we do not find that the trial court abused its discretion by denying Osgood's motion to remove A.S. for cause.

B.

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

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

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

(R. 564-65.)

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

Although S.O. had certain beliefs regarding the imposition of the death penalty, she ultimately stated that

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

C.

Finally, Osgood argues that the trial court committed reversible error when it denied his motion to remove prospective juror J.S. for cause.[8] During voir dire, J.S. stated that he had known one of the State's witnesses, Don

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

Davis, since the 1970s. When asked if that relationship would make J.S. more inclined to believe Davis's testimony, J.S. stated: "I have a lot of respect for him, but I mean, at the end of the day, the facts are the facts." (R. 622-23.) J.S. also stated that he knew one of the assistant district attorneys, C.J. Robinson, who was prosecuting the case against Osgood. According to J.S., Robinson bought property from J.S. approximately three months earlier. However, J.S. had previously testified that he did not "personally know [Robinson]" and only knew him "[j]ust passing at the softball field, something like that." (R. 622.)

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

not abuse its discretion by denying Osgood's motion to remove J.S. for cause.

IV.

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

her view on capital punishment would prevent or substantially impair the performance of his or her duties as a juror.").

During individual voir dire, the following exchange occurred:

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

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

According to Osgood, the trial court committed reversible error by granting the State's motion to challenge R.P. for cause because, he said, R.P. indicated that she would be able to render a sentencing recommendation based on the evidence

presented in court and the instructions from the trial court. Osgood compares R.P.'s answers with the answers given by prospective juror S.O., discussed in Part III of this opinion and claims that the trial court's decision to exclude R.P. for cause was inconsistent with its decision not to exclude S.O. for cause.

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

The length and depth of the voir dire of a prospective juror will not, on its on, support a finding on appeal regarding the propriety of a trial court's grant or denial of a party's challenge for cause. However, we find it relevant

here in light of the fact that a trial court's decision on such a matter is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Wainright, 469 U.S. at 428. As noted, "[t]he decision of the trial court on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion." Albarran, 96 So. 3d at 159 (internal citations and quotations omitted). "A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005)(internal citations omitted).

In the present case, the trial court, who was in the best position to observe the prospective jurors' demeanor and to assess their credibility, was able to hear more detail regarding S.O.'s feelings about the death penalty and her ability to be a fair and impartial juror. However, the trial court did not hear the same detail regarding R.P.'s beliefs and her ability to be fair and impartial. Thus, we find support in the record for the trial court's denial of Osgood's

challenge to S.O. as well as the trial court's granting the State's motion to remove R.P. Accordingly, this Court finds that the trial court did not abuse its discretion by granting the State's motion to challenge R.P. for cause.[9]

V.

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

A.

Osgood claims that the prosecutor made comments similar to the comments this Court disapproved of in Guthrie v. State, 616 So. 2d 914 (Ala. Crim. App. 1993). In Guthrie, the

[9]Although this issue arose prior to the guilt phase of Osgood's trial, we note that R.P. was not questioned by either party regarding her ability to render a fair and impartial guilt-phase verdict based on her beliefs about the death penalty. Although mentioned in dicta, the Court in Witherspoon noted that its holding did not "render invalid the conviction, as oppose to the sentence, in this or any other case." 391 U.S. at 523 n. 21. Thus, we question whether this issue affects the guilt phase of Osgood's trial.

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

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

A review of the record reveals that, during voir dire, the prosecutor explained to the jury that the State's burden of proof was beyond a reasonable doubt and not "beyond all doubt." (R. 389.) The prosecutor then stated: "This is a capital case. The death penalty is an appropriate punishment. Does anybody think that in a capital case the standard should be any higher than it is for any other criminal case?" (R. 390.) Thus, when the comment is read in the proper context, the prosecutor was not telling the jury that the death penalty was appropriate in that particular case, i.e., that it was appropriate for Osgood. Rather, the

prosecutor was stating that death was an appropriate punishment for capital cases in general and inquiring whether any prospective jurors believed that the State should be held to a higher standard of proof in such cases. Thus, the prosecutor's statement during voir dire was not like the prosecutor's statement in Guthrie and was not grounds for a mistrial. See Vanpelt v. State, 74 So. 3d 32, 69 (Ala. Crim. App. 2009), quoting Ex parte Thomas, 625 So. 2d 1156, 1157 (Ala. 1993)("'[A] mistrial is a drastic remedy, to be used only sparingly and only to prevent manifest injustice.'"). Because the prosecutor's comment in the present case was not improper, the trial court was correct to deny Osgood's motion for a mistrial.

B.

In a footnote in his brief on appeal, Osgood also argues that the trial court should have granted a mistrial based on social-media posts allegedly made by the prosecutor and a member of his staff regarding Osgood's case and their opinions regarding the appropriate punishment. (Osgood's brief, at 68 n. 8.) The record does not indicate that any of the jurors read or heard about the alleged social-media posts. (See R.

1150-61.) Rather, the argument made to the trial court was that the State had violated a pretrial order that both parties refrain from speaking with the press. Nevertheless, Osgood provided no authority for his proposition that a trial court should declare a mistrial when a party writes posts on social media regarding its views on the appropriate punishment in a pending case, especially when there is no indication that the jury read or heard about the post.

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

> "Rule 28(a)(10), Ala. R. App. P., requires that an argument contain 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.' 'Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed.' Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). 'Authority supporting only "general propositions of law" does not constitute a sufficient argument for reversal.' Beachcroft Props., LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004), quoting Geisenhoff v. Geisenhoff, 693 So. 2d 489, 491 (Ala. Civ. App. 1997)."

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

VI.

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

In support of his argument, Osgood cites Hammond v. State, 665 So. 2d 970, 972-73 (Ala. Crim. App. 1995), a case in which the record on appeal was missing a large portion of the voir dire proceedings relating to the State's challenges for cause of six potential jurors. This Court found that those missing portions constituted a "substantial and

significant portion of the record" and that "the missing portions affect[ed] a substantial right of the appellant." According to Osgood, the portions of the record missing in his case "are even more substantial than the omissions that required reversal in Hammond." (Osgood's brief, at 74.) We disagree.

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

> "In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the trial court to 'order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in-chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof ...'; and the court had granted the motion. After granting the motion, the court had the duty to see that the entire proceedings were transcribed; we must conclude that

the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. See Ex parte Godbolt, 546 So. 2d 991 (Ala. 1987). Thus, the question becomes whether that error constituted reversible error.

> """When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal. The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is represented on appeal by counsel not involved at trial [as in this case], counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the

> proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects....
>
> "'"We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript. When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed...."'
>
> "Ex parte Godbolt, 546 So. 2d at 997. (Citations omitted; emphasis added.)(Quoting with approval United States v. Selva, 559 F. 2d 1303, 1305-06 (5th Cir. 1977))."

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

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

> "We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether 'a

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

632 So. 2d at 546.

In the present case, as in Harris, the trial court granted Osgood's pretrial motion to have all hearings transcribed. (C. 105.) Similarly, Osgood is represented by different counsel on appeal than he was at trial. However, this Court, like the Court in Harris, has carefully reviewed each of the 15 instances in the record in which untranscribed discussions occurred as well as the exchanges occurring before and after each untranscribed discussion. We have concluded

that the untranscribed portions of the record did not constitute a substantial and significant portion of the record, and we have concluded affirmatively that Osgood's rights have not been adversely affected by the omissions from the transcript. Rather, the omitted discussions clearly related to nonsubstantive matters such as making sure that a witness had the correct exhibit, see R. 164, ensuring that a witness understood that she could not give hearsay testimony, see R. 678, and informing the trial court that a video was about to be played for the jury, see R. 811. Accordingly, under the particular facts of this case, we conclude that the failure to transcribe the above-mentioned off-the-record discussions was harmless error.

We also note that 10 of the 15 off-the-record discussions were initiated by defense counsel. Although those discussions were similarly nonsubstantive and did not affect Osgood's substantial rights, they constitute invited error. See Sharifi v. State, 993 So. 2d 907, 936 (Ala. Crim. App. 2008), quoting Robitaille v. State, 971 So. 2d 43, 59 (Ala. Crim. App. 2005)("Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek

to profit thereby. The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error.")(Internal citations and quotation marks omitted.)

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

First, we note that the trial court is vested with broad discretion in excusing jurors under § 12-16-63, Ala. Code 1975. See Scott v. State, 163 So. 2d 389, 424 (Ala. Crim. App. 2012). Further, § 12-16-74, Ala. Code 1975, "expressly provides that a trial court in capital cases may excuse prospective jurors outside the presence of parties and their counsel, for reasons of 'undue hardship, extreme inconvenience, or public necessity,' as provided in § 12-16-63(b)." Id., quoting Ex parte Pierce, 612 So. 2d 516, 518 (Ala. 1992). Considering the trial court's broad discretion in excusing jurors under § 12-16-63 and the fact that the presence of the parties is not even required during this portion of jury selection, this Court finds that any error in failing to transcribe the individual excuses of the potential jurors was harmless.

We also note that, notwithstanding the fact that Osgood's presence was not required, the record indicates that Osgood was present with counsel during this portion of the proceedings. The trial court's questions to the venire regarding their general qualifications were transcribed as well as the names of the individual jurors who were excused.

Thus, it appears that defense counsel raised no objections to the trial court's questioning of the venire or to the trial court's decision to excuse any of the individual prospective jurors. Accordingly, Osgood is due no relief on this claim.

VII.

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

This Court has held:

> "Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence. Chunn v. State, 339 So. 2d 1100, 1102 (Ala. Cr. App. 1976). To be admissible, the photographic material must be a true and accurate

> representation of the subject that it purports to represent. Mitchell v. State, 450 So. 2d 181, 184 (Ala. Cr. App. 1984). The admission of such evidence lies within the sound discretion of the trial court. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882, 883 (1973); Donahoo v. State, 505 So. 2d 1067, 1071 (Ala. Cr. App. 1986)(videotape evidence). Photographs illustrating crime scenes have been admitted into evidence, as have photographs of victims and their wounds. E.g., Hill v. State, 516 So. 2d 876 (Ala. Cr. App. 1987). Furthermore, photographs that show the external wounds of a deceased victim are admissible even though the evidence is gruesome and cumulative and relates to undisputed matters. E.g., Burton v. State, 521 So. 2d 91 (Ala. Cr. App. 1987). Finally, photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors. Hutto v. State, 465 So. 2d 1211, 1212 (Ala. Cr. App. 1984)."

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

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

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

In the present case, Osgood entered a plea of not guilty. Thus, the State had the burden of proving his guilt beyond a

reasonable doubt. The crime scene photographs, though graphic, were relevant to illustrate and corroborate the testimony of police officers who investigated Brown's murder. Similarly, the autopsy photographs helped to illustrate the State medical examiner's testimony regarding the mechanisms of Brown's injuries and her cause of death. Accordingly, the trial court did not abuse its discretion by allowing photographs of the victim to be admitted into evidence.

VIII.

Next, Osgood argues that the State violated Crawford v. Washington, 541 U.S. 36 (2004), when it played the video of Osgood's November 16, 2010, confession in which Investigator Lockhart read Tiffany Matthews's statement to Osgood. According to Osgood, the statement was testimonial in nature, constituted double hearsay, and violated Osgood's constitutional right to confront witnesses against him. Because Osgood did not raise this issue at trial, we will review it only for plain error. See Rule 45A, Ala. R. App. P.

As described above, Matthews, a jailhouse informant, provided police with a written statement in which she claimed to have heard Vandyke implicate Osgood in Brown's murder.

During an interview with Osgood on November 16, 2010, Investigator Lockhart read Matthew's statement aloud. However, Lockhart read the statement as if it were written in the first person in order to make Osgood believe that Vandyke had written the statement. Immediately after Lockhart read the statement, Osgood confessed to raping, sodomizing, and murdering Brown.

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

> "'The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."' Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, 'the Sixth Amendment [prohibits the admission of] testimonial hearsay [statements offered to prove the truth of the matter asserted], ... and interrogations by law enforcement officers fall squarely within that class.' Crawford, 541 U.S. at 53 (2004); 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')). Accordingly,
>
> > "'It is well settled that[, when offered for the truth of the matter asserted,] a nontestifying codefendant's statement to police implicating the accused in the crime is inadmissible against the accused; it does not fall within any

> recognized exception to the hearsay rule and ... its introduction violates the accused's confrontation rights. See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); R.L.B. v. State, 647 So. 2d 803 (Ala. Crim. App. 1994); Ephraim v. State, 627 So. 2d 1102 (Ala. Crim. App. 1993).'
>
> "Jackson v. State, 791 So. 2d 979, 1024 (Ala. Crim. App. 2000)."

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

which Lockhart read Matthews's statement was to show its effect on Osgood, not to prove the truth of its contents.

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

IX.

Next, Osgood argues that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), when it used peremptory strikes to remove two prospective jurors from the venire. The record reveals that, after prospective jurors were excused for undue hardship, 43 prospective jurors remained, 3 of whom were black. One of the prospective black jurors was removed for cause; the remaining two were struck by the State using its peremptory challenges. Osgood asserts that the State exercised its peremptory challenges to remove S.L. and C. B., the two black jurors, solely on the basis of race causing Osgood, who is white, to be tried by an all white jury. Osgood did not raise a Batson challenge at trial. Thus, we review this issue only for plain error. See Rule 45A, Ala. R. App. P.

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

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

The Alabama Supreme Court has held:

> "The burden of persuasion is initially on the party alleging discriminatory use of a peremptory challenge to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the court is to consider 'all relevant circumstances' which could lead to an inference of discrimination. See Batson, 476 U.S. at 93, 106 S.Ct. at 1721, citing Washington v. Davis, 426 U.S. 229, 239–42, 96 S.Ct. 2040, 2047–48, 48 L.Ed.2d 597 (1976). The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:
>
> > "1. Evidence that the 'jurors in question share[d] only this one characteristic — their membership in the group — and that in all other respects they [were] as heterogeneous as the community as a whole.' [People v.] Wheeler, 22 Cal.3d [258,] at 280, 583 P.2d [748,] at 764, 148 Cal.Rptr. [890,] at 905 [(1978)]. For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' Wheeler, 22 Cal.3d

at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.

"2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

"3. The past conduct of the offending attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)].

"4. The type and manner of the offending attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.

"5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 [905] (1978)."

"6. Disparate treatment of members of the jury venire with the same characteristics; or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary

> school teacher was not challenged. Slappy, 503 So. 2d at 352 and 355.
>
> "7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So. 2d at 355.
>
> "8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. [229,] at 242, 96 S.Ct. [2040,] 2049 (1976)].
>
> "9. The offending party used peremptory challenges to dismiss all or most black jurors, but did not use all of his peremptory challenges. See Slappy, 503 So. 2d at 354, Turner, supra."

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

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

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

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

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

X.

Next, Osgood argues that the trial court erred by allowing the State to introduce evidence about law enforcement's investigation of other suspects. Osgood points to Investigator Lockhart's testimony regarding his early investigation into another man as a suspect in Brown's murder. Lockhart stated that he had initially developed the other man as a suspect based on information that the other man had been harassing Brown. However, Lockhart testified that Richardson had an alibi and was later excluded based on DNA evidence. According to Osgood, this testimony was irrelevant and therefore violated his "right to due process, a fair trial, and to confront the witnesses against him, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Alabama law." (Osgood's

brief, at 92.) Osgood did not object to this testimony at trial; thus, we review it only for plain error. See Rule 45A, Ala. R. App. P.

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

appeal that "[i]dentity was not an issue" in his trial, Osgood maintained his plea of not guilty and the State had the burden to prove his guilt beyond a reasonable doubt. Accordingly, that testimony was relevant and its admission did not constitute error, much less plain error.

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

Penalty-Phase Issues

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

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

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

Ann Marie also testified that Osgood worked as a stripper for a period of time and that he would frequently have sexual relationships with women he did not know very well. According

to Ann Marie, Osgood told her that he struggled with addiction. However, Ann Marie stated that Osgood was very loyal and that he was a loving uncle to her children. Anne Marie also testified that she had never known Osgood to be violent.

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

Dick provided the jury with an explanation of how a human brain develops from childhood and testified that Osgood's

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

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

Dick further testified that, for various reasons, Osgood was in and out of foster care throughout his childhood and that he ultimately ended up in the custody of his adoptive mother with whom he had a tumultuous and sometimes violent

relationship. Dick stated that Osgood was later placed in group facilities during his teenage years. Dick finally opined that Osgood's lack of early bonding with his parents, coupled with his experiences during childhood, predisposed him to the behaviors that led to the underlying conduct in the present case. (R. 1309.)

Dr. Leonard Mulbry, a forensic psychiatrist, testified that he interviewed Osgood on two occasions and performed a psychiatric evaluation of Osgood. Dr. Mulbry stated that he was asked specifically to evaluate Osgood's "unusual sexual behaviors" to determine whether Osgood exhibited "compulsive sexual behavior" or "sexual addiction." (R. 1326.) According to Dr. Mulbry, Osgood revealed that he was sexually abused at the age of three or four; that his first sexual encounters were with other children at the age of nine; and that when he was 14 years old, he became sexually involved with a 24-year-old woman who became pregnant with his child. Dr. Mulbry diagnosed Osgood with alcohol-use disorder, methamphetamine-use disorder, and anti-social personality disorder. Dr. Mulbry also diagnosed Osgood with sexual addiction but stated

that the diagnosis was "not DSM regulated."[12] (R. 1339.) Dr. Mulbry stated that Osgood reported having 10 children but knew the whereabouts of only one. According to Dr. Mulbry, Osgood's background contributed to the development of his anti social personality disorder.

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

Discussion

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

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

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

The trial court then defined mitigating circumstances for the jury by explaining that mitigating circumstances are "things that the defendant brings to you in order to attempt to outweigh the aggravating circumstances. The defendant is allowed to offer any evidence in mitigation that is evidence that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole." (R. 1403.)

The trial court went on to list each of the statutory mitigating circumstances provided in § 13A-4-51, Ala. Code 1975. However, when the trial court defined nonstatutory mitigating circumstances as provided in § 13A-5-52, Ala. Code 1975, it stated:

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

(R. 1404)(Emphasis added.)

Osgood contends that this instruction improperly restricted the jury's consideration of nonstatutory mitigating circumstances to only two areas: Osgood's family life and his substance abuse. Osgood points out that he offered other mitigating evidence that would not fall into either of those categories. As noted above, Osgood offered evidence that he had been sexually abused by a man at a bar when he was a child; that he fathered a child with a 24-year-old woman when he was 14 years old; that he had sexual encounters with other children when he was 9 years old; that his brain development

was potentially hindered by the malnutrition he suffered as an infant; that he was admitted to a psychiatric hospital as a teenager; that he reported a suicide attempt; and that Dr. Mulbry diagnosed him as having antisocial personality disorder. According to Osgood, the above-mentioned instruction prevented the jury from considering and weighing that evidence in mitigation.

Section 13A-5-45(g), Ala. Code 1975, provides:

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

Additionally, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), the United States Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Additionally, in Ex parte Smith,

[Ms. 1010267, March 14, 2003] ___ So. 2d ___(Ala. 2003), the Alabama Supreme Court, discussed mitigating circumstances in the context of a capital case as follows:

> "To determine the appropriate sentence, the sentencer must engage in a 'broad inquiry into all relevant mitigating evidence to allow an individualized determination.' Buchanan v. Angelone, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation. Jacobs v. State, 361 So. 2d 640, 652–53 (Ala. 1978). See 13A–5–45(g), Ala. Code 1975 ('The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52.'). '[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring specially)."

In the present case, the trial court's only jury instruction regarding nonstatutory mitigating circumstances specifically identified two areas the jury could consider, i.e., Osgood's family life and his substance abuse. It is well settled that "'[t]he jury is presumed to follow the instructions given by the trial court.'" Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010), quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999). The trial

court's instruction that the nonstatutory mitigating circumstances were, "as presented in this case, ... substance abuse by the defendant and his family life," effectively precluded the jury from considering and weighing the other mitigating circumstances offered by Osgood, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, see Lockett, supra, as well as § 13A-5-45(g), Ala. Code 1975.

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

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

(R. 1405)(Emphasis added.)

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

Accordingly, this Court finds that the trial court's penalty-phase jury instructions improperly limited the jury's consideration of nonstatutory mitigating evidence and

inaccurately described the process for weighing the aggravating circumstances and the mitigating circumstances. Consequently, Osgood's rights under both Alabama law and the United States Constitution were violated.

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

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

circumstances so long as the mitigating circumstances do not outweigh the aggravating circumstances"). The Court further held:

> "No other instructions by the trial court and no other feature of the record instills us with any confidence that the jury did not, within the parameters of the erroneous instructions, base the death penalty recommendation on a finding that the mitigating circumstances did not outweigh the aggravating circumstances even though the mitigating circumstances did equal the aggravating circumstances. Such a recommendation would be contrary to § 13A-5-46(e). Therefore, the erroneous jury instructions on the topic of weighing the aggravating circumstances and the mitigating circumstances constitute plain error."

Bryant, 951 So. 2d at 730.

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

46(e), Ala. Code 1975, as well as the Constitutional mandates set forth in Lockett v. Ohio, supra.

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

We also note that, in the trial court's written sentencing order, the court stated that, in reaching its decision to sentence Osgood to death, it had "given great consideration to the jury's recommendation and considers it to

be a heavy factor to consider." (C. 468.) Accordingly, this Court finds it probable that the trial court's improper penalty-phase instructions adversely affected Osgood's Constitutional rights and, therefore, constituted plain error. See Rule 45A, Ala. R. App. P.

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

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

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

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