REL: March 8, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-15-1061

Stephon Lindsay

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-13-652)

KELLUM, Judge.

The appellant, Stephon Lindsay, was convicted of murdering his 21-month-old daughter, Maliyah Lindsay, an offense defined as capital by § 13A-5-40(a)(15), Ala. Code 1975, because Maliyah was less than 14 years of age. The jury

unanimously recommended that Lindsay be sentenced to death. The circuit court followed the jury's recommendation and sentenced Lindsay to death.[1] This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-55, Ala. Code 1975.

The State's evidence tended to show that on March 12, 2013, police discovered Maliyah's body in a wooded area after Lindsay confessed to murdering her and told police where he had taken her body. Dr. Valerie Green, medical examiner with the Alabama Department of Forensic Sciences, testified that Maliyah died of "multiple sharp force injuries" to her neck and that the cuts severed her jugular vein and carotid artery. (R. 1811.) The cuts were so deep, Dr. Green said, that Maliyah's spinal cord was visible. Maliyah also had cuts on her chest and chin, defensive wounds on her hands, and bruising around her mouth, which was consistent with someone holding his hand over Maliyah's mouth. (R. 1786.)

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[1]The jury's sentencing verdict is no longer a recommendation. Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended, effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury. Act No. 2017-131, however, does not apply retroactively. See § 2, Act No. 2017-131, Ala. Acts 2017, § 13A-5-47.1, Ala. Code 1975.

Tasmine Thomas, Maliyah's mother, testified that she and Lindsay had two children together and that Maliyah was born in June 2011. She testified that at the time Maliyah was murdered she and Lindsay and the children lived in a two-story apartment on White Avenue in Gadsden. On March 5, 2013, she said, she stayed in the apartment all day and went to the grocery store that evening. When she got back from the store she started feeling sick and went to bed. Lindsay told her that his sister was going to take Maliyah to go stay with her so that Thomas could have a break. Thomas testified:

> "[Prosecutor]: Was there anything unusual about the way that [Lindsay] was acting between the time that you last saw Maliyah and when you wanted to go get her?
>
> "[Thomas]: No. He was -- He did what he normally does. Like, he was cleaning a lot downstairs. He was cleaning a lot.
>
> "[Prosecutor]: Was that unusual?
>
> "[Thomas]: No. He cleaned a lot already. But he was doing it a little bit too much.
>
> "[Prosecutor]: Why do you say a little bit too much?
>
> "[Thomas]: Because I smelled a lot of bleach. It was strong.
>
> "[Prosecutor]: Did you ask him about it?

> "[Thomas]: I asked him why was he using so much bleach.
>
> "[Prosecutor]: What did he tell you?
>
> "[Thomas]: He said because he liked the smell of bleach when he cleans. Like, he was using bleach Pine-sol."

(R. 1569-70.) Thomas said that on March 11, 2013, she asked Lindsay when he was going to bring Maliyah home. She said that Lindsay left their apartment early that morning and told her that he was going to get Maliyah. She waited for Lindsay about three hours and then telephoned Lindsay's sister. His sister told her that Maliyah had not been with them and that she had not seen Maliyah since March 5. Thomas then telephoned emergency 911.

Det. Thomas Hammonds with the City of Gadsden Police Department testified that he was assigned to investigate the case and that police tried to locate Lindsay and tracked his cellular telephone to an address in Clayton. When Lindsay came out of the door of the residence he asked Lindsay if Maliyah was okay and Lindsay responded, "No, she's not okay" ... "She is not alive." (R. 1600.) He took Lindsay back to

the police station and advised him of his Miranda[2] rights. Lindsay confessed that he killed Maliyah by cutting her neck, and he told police that he put her body in a bag and took the body to a wooded area. He also said that he took several weapons, an axe and several swords, and disposed of them near the body.

In the circuit court's sentencing order, the court set out the following facts surrounding Lindsay's confession:

> "The videotape of [Lindsay's] statement to police was admitted into evidence at trial, in which [Lindsay] talked at length about his religion, Yahweh ben Yahweh, and how he came to be a believer. He said that he was told by Yahweh to kill his daughter. He said that the reason he had to kill Maliyah was because she had become like an idol to him because of her beauty and innocence, and because he loved her too much. Lindsay described how he murdered his daughter, cutting her throat and nearly decapitating the child. He told Hammonds that he used an axe or hatchet to kill the child on the evening of March 5, 2013, at the apartment on White Avenue, while Tasmine and their infant daughter were sleeping upstairs. He said the murder took place in the room beside the kitchen. Lindsay told detectives that during the murder, Maliyah tried to scream but he held his hand over her mouth.
>
> "Lindsay said that he placed Maliyah's body in a tote bag, and put it on the front seat of his car when he left the apartment. He said that he waited until very late to leave with the body, then just

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

> started driving. He said he left her body in the bag in the woods off the side of the road. He took the hatchet and his swords to another street and threw them into the woods. He then used Clorox and washing powders to clean up the blood in the apartment. He left the apartment on March 11, 2013, after telling Tasmine he was going to pick up Maliyah at this sister's house. He said that he sold his car, but that he never intended to run away, he just needed the money. Lindsay said he always intended to tell the truth about what he had done to Maliyah.
>
> "Following the directions Lindsay gave, Gadsden police officers went to a wooded area off Plainview Street and began to search. They found Maliyah's body near a bucket in the woods containing a dead puppy. After searching that area, officers brought Lindsay to the scene. He directed them to an area on the side of the mountain off Brentwood Avenue, where he said he threw the hatchet and the swords into the woods. Investigators from Gadsden Police Department, the Etowah County Sheriff's Department, the Etowah County Drug Enforcement Unit, and agents from the Center for Applied Forensics at Jacksonville State University conducted an extensive search of the heavily wooded hillside that went on throughout the night and the following day. Officers found two knives or swords that had belonged to Lindsay, but the hatchet was not recovered, due to the steep terrain and dense woods. On the other side of the road, in a ravine, officers recovered several torn pieces of paper and/or cardboard containing [Lindsay's] religious writings, as well as an empty Clorox bottle."

(C. 115-16.)

In his defense, Lindsay presented the testimony of Dr. Robert Bare, a psychologist at Taylor Hardin Secure Medical

Facility ("Taylor Hardin"). Dr. Bare testified that he evaluated Lindsay and that it was his opinion that Lindsay suffered from paranoid schizophrenia with a personality disorder.

> "[Dr. Bare]: [W]hen [Lindsay] initially came to [Taylor Hardin] he had -- Mr. Lindsay had exhibited delusions of grandiose delusions that he was the son of Yahweh, that he had been -- that some of the acts that we will talk about in a minute were prompted by his belief in Yahweh and essentially commanded to him by Yahweh."

(R. 1856.) Lindsay was placed on medication and improved, Dr. Bare said.

On cross-examination, Dr. Bare stated that he spoke with many of Lindsay's family members.

> "[Prosecutor]: So based upon your conversations with all these family members, none of them were able to tell you about any bizarre or overtly psychotic behavior by Mr. Lindsay before he killed this little girl, right?
>
> "[Dr. Bare]: Correct.
>
> "[Prosecutor]: So all of a sudden he gets down to Taylor Hardin and he walks in the door hallucinating?
>
> "[Dr. Bare]: Apparently. That was in his report, yes.
>
> "...."

> "[Prosecutor]: And people do sometimes feign, fake, or exaggerate psychotic symptoms in order to get a certain result, do they not?
>
> "[Dr. Bare]: Yes, sir."

(R. 1901-02.) Dr. Bare also testified that he had not seen Lindsay experience any hallucinations but relied on what the staff at Taylor Hardin and Lindsay had told him. He further stated that before Lindsay was brought to Taylor Hardin and while he was incarcerated at the county jail he exhibited no "overt sign of any kind of psychotic behavior." (R. 1903.) He could not say if the hallucinations were caused by Lindsay's mental-health issues or by Lindsay's substance abuse.

The jury found Lindsay guilty of murdering Maliyah. A presentence report was prepared and a sentencing hearing was held before the same jury. The jury unanimously recommended a sentence of death after it found two aggravating circumstances: (1) that Lindsay had previously been convicted of a felony involving the use or threat of violence to the person, § 13A-5-49(2), Ala. Code 1975; and (2) that the murder was especially heinous, atrocious, or cruel as compared to

other capital murders, § 13A-5-49(8), Ala. Code 1975.[3] The circuit court issued an order sentencing Lindsay to death. This appeal followed.

Standard of Review

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

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

In discussing the scope of plain error, this Court in Johnson v. State, 120 So. 3d 1130 (Ala. Crim. App. 2009), stated:

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

[3]The circuit court used verdict forms, similar to those approved by the Alabama Supreme Court for use in the penalty phase of a capital-murder trial, so that the jury could memorialize what aggravating circumstances it found to exist beyond a reasonable doubt. See Ex parte McGriff, 908 So. 2d 1024, 1033 (Ala. 2004).

> United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." See Ex parte Price, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); Burgess v. State, 723 So. 2d 742 (Ala. Crim. App. 1997), aff'd, 723 So. 2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); Johnson v. State, 620 So. 2d 679, 701 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala. 1993), on remand, 620 So. 2d 714 (Ala. Crim. App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993).'
>
> "Hall v. State, 820 So. 2d 113, 121–22 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Although the failure to object will not preclude our review, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992)."

Sale v. State, 8 So. 3d 330, 345 (Ala. Crim. App. 2008).

We now review the issues raised by Lindsay in his brief to this Court.

Guilt-Phase Issues

I.

Lindsay first argues that the circuit court committed reversible error by failing to conduct an "appropriate

inquiry" into his competency to stand trial and that the court's failure to do so violated federal and state law.

The record shows that in April 2013 Lindsay moved that he be examined by a mental health expert. (1 Supp. 50-52.) In this motion, Lindsay requested that he be evaluated to determine whether he had the present ability to assist in his defense or whether he was competent to stand trial. The circuit court issued an order on April 15, 2013, directing that Lindsay be evaluated to determine his competency to stand trial and his mental state at the time of the offense. (1 Supp. 57-59.) Lindsay was transferred to Taylor Hardin in October 2013. Dr. Bare examined Lindsay and determined that Lindsay was a paranoid schizophrenic. Lindsay was prescribed medication for that condition and seemed to improve.

Several months later Lindsay was returned to the Etowah County jail. In December 2015, Lindsay filed a second motion for a mental examination to determine his competency to stand trial and argued that his attorney had "noticed the deterioration in [Lindsay]" since Lindsay had returned to the county jail. (C. 43-45.) The circuit court granted the

motion, and Lindsay was examined a second time to determine his competency to stand trial. (C. 46-47.)

At a pretrial hearing in February 2016, the circuit court noted that Lindsay had been examined twice at Taylor Hardin. The circuit court noted that Dr. Bare had determined that Lindsay was competent to stand trial; that Dr. Bare's report had been filed under seal in December 2015, after the second mental examination; and that Dr. Bare's letter of December 18, 2015, also discussed that Lindsay was competent to stand trial. (R. 174.)[4]

The defense also called Dr. Bare to testify in its case-in-chief. Dr. Bare testified on cross-examination that it was his opinion that Lindsay was competent to stand trial. (R. 1898-99.) Moreover, Lindsay filed several pro se motions during the course of the proceedings. Lindsay's motion for a new trial was articulate and well reasoned.[5]

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[4]Lindsay states in brief that there is nothing in the record that shows that Lindsay was competent to stand trial.

[5]Lindsay's motion stated, in part: "[T]he defendant's constitutional rights to due process and a fair and impartial trial were violated as follows: Before Defendant's trial began, the Court ordered that the defendant be mentally evaluated by doctors at Taylor Hardin Mental Health Center. Defendant was then sent to Taylor Hardin and evaluated, and after being evaluated the defendant was sent back to the

On appeal, Lindsay argues that based on the record the circuit court was obliged to hold a formal competency hearing.

> "The United States Supreme Court in Pate v. Robinson[, 383 U.S. 375 (1966),] held that a trial court must conduct a competency hearing when it has a 'reasonable doubt' concerning the defendant's competency to stand trial. That Pate holding is incorporated into § 15-16-22, Ala. Code 1975. That section reads, in pertinent part:
>
> > "'(a) Whenever it shall be made known to the presiding judge of a court by which an indictment has been returned against a defendant for a capital offense, that there is reasonable ground to believe that such defendant may presently lack the capacity to proceed or continue to trial, as defined in Section 22-52-30, or whenever said judge receives notice that the defense of said defendant may proceed on the basis of mental disease or defect as a defense to criminal responsibility; it shall be the duty of the presiding judge to forthwith order that such defendant be committed to the Department of Mental Health and Mental Retardation for examination by one or more mental health professionals appointed by the Commissioner of the Department of Mental Health and Mental Retardation.'
>
> "(Emphasis added.)
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> "Rule 11.1, Ala. R.Crim. P., defines 'mentally incompetent' as 'lack[ing] sufficient present

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Etowah County jail. Then a senior doctor from Taylor Hardin (Doctor Bare) turned in his report to the Circuit Court of Etowah County concerning his mental evaluation of the defendant, Stephon Lindsay." (C. 138.)

ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant.'

"Rule 11.6, Ala. R.Crim. P., provides:

> "'(a) Preliminary Review. After the examinations have been completed and the reports have been submitted to the circuit court, the judge shall review the reports of the psychologists or psychiatrists and, if reasonable grounds exist to doubt the defendant's mental competency, the judge shall set a hearing not more than forty-two (42) days after the date the judge received the report or, where the judge has received more than one report, not more than forty-two (42) days after the date the judge received the last report, to determine if the defendant is incompetent to stand trial, as the term "incompetent" is defined in Rule 11.1. At this hearing all parties shall be prepared to address the issue of competency.'

"(Emphasis added.)

"The trial court has been described as the initial 'screening agent' for mental-health issues:

> "'[Section 15-16-21, Ala. Code 1975] places the initial burden on the trial court to determine whether there are "reasonable grounds" to doubt the accused's sanity. "The trial court is, thus, the 'screening agent' for mental examination requests." Reese v. State, 549 So. 2d 148, 150 (Ala. Cr. App. 1989). "'It is left to the discretion of the trial court as to whether there is a reasonable or bona fide doubt as to sanity, and, thus, whether a

> further examination is required.'" 549 So. 2d at 150. The trial court makes a preliminary determination "without the aid of a jury as to whether reasonable grounds existed to doubt the defendant's competency." Rule 11.3, A.R.Crim. P., Committee Comments.'

"Daniels v. State, 621 So. 2d 335, 337 (Ala. Crim. App. 1992).

"'Competency to stand trial is a factual determination.' United States v. Boigegrain, 155 F.3d 1181, 1189 (10th Cir. 1998). 'There are of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.' Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). 'In making a determination of competency, the ... court may rely on a number of factors, including medical opinion and the court's observation of the defendant's comportment.' United States v. Nichols, 56 F.3d 403, 411 (2d Cir. 1995). 'Comments of defense counsel concerning an accused's competency to stand trial are not conclusive; however, they should be considered by the court.' Williams v. State, 386 So. 2d 506, 510-11 (Ala. Crim. App. 1980). 'Given that "a defendant's behavior and demeanor at trial are relevant as to the ultimate decision of competency," we stress that the observations and conclusions of the district court observing that behavior and demeanor are crucial to any proper evaluation of a cold appellate record.' United States v. Cornejo-Sandoval, 564 F.3d 1225, 1234 (10th Cir. 2009). '[O]ne factor a court must consider when determining if there is reasonable cause to hold a competency hearing is a medical opinion regarding a defendant's competence.' United States v. Jones, 336 F.3d 245, 257 (3d Cir. 2003).

> "'We have said that "[i]t is the burden of a defendant who seeks a pretrial competency hearing to show that a reasonable or bona fide doubt as to his competency exists." Woodall v. State, 730 So. 2d 627, 647 (Ala. Cr. App. 1997), aff'd in relevant part, 730 So. 2d 652 (Ala. 1998). "'The determination of whether a reasonable doubt of sanity exists is a matter within the sound discretion of the trial court and may be raised on appeal only upon a showing of an abuse of discretion.'" Id.; see also Tankersley v. State, 724 So. 2d 557, 564 (Ala. Cr. App. 1998).'
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> "Freeman v. State, 776 So. 2d 160, 172 (Ala. Crim. App. 1999)."

Luong v . State, 199 So. 3d 173, 194-96 (Ala. Crim. App. 2015) (opinion on remand).

> "Rule 11.6(a) authorizes the circuit court to make a preliminary determination that reasonable grounds exist to conduct a competency hearing, based on the reports submitted by examining psychologists and/or psychiatrists. Authorizing the court to make this initial determination will avoid mandating a competency hearing when reasonable grounds do not exist to doubt the defendant's competency to stand trial, as evidenced by the reports of the examining psychologists or psychiatrists. While this procedure safeguards valuable court time and resources, it also ensures that the defendant's right to a competency hearing before a judge or jury will be preserved when reasonable grounds exist to doubt the defendant's mental competency.
>
> "After reviewing the reports, if the judge finds reasonable grounds to doubt the defendant's mental competency, the judge must schedule a competency

> hearing within forty-two (42) days after the date the last report is received."

Committee Comments to Rule 11.6, Ala. R. Crim. P.

> "Rule 11.6(a) does not automatically require a competency hearing following the mental examination. Only when the judge finds after a review of the reports that 'reasonable grounds exist to doubt the defendant's mental competency' is the judge required to set a competency hearing and that hearing must be held not more than 42 days after the judge receives the report."

Tankersley v. State, 724 So. 2d 557, 565 (Ala. Crim. App. 1996).

Furthermore, a diagnosis of paranoid schizophrenia does not mean that a defendant is per se incompetent to stand trial. See State v. Anderson, 244 So. 3d 640, 650 (La.Ct.App. 2017) ("The fact that [the defendant] suffers from paranoid schizophrenia is not inconsistent with a finding that he was competent to stand trial."); State v. Woods, 301 Kan. 852, 861, 348 P.3d 583, 592 (2015) ("[The defendant] is not per se incompetent just because he was previously diagnosed with schizophrenia."); In re Rhome, 172 Wash. 2d 654, 662, 260 P.3d 874, 879 (2011) ("[The defendant] carried a diagnosis of paranoid schizophrenia, but had been found competent to stand trial and was allowed to proceed pro se with standby counsel."); State v. Braden, 98 Ohio St. 3d 354, 375, 785

N.E.2d 439, 462 (2003) ("[The mental health expert] diagnosed [the defendant] as suffering from paranoid schizophrenia, but this diagnosis is not synonymous with incompetence to stand trial. 'A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.'"); State v. Elam, 89 S.W.3d 517, 521 (Mo.Ct.App. 2002) ("[A] defendant may be diagnosed with a mental disease and still be declared competent to stand trial."); State v. Frezzell, 958 S.W.2d 101, 104 (Mo.Ct.App. 1998) ("The actual presence of some degree of mental illness or need for treatment does not necessarily equate with incompetency to stand trial.").

Lindsay was not automatically entitled to a competency hearing because he had been examined by a mental-health expert to determine his competency to stand trial. The circuit court had Dr. Bare's written findings that Lindsay was competent to stand trial and had the luxury, which this Court lacks, of personally observing Lindsay's demeanor during the proceedings. Lindsay also filed several articulate pro se motions with the circuit court. Based on Dr. Bare's findings and the court's personal dealings with Lindsay, we agree with the circuit court that it had no "reasonable grounds" to make

any further inquiry into Lindsay's competency to stand trial See Luong v. State, supra. Lindsay is due no relief on this claim.

II.

Lindsay next argues that the circuit court erred in death-qualifying the prospective jurors because, he says, it created a conviction-prone jury.

> "A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Neither the federal nor the state constitution prohibits the state from ... death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391–92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993)."

Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand).

The circuit court committed no error in death-qualifying the prospective jurors. Lindsay is due no relief on this claim.

III.

Lindsay next argues that the circuit court erred in failing to remove four prospective jurors for cause that, he says, were biased against him.

Lindsay objected to the circuit court's failure to remove only one of the challenged jurors. Therefore, we review the failure to sua sponte remove three of the jurors for plain error. See Rule 45A, Ala. R. App. P.

When discussing a trial court's failure to remove a juror for cause, this Court has stated:

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

> sufficiently impartial if he or she can set aside that opinion and render a verdict based upon the evidence in the case. Kinder, at 60-61. In order to justify disqualification, a juror '"must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused"'; '"[s]uch opinion must be so fixed ... that it would bias the verdict a juror would be required to render."' Oryang v. State, 642 So. 2d 979, 987 (Ala. Cr. App. 1993) (quoting Siebert v. State, 562 So. 2d 586, 595 (Ala. Cr. App. 1989))."

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

> "The test for determining whether a strike rises to the level of a challenge for cause is 'whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence.' Marshall v. State, 598 So. 2d 14, 16 (Ala. Cr. App. 1991). 'Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause.' Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983). 'The decision of the trial court "on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion."' Nettles, 435 So. 2d at 153. In Marshall v. State, 598 So. 2d 14 (Ala. Cr. App. 1991), this court held that it was not error for a trial court to deny challenges for cause of two jurors who stated that they knew the victim or her family. One veniremember had been employed as a maid by the victim's family and the other stated that she knew the victim's family. Marshall, 598 So. 2d at 16. This court held that this relationship was not grounds for a challenge for cause as long as the juror indicates that he or she can be fair and impartial. 598 So. 2d at 16. In the present case, the juror remembered the victim's face from high school, but was not, and had not been, personally acquainted with the victim. Therefore, the trial court did not err in allowing the juror to remain on the jury."

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

> "Even though a prospective juror may initially admit to a potential for bias, the trial court's denial of a motion to strike that person for cause will not be considered error by an appellate court if, upon further questioning, it is ultimately determined that the person can set aside his or her opinions and try the case fairly and impartially, based on the evidence and the law."

Ex parte Land, 678 So. 2d 224, 240 (Ala. 1996).

Moreover, the Alabama Supreme Court has recognized that the harmless-error rule applies to a court's refusal to remove a prospective juror for cause.

> "The application of a 'harmless-error' analysis to a trial court's refusal to strike a juror for cause is not new to this Court; in fact, such an analysis was adopted as early as 1909:
>
> > "'The appellant was convicted of the crime of murder in the second degree. While it was error to refuse to allow the defendant to challenge the juror C.S. Rhodes for cause, because of his having been on the jury which had tried another person jointly indicted with the defendant, yet it was error without injury, as the record shows that the defendant challenged said juror peremptorily, and that, when the jury was formed the defendant had not exhausted his right to peremptory challenges.'
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> "Turner v. State, 160 Ala. 55, 57, 49 So. 304, 305 (1909). However, in Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), overruled on other grounds, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United

> States Supreme Court stated, in dicta, that '[t]he denial or impairment of the right is reversible error without a showing of prejudice.' (Emphasis added.) Some decisions of this Court as well as of the Alabama Court of Criminal Appeals reflect an adoption of this reasoning. See Dixon v. Hardey, 591 So. 2d 3 (Ala. 1991); Knop v. McCain, 561 So. 2d 229 (Ala. 1989); Ex parte Rutledge, 523 So. 2d 1118 (Ala. 1988); Ex parte Beam, 512 So. 2d 723 (Ala. 1987); Uptain v. State, 534 So. 2d 686, 688 (Ala.Crim.App. 1988) (quoting Swain and citing Beam and Rutledge); Mason v. State, 536 So. 2d 127, 129 (Ala.Crim.App. 1988) (quoting Uptain).
>
> "... [T]his Court has returned to the harmless-error" analysis articulated in the Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and [United States v.] Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const. 1901, § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.
>
> "In this instance, even if the Betheas could demonstrate that the trial court erred in not granting their request that L.A.C. be removed from the venire for cause (an issue we do not reach), they would need to show that its ruling somehow injured them by leaving them with a less-than-impartial jury. The Betheas do not proffer any evidence indicating that the jury that was eventually impaneled to hear this action was biased or partial. Therefore, the Betheas are not entitled to a new trial on this basis."

Bethea v. Springhill Memorial Hospital, 833 So. 2d 1, 6-7 (Ala. 2002) (footnotes omitted). See also Calhoun v. State, 932 So. 2d 923 (Ala. Crim. App. 2005). Compare General Motors

Corp. v. Jernigan, 883 So. 2d 646 (Ala. 2003) (harmless-error analysis does not apply when the circuit court erroneously denied five challenges for cause).

With these principles in mind we review the claims raised by Lindsay concerning the four challenged prospective jurors.

A.

Lindsay first argues that prospective juror J.H.[6] should have been removed for cause because, he says, he had a longstanding friendship with the district attorney. He said that they attended the same church and that J.H. had nominated the district attorney for a city judgeship while J.H. was a member of the city counsel.

The record indicates that on J.H.'s juror questionnaire he indicated that he had been to school with defense counsel's mother and father and that he had known the district attorney his whole life. The prosecutor first asked J.H. if his friendship with the district attorney would affect his ability to be impartial. J.H. stated that it would not. (R. 723.) Defense counsel then questioned J.H. about whether the fact that he had gone to school with defense counsel's parents

[6]To protect the anonymity of the jurors we are using their initials.

would affect his ability to be impartial. J.H. said it would not. (R. 767.) Counsel also asked if his friendship with the district attorney would affect his ability to be impartial. Again, J.H. indicated that it would not. (R. 768.) At the conclusion of voir dire, defense counsel moved that prospective juror J.H. be removed for cause. The circuit court denied the motion after noting that J.H. indicated that his friendship with the district attorney would not affect his ability to be impartial. (R. 1445.)

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

Bohannon v. State, 222 So. 3d 457, 478 (Ala. Crim. App. 2015). The circuit court did not err in denying Lindsay's motion to remove prospective juror J.H. for cause. Lindsay is due no relief on this claim.

Moreover, Lindsay used his first peremptory strike to remove juror J.H., and J.H. did not serve on Lindsay's jury. Accordingly, any error in failing to remove juror J.H. for cause was harmless beyond a reasonable doubt. See Bethea v. Springhill Memorial Hospital, 833 So. 2d at 6-7. Lindsay is due no relief on this claim.

B.

Next, Lindsay argues that the circuit court erred in failing to remove prospective juror M.O. for cause because, he says, she asked not to serve on the jury, she indicated a bias against people with mental illness, and she said that she had discussed the case with her coworkers.

Lindsay did not move to remove prospective juror M.O. for cause; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record shows that M.O. stated on her juror questionnaire that it would cause her "heartache" to serve on the case. M.O. also stated during voir dire that "I work with a lot of workers' comp cases. And I have personally seen faked injuries. I don't see why people wouldn't fake mental illness as well." (R. 1001.) M.O. further stated during voir

dire that she had discussed the case with her coworkers before she became a member of the venire.

The record shows that when questioned by the prosecutor, M.O. indicated that she could be impartial, that she would not let her emotions control her verdict, that she had not formed an opinion about the case, and that her verdict would be based on the evidence presented in the case. (R. 1118-19.) M.O. was asked about her experience with workers' compensation cases and said that it would not influence her. (R. 1001.) The circuit court did not err in failing to sua sponte remove juror M.O. for cause. Lindsay is due no relief on this claim.

Moreover, Lindsay used his 12th peremptory strike to remove prospective juror M.O. for cause. As stated previously, any error in failing to remove M.O. was harmless based on Bethea v. Springhill Memorial Hospital. Lindsay is due no relief on this claim.

C.

Lindsay next argues that the circuit court erred in failing to sua sponte remove prospective juror S.T. for cause because, he says, she stated during voir dire that she could not carry out her duty. (R. 1188.)

Lindsay did not object and request that prospective juror S.T. be removed for cause. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The voir dire of prospective juror S.T. reads:

> "[S.T.]: The thing with me is probably that I don't know how bad the pictures are. I wouldn't know if I'm elected as a juror, I really couldn't tell, you know, the nature of the photos. That's why I may -- That's just a comment I did. But it wouldn't affect my outcome or opinion towards the situation and the matter of the case if elected.
>
> "The Court: So, obviously, nobody wants to see anything difficult.
>
> "[S.T.]: Right.
>
> "The Court: If you did have to see pictures in this case that would be hard for you or difficult for you, would you be able to perform your duties in this case?
>
> "[S.T.]: Yes."

(R. 1347-48.) S.T. stated that the photographs would not prevent her from performing her duties as a juror. Also, the circuit court at the conclusion of the court's questions during voir dire asked the veniremembers: "Is there any juror who knows anything about the case that would influence your verdict in any way?" No juror responded. (R. 471.)

The circuit court did not err in failing to sua sponte remove prospective juror S.T. for cause. See Dunning, supra. Lindsay is due no relief on this claim.

D.

Lindsay next argues that the circuit court erred in failing to remove prospective juror L.B. for cause because, he says, L.B. was a probation officer and he knew the district attorney and staff and had worked around them for five years.

Lindsay did not challenge L.B. for cause or move that he be removed for cause. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Knowing the district attorney is not a ground "supporting removal for cause under § 12-16-150, Ala. Code 1975." Osgood v. State, [Ms. CR-13-1416, October 21, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016). See also Bohannon v. State, 222 So. 3d at 478. L.B. indicated that his relationship with the district attorney would not affect his ability to be impartial. The circuit court did not err in failing to sua sponte remove prospective juror L.B. for cause.

E.

Last, Lindsay argues that his jury included four jurors who were biased against him -- C.G., S.T., E.L., and J.P. --

in violation of his right to be tried by an impartial jury. Lindsay's entire argument on this issue states:

> "Juror C.G. indicated that she did not agree with the presumption of innocence: 'the accused should have to make more of an effort to prove innocence.' C.G.'s questionnaire at 10. Two other jurors, J.P. and S.T., indicated that the fact that a defendant is charged made them believe that he is more likely to be guilty. J.P.'s questionnaire at 12; S.T.'s questionnaire at 12. Additionally, Juror E.L. indicated that she would automatically impose the death penalty for a person convicted of killing a child under age five, but was never questioned about this on individual voir dire. E.L.'s questionnaire at 15. The inclusion of biased veniremembers on the jury violated Mr. Lindsay's right to an impartial jury."

(Lindsay's brief, at pp. 77-78.)

"A defendant is 'entitled to be tried by 12, not 9 or even 10 impartial and unprejudiced jurors.'" Ex parte Killingsworth, 82 So. 3d 761, 764 (Ala. 2010), quoting, in part, Parker v. Gladden, 385 U.S. 363 (1966). However, as the State correctly argues, each of the above-challenged jurors stated on his or her juror questionnaire that they could follow the court's instructions and be fair and impartial. Also, the voir dire conducted by the circuit court shows that all of the prospective jurors were asked if they knew "anything about the case that would influence [their] verdict in any way?" (R. 471.) No juror responded in

the affirmative to this question. The record does not suggest that Lindsay was tried by a jury on which four biased jurors sat. Lindsay is due no relief on this claim.

IV.

Lindsay next argues that the record establishes a prima facie case of racial discrimination in the selection of his jury in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Specifically, he argues that the case should be remanded to the Etowah Circuit Court for that court to conduct a Batson hearing.

The United States Supreme Court in Batson held that it was a violation of the Equal Protection Clause of the United States Constitution to strike a black individual from a black defendant's jury based solely on his or her race. This holding was extended to white defendants in Powers v. Ohio, 499 U.S. 400 (1991); to defense counsel in criminal cases in Georgia v. McCollum, 505 U.S. 42 (1992); and to gender-based claims in J.E.B. v. Alabama, 511 U.S. 127 (1994). The Alabama Supreme Court extended this holding to white prospective jurors in White Consolidated Industries, Inc. v. American Liberty Insurance, Inc., 617 So. 2d 657 (Ala. 1993).

In this case, Lindsay did not make a Batson objection after the peremptory strikes were completed. Thus, we review this issue for plain error. See Rule 45A, Ala. R. App. P.

> "To find plain error in the Batson [v. Kentucky, 476 U.S. 79 (1986),] context, we first must find that the record raises an inference of purposeful discrimination by the State in the exercise of its peremptory challenges. E.g., Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007). Where the record contains no indication of a prima facie case of racial discrimination, there is no plain error. See, e.g., Gobble v. State, 104 So. 3d 920, 949 (Ala. Crim. App. 2010)."

Henderson v. State, 248 So. 3d 992, 1016 (Ala. Crim. App. 2017).

Alabama appellate courts have rarely found plain error in the Batson context. Indeed, on numerous occasions this Court has declined to find plain error based on an undeveloped and cold record. See Gaston v. State, [Ms. CR-15-0317, March 16, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018); Russell v. State, [Ms. CR-13-0513, September 8, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017); Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017); Henderson v. State, 248 So. 3d 992 (Ala. Crim. App. 2017); Osgood v. State, [Ms. CR-13-1416, October 21, 2016] ___So. 3d ___ 2016); Largin v. State, 233 So. 3d 374 (Ala. Crim. App. 2015); Townes v. State, 253

So. 3d 447 (Ala. Crim. App. 2015); Bohannon v. State, 222 So. 3d 457 (Ala. Crim. App. 2015); Luong v. State, 199 So. 3d 173 (Ala. Crim. App. 2015); White v. State, 179 So. 3d 170 (Ala. Crim. App. 2013); Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013); McMillan v. State, 139 So. 2d 184 (Ala. Crim. App. 2010); Gobble v. State, 104 So. 3d 920 (Ala. Crim. App. 2010); Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008).[7]

> "'A defendant makes out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" surrounding a prosecutor's conduct during the defendant's trial.' Lewis v. State, 24 So. 3d 480, 489(Ala. Crim. App. 2006) (quoting Batson, 476 U.S. at 94, aff'd, 24 So. 3d 540 (Ala. 2009). '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.' Ex parte Branch, 526 So. 2d [609] at 622 [(Ala. 1987)] (citing Batson, 476 U.S. at 93, citing in turn Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). In Ex parte Branch, the Alabama Supreme Court specifically set forth a number of 'relevant circumstances' to consider in determining whether a

[7]In Ex parte Phillips, [Ms. 1160403, October 19, 2018] ___ So. 3d ___ (Ala. 2018), Chief Justice Stuart, writing, in a special concurrence joined by two members of the Alabama Supreme Court, stated: "For the reasons set forth above, I would overrule Ex parte Bankhead[, 585 So. 2d 112 (Ala. 1991),] and its progeny in this regard and now hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for the first time on appeal." ___ So. 3d at ___.

prima facie case of race discrimination has been established:

> "'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 shared] 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 state's 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 state's 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 (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] at 2049 [(1976)].

"'9. The state used peremptory challenges to dismiss all or most black jurors. See Slappy, 503 So. 2d at 354, Turner, supra.'

"Id. at 622-23. In Ex parte Trawick, 698 So. 2d 162 (Ala. 1997), the Court reiterated the Ex parte Branch factors in a manner applicable to gender as follows:

> "'(1) evidence that the jurors in question shared only the characteristic of gender and were in all other respects as heterogenous as the community as a whole; (2) a pattern of strikes against jurors of one gender on the particular venire; (3) the past conduct of the state's attorney in using peremptory challenges to strike members of one gender; (4) the type and manner of the state's questions and statements during voir dire; (5) the type and manner of questions directed to the challenged juror, including a lack of questions; (6) disparate treatment of members of the jury venire who had the same characteristics or who answered a question in the same manner or in a similar manner; and (7) separate examination of members of the venire. Additionally, the court may consider whether the State used all or most of its strikes against members of one gender.'

"698 So. 2d at 168."

White v. State, 179 So. 3d at 199-200.

Here, the record shows that after some prospective jurors were excused for undue hardship 78 prospective jurors remained on the venire. The State and the defense each had 33 peremptory strikes. The State used 8 of its 33 strikes to remove black prospective jurors -- its 3rd, 5th, 7th, 13th, 18th, 23rd, 26th, and 31st strikes -- to remove black

prospective jurors K.D., D.B., J.C., C.S., S.B., D.M., D.H., and K.D. Lindsay used 32 of his 33 strikes to remove white prospective jurors. The defense used its last strike to remove a black prospective juror. Lindsay's jury was composed of 6 black jurors and 6 white jurors. Of the three alternates, two were black and one was white.

The voir dire in this case was extensive. It consists of almost 1,000 pages of the certified record on appeal. (R. 455-1437.) The jurors also completed an 18-page juror questionnaire that contained 80 questions. There is no indication from the extensive voir dire examination that the State unfairly targeted black prospective jurors in its questioning. Indeed, the opposite is true.

We have thoroughly examined the voir dire and the juror questionnaires. Juror K.D. stated during voir dire examination that she had moral or religious reservations about the death penalty. (R. 1176, 1364.) Juror D.B. stated during voir dire that she did not think that she could vote for the death penalty. (R. 519.) Also, on D.B.'s questionnaire she wrote that the death penalty did not fix any problems and that she would automatically vote for life imprisonment without parole. Juror J.C. stated in her questionnaire that her

brother had been convicted of rape. Juror C.S. indicated on her questionnaire that her son had been convicted of possession of marijuana and that she would automatically vote for life imprisonment without parole. Juror S.B. stated on her questionnaire that she would automatically vote for life imprisonment without parole and that the death penalty was imposed too randomly. Juror D.M. stated on her questionnaire that she could not say how she felt about the death penalty. Juror D.H. stated on her questionnaire that she had family members or close friends who had been convicted and that she would automatically vote for life imprisonment without parole. Juror K.D. stated on her questionnaire that she had family members or close friends who had been convicted and that she would automatically vote for life imprisonment.

> "The above reasons, which are readily discernible from the record, were all race-neutral reasons. 'The fact that a family member of the prospective juror has been prosecuted for a crime is a valid race-neutral reason.' Yelder v. State, 596 So. 2d 596, 598 (Ala. Crim. App. 1991). '[A] veniremember's connection with or involvement in criminal activity may serve as a race-neutral reason for striking that veniremember.' Wilsher v. State, 611 So. 2d 1175, 1183 (Ala. Crim. App. 1992). '"That a veniremember has reservations about the death penalty, though not sufficient for a challenge for cause, may constitute a race-neutral and reasonable explanation for the exercise of a

> peremptory strike."' Fisher v. State, 587 So. 2d 1027, 1036 (Ala. Crim. App. 1991)."

Bohannon v. State, 222 So. 3d 457, 482 (Ala. Crim. App. 2015).

Lindsay also argues that the Etowah County District Attorney's Office has a long history of discrimination in the selection of juries. It cites a 1996 case, State v. Williams, 679 So. 2d 275 (Ala. Crim. App. 1996), and a 1987 case, Turner v. State, 521 So. 2d 93 (Ala. Crim. App. 1987), in support of that argument. However, this Court has stated:

> "Although Bohannon contends that there is a long history of racial discrimination by the Mobile County District Attorney's Office in striking juries, the most recent case cited by Bohannon in his brief in making this claim is a 1999 case. Despite Bohannon's contention that the district attorney's office has a long history of striking jurors based on race, 'this was not reflected in, or indicated by, the record. See Sharifi v. State, 993 So. 2d 907, 928 (Ala. Crim. App. 2008) (no inference from the record of discriminatory use of peremptory challenges by the prosecutor despite Sharifi's argument that Madison County has a long history of violating Batson and that the number of strikes used by the State indicated prejudice).' Ditch v. State, 67 So. 3d 936, 982 (Ala. Crim. App. 2010). See also McMillan v. State, 139 So. 3d [184] at 205 [(Ala. Crim. App. 2010)]."

Bohannon, 222 So. 3d at 483.

Based on this Court's review of the record, we cannot say that Lindsay has proven a prima facie case of racial discrimination in the prosecutor's strikes of black

prospective jurors. See Henderson, supra. Lindsay is due no relief on this claim.

V.

Lindsay next argues that his statements to police should have been suppressed because, he says, they were obtained in violation of state and federal law. Specifically, he argues that his initial statement was unlawfully admitted because he was not read his Miranda[8] rights and that his subsequent confession was coerced because of his mental state.

A.

Lindsay first contends that when police first spoke with him they asked him about Maliyah before reading him his Miranda rights. Lindsay responded to the police inquiry that Maliyah was not okay and that she not alive. The State argues that Lindsay's statements were admissible because they fell within the "public safety" exception to the Miranda requirements.

Lindsay did not challenge his statements to police at trial; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

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

In discussing the public-safety exception to Miranda requirements, this Court has stated:

> "[T]his case falls within the narrow scope of the 'public safety' exception and the related 'emergency' or 'rescue' exception. See 3 W. Rigel, Searches and Seizures, Arrests and Confessions § 26.5(d) at 26–30 through 26–32 (2d ed. 1993); 1 W. LaFave, Criminal Procedure § 6.7 at 506–09 (1984) and at 115–17 (Supp. 1991). See New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (police may, in swiftly developing circumstances, ask questions reasonably prompted by considerations of public safety without violating Miranda). '[Q]uestions aimed at the safety or rescue of another person are not considered interrogation, although responses to the questioning might be highly incriminating.' 3 Rigel § 27.4(b) at 27–31—27–32. See also State v. Vickers, 159 Ariz. 532, 768 P.2d 1177 (1989), cert. denied, 497 U.S. 1033, 110 S.Ct. 3298, 111 L.Ed.2d 806 (1990). Here, Officer Joiner's question to the appellant was not designed to elicit any incriminating response but was asked solely for the purpose of determining whether the appellant was injured.
>
> "Furthermore, we note that '"[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process"' does not require compliance with Miranda. Lesley v. State, 599 So. 2d 64 (Ala. Cr. App. 1992). 'Miranda does not prevent traditional investigatory functions such as general on-the-scene questioning; general on-the-scene questioning of a suspect does not constitute interrogation for Fifth Amendment purposes.' Hubbard v. State, 500 So. 2d 1204, 1224 (Ala. Cr. App.), affirmed, 500 So. 2d 1231 (Ala. 1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1591, 94 L.Ed.2d 780 (1987). Accord Bui v. State, 551 So. 2d 1094, 1108 (Ala. Cr. App. 1988), affirmed, 551 So. 2d 1125 (Ala. 1989), vacated on other grounds,

> 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991) (officer's asking appellant about his children, whose corpses, along with the murder weapon, were on the bed next to appellant, was in the nature of general on-the-scene investigation and, thus, statement was admissible even though the appellant had not been read his Miranda rights); Jackson v. State, 412 So. 2d 302, 306-07 (Ala. Cr. App. 1982) (Miranda warnings not required when officers who were conducting general on-the-scene investigation of recent homicide asked, 'What happened?' and accused gave incriminating response). See also Lesley v. State, 599 So. 2d 64, 71 (Ala. Cr. App. 1992); Fisher v. State, 587 So. 2d 1027, 1038 (Ala. Cr. App.), cert. denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 503 U.S. 941, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992)."

Smith v. State, 646 So. 2d 704, 708 (Ala. Crim. App. 1994).

The United States Supreme Court has recognized that: "concerns for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in Miranda." New York v. Quarles, 467 U.S. 649, 653 (1984). See Benson v. State, 698 So. 2d 333, 335 (Fla. 4th Dist. 1997) ("Since Quarles, however, several state and federal courts have addressed and applied the 'public safety' exception to Miranda in a variety of circumstances, including concern for the safety of victims and police officers."); Trice v. United States, 662 A.2d 891, 897 (D.C. 1995) ("A refusal to apply the exception in this case would effectively penalize the government because [police] ... asked a question reasonably

prompted by a concern for the well being of small children.").

We agree with the State that the public-safety exception applies to the circumstances in this case. A 21-month-old child had been missing for 6 days and police were concerned for the child's welfare. Accordingly, the statements that Lindsay made when police first approached him were admissible without benefit of Miranda warnings. There is no error, much less plain error, in the admission of Lindsay's initial statement to police. Lindsay is due no relief on this claim.

B.

Lindsay next argues that his confession made at the police station after he was read his Miranda rights was involuntary because of his mental condition.

This issue was not presented to the circuit court; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

> "An accused's alleged mental condition alone will not prevent a statement from correctly being received into evidence at trial. As this court has stated:
>
> > "'The Alabama courts have recognized that subnormal tendencies of the accused are but one factor to review in the totality of the circumstances surrounding the confession. See McCord v. State, 507 So. 2d 1030 (Ala. Cr. App. 1987); Sasser v.

> State, 497 So. 2d 1131 (Ala. Cr. App. 1986); Corbie v. State, 412 So. 2d 299 (Ala. Cr. App. 1982). For a more in-depth discussion of this point, see, 23 A.L.R. 4th 493, 8 A.L.R.4th 16.
>
> "'Judge Bowen, speaking for this court in Corbie, supra, 412 So. 2d at 301, stated:
>
> > "'"Mental 'subnormality' does not in and of itself render a confession involuntary. Parker v. State, 351 So. 2d 927 (Ala. Cr. App.), cert. quashed, 351 So. 2d 938 (Ala. 1977); Arnold v. State, 348 So. 2d 1092 (Ala. Cr. App.), cert. denied, 348 So. 2d 1097 (Ala. 1977). The mere fact that the defendant was simpleminded or 'functionally illiterate' will not vitiate the voluntariness of his confession."'"

Wheeler v. State, 659 So. 2d 1032, 1034 (Ala. Crim. App. 1995) quoting Hardey v. State, 549 So. 2d 631, 633 (Ala. Crim. App. 1989). "Except in the most extreme cases, the mental abnormality of the accused is just one factor which must be considered in determining from the totality of the circumstances the voluntariness and admissibility of a confession." Corbie v. State, 412 So. 2d 299, 301 (Ala. Crim. App. 1982).

We have examined the videotape of Lindsay's confession. (State's exhibit 25.) In the videotape, Lindsay appears calm and controlled. The videotape shows Lindsay in a small interview room sitting on a chair against the wall with his left arm handcuffed and the handcuff secured to the wall. At no time in the videotape did Lindsay appear aggressive or agitated, and he was articulate and respectful to the officers. Lindsay was advised of his Miranda rights and voluntarily signed the waiver-of-rights form. Lindsay confessed that he killed Maliyah because Yahweh told him to get rid of her, that it was hard for him to kill her, and that he is "not crazy and did not just go off the deep end." Lindsay was able to tell police specifics of what occurred the entire day on the day he murdered Maliyah. This is not one of those extreme cases where Lindsay's mental condition rendered his confession involuntary. Lindsay's confession was correctly received into evidence irrespective of his mental health. Lindsay is due no relief on this claim.

VI.

Lindsay next argues that the circuit court erred in failing to sua sponte give instructions to the jury when certain evidence was admitted during Thomas's testimony.

Specifically, he argues that it was error for the prosecutor to ask Thomas if Lindsay had ever been violent, to ask Thomas when her relationship with Lindsay began, and to ask Thomas if Lindsay had ever sold drugs. He asserts that the questions implied that he had a history of prior criminal activity.

The record shows that before trial Lindsay made a motion in limine seeking to prohibit the State from introducing any evidence of Lindsay's prior bad acts. (C. 87-89.) The circuit court reserved ruling on the motion until specific evidence was introduced at trial. (R. 439.) Lindsay argues that the following questions to Thomas violated the motion in limine.

During Thomas's testimony, the prosecutor questioned Thomas about whether Lindsay had a temper:

> "[Prosecutor]: During the time that you and [Lindsay] lived together did he have a temper?
>
> "[Thomas]: Yes.
>
> "[Prosecutor]: And did he ever act out on his temper?
>
> "[Thomas]: Yes.
>
> "[Prosecutor]: Was he ever violent with you?
>
> "[Thomas]: Yes.
>
> "[Defense counsel]: Your Honor, I'm going to --

"....

"The Court: My understanding regarding prior acts and things of that nature we were going to discuss that outside the presence of the jury before we put that up.

"[Prosecutor]: I'm sorry, Judge. I didn't do that on purpose.

"The Court: Okay. Your objection?

"[Defense counsel]: I object to any line of questioning regarding any violent acts or physical arguments.

"The Court: State?

"[Prosecutor]: I do believe the nature of their defense at some point in time in this trial is going to open the door --

"....

"The Court: At this point in time, sustain, at this time, with the understanding that if anything changes in regard to the opening of -- we will come back before the Court.

"[Prosecutor]: I need to clarify something.

"Judge, part of the thing is that he did have a temper and, I mean, am I allowed to ask about his temper or I'm not supposed to ask that?

"....

"The Court: I don't have a problem with temper, but going into specific acts and things like that."

(R. 1545-49.) The circuit court sustained the objection and did not allow the prosecutor to go into any specific bad acts. Lindsay did not request a limiting instruction.

Lindsay also argues that the court should have sua sponte given an instruction to the jury when the following occurred:

> "[Prosecutor]: How old were you when you first met Stephon Lindsay?
>
> "[Thomas]: Seventeen.
>
> "[Prosecutor]: Do you remember about when it was when you first met him?
>
> "[Thomas]: September of 2011. I think.
>
> "[Prosecutor]: And did the two of you start talking to each other at that time throughout the relationship?
>
> "[Thomas]: Like, as friends, yes. Yes, but anything else, no.
>
> "[Prosecutor]: At some point after that did you get into a relationship where he was your boyfriend?
>
> "[Thomas]: Yes.
>
> "[Prosecutor]: And do you know about how long of a time passed before that happened?
>
> "[Thomas]: Nine months."

(R. 1538-39.) As the State argues § 13A-6-62, Ala. Code. 1975, defines the offense of second-degree rape as having sexual relations with a member of the opposite sex when that

person is over the age of 12 and less than 16 years of age. Thomas did not testify that she had a romantic relationship with Lindsay when she was 16 or younger.

Last, Thomas argues that the following testimony was prejudicial:

> "[Prosecutor]: Did Stephon smoke marijuana at your house?
>
> "[Thomas]: Yes.
>
> "[Prosecutor]: Did you see marijuana in your house?
>
> "[Thomas]: Yes.
>
> "[Prosecutor]: Were you ever aware of any other ways that Stephon was trying to make money?
>
> "[Thomas]: I was told that he was selling --
>
> > "[Defense counsel]: Your Honor, I think she said she heard.
> >
> > "The Court: Overrule. I believe she said told. Sustain.
>
> "[Prosecutor]: Did Stephon tell you he was selling drugs?
>
> "[Thomas]: No."

(R. 1554-55.) The circuit court sustained the objection and Lindsay did not request a jury instruction. Also, Dr. Bare testified during his direct examination by defense counsel

that Lindsay told him that he had been using marijuana and cocaine heavily around the time of the murder.

"Giving a curative instruction regarding the fleeting remark may have drawn more unwanted attention to the remark." Wilson v. State, 142 So. 3d 732, 815 (Ala. Crim. App. 2010).

Moreover,

> "[The defendant], himself, confessed to his participation in Walker's murder, and Walker's property was found in [the defendant's] house. Under the facts of this case, this Court cannot say that the circuit court's failure to give a curative instruction adversely affected the outcome of the trial, Ex parte Walker, 972 So. 2d 737, 752 (Ala. 2007), or was 'so egregious ... that [it] seriously affected] the fairness, integrity or public reputation of judicial proceedings.' Ex parte Price, 725 So. 2d 1063, 1071-72 (Ala. 1998)."

142 So. 3d at 815.

Here, Lindsay confessed to murdering Maliyah and gave a detailed account of what he had done to her body. Indeed, police found Maliyah's body after Lindsay told them where they could locate it. We cannot say that the circuit court's failure to give a limiting instruction on the testimony elicited during Thomas's examination affected the fairness and integrity of the judicial proceedings. See Wilson and Rule 45A, Ala. R. App. P.

Moreover, the harmless-error rule applies to death-penalty cases. See Ex parte Brownfield, 44 So. 3d 43 (Ala. 2009).

> "In [Ex parte] Wilson, [571 So. 2d 1251 (Ala. 1990),] this Court, quoting Chapman [v. California], 386 U.S. [18] at 24, 87 S.Ct. [824] at 828 [(1967)], stated that '"before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."' 571 So. 2d at 1264. Applying that rule of law to the facts of this case, we conclude, as did the Court of Criminal Appeals, that the record shows that the evidence of guilt is 'virtually ironclad'; therefore, we agree with the Court of Criminal Appeals that [the error] did not affect the outcome of the trial or otherwise prejudice [the appellant's] right to a fair trial."

Ex parte Greathouse, 624 So. 2d 208, 211 (Ala. 1993). We are confident that admission of the above-cited testimony was harmless beyond a reasonable doubt. See Chapman v. California. Lindsay is due no relief on this claim.

VII.

Lindsay next argues that the circuit court erred in admitting two swords into evidence, State's exhibits no. 11 and no. 12, because, he says, they were irrelevant and highly prejudicial.

The record shows that Lindsay told police where he had disposed of the body, an axe, and several swords.[9] When the State sought to introduce the two swords that were discovered Lindsay objected and argued that the swords were not relevant because, he said, they were not the weapons used in the murder. (R. 1575.) The State argued:

> "Your Honor, these are weapons that [Lindsay] kept that he pulled out and showed to people routinely that he disposed of along with the murder weapon. We expect [Thomas] to testify that she had seen the hatchet or axe that he talked about killing the baby with. Unfortunately law enforcement wasn't able to recover that, but we did recover these and we recovered them at the direction of [Lindsay] showing where they were."

(R. 1576.) The circuit court allowed the swords to be admitted into evidence. (R. 1576.)

> "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. E.g., Gavin v. State, 891 So. 2d 907, 963 (Ala. Crim. App. 2003). Rule 402, Ala. R. Evid., states that all relevant evidence is admissible, unless otherwise precluded by law. Rule 401, Ala. R. Evid., defines relevant evidence as '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.' As with the determination of

[9]Lindsay admitted that the swords belonged to him.

> admissibility, trial courts have broad discretion in determining whether evidence is relevant, and a court's determination will not be reversed unless the decision constituted an abuse of discretion. Gavin at 963."

Yeomans v. State, 898 So. 2d 878, 894 (Ala. Crim. App. 2004).

The coroner testified that the murder weapon was something "that had a sharp edge, like that of a knife or something -- it could be larger, but you have to have a sharp edge like a machete or axe or something like that which has to have a sharp edge." (R. 1786.) Lindsay first stated in his confession that he killed Maliyah with a knife but later in the confession said that he used an axe. There was no forensic testimony that identified the actual murder weapon.

> "Rule 402, Ala. R. Evid., provides that '[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State.' Rule 401, Ala. R. Evid., defines 'relevant evidence' as '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.' 'Alabama recognizes a liberal test of relevancy, which states that evidence is admissible "if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence."' Hayes [v. State], 717 So. 2d [30] at 36 [(Ala. Crim. App. 1997)], quoting C. Gamble, Gamble's Alabama Evidence § 401(b). '[A] fact is admissible against a relevancy challenge if

> it has any probative value, however[] slight, upon a matter in the case.' Knotts v. State, 686 So. 2d 431, 468 (Ala. Crim. App. 1995), aff'd, 686 So. 2d 486 (Ala. 1996). Relevant evidence should be excluded only 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Rule 403, Ala. R. Evid. 'The general rule is that articles which are properly identified and which tend to show the commission of the crime or the manner in which it was committed or elucidate some matter in issue are admissible in evidence for inspection and observation by the jury.' Basle v. State, 408 So. 2d 173, 179 (Ala. Crim. App. 1981)."

Gavin v. State, 891 So. 2d 907, 963-64 (Ala. Crim. App. 2003).

The circuit court did not abuse its considerable discretion in admitting the weapons discovered near the victim's body. Lindsay is due no relief on this claim.

VIII.

Lindsay argues that the circuit court erred in admitting autopsy photographs of the victim into evidence because, he says, they were cumulative and more prejudicial than probative. Specifically, Lindsay challenges the admission of State's exhibit nos. 42-46 and 128 through 153.[10]

[10]The State withdrew State's exhibit nos. 137 and 145.

The record shows that, during the testimony of Conduce Grimes, a crime-scene technician, the State introduced photographs marked as exhibits nos. 42-46. The State argued:

> "They do show different aspects of the injury to the neck, it does show the relation of those injuries to other injuries on the body, that being the injury to the chest. And show different perspectives of the wound. We think it's important not -- I mean, the photographs that we have agreed to are shocking enough. But these do show -- we do need to document -- given the severity of the injury to the neck, we do need to show that there was no change in the aspect of the injury between the time the body was initially recovered and the time the body went for autopsy."

(R. 1656.) Lindsay argued that the photographs were duplicative and would "inflame and enrage -- inflame the jury." (R. 1657.) The circuit court allowed the photographs to be admitted. (R. 1659.)

The record also shows that during Dr. Valerie Green's testimony, the State sought to introduce State's exhibit nos. 128 through 153, "excluding 145 and 137," which it withdrew. The State asserted that those photographs were necessary for Dr. Green to render her opinion concerning the victim's cause of death and her injuries. (R. 1766.) Lindsay objected and argued that the photographs were cumulative and would inflame

the jury. The circuit court allowed the photographs to be admitted into evidence. (R. 1766.)

> "'Alabama courts have held on many occasions that photographs of the crime scene and the victims are admissible, even though they might be gruesome and cumulative, if they shed light on an issue being tried. E.g., Baird v. State, 849 So. 2d 223, 246 (Ala. Crim. App. 2002).' McGahee v. State, 885 So. 2d 191, 214 (Ala. Crim. App. 2003)."

Blackmon v. State, 7 So. 3d 397, 449 (Ala. Crim. App. 2005).

> "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 (1968).

The circuit court did not abuse its considerable discretion in allowing the photographs to be received into evidence. Lindsay is due no relief on this claim.

IX.

Lindsay next argues that it was error to allow Dr. Bare to testify concerning his opinion of Lindsay's mental state at the time of the murder, his opinion of Lindsay's competency to stand trial, and his opinion of Lindsay's religious beliefs.

A.

First, Lindsay argues that the circuit court erred in allowing Dr. Bare to testify regarding his opinion of

Lindsay's mental state at the time of the murder. Lindsay argues that Dr. Bare could not testify about his mental state because, he says, that evidence embraced the ultimate matter at issue and was inadmissible under Rule 704, Ala. R. Evid. Rule 704, Ala. R. Evid., provides: "Testimony in the form of an opinion or inference otherwise admissible is to be excluded it if embraces an ultimate issue to be decided by the trier of fact."

The record shows that during Dr. Bare's cross-examination by the prosecutor, the following occurred:

> "[Prosecutor]: Dr. Bare, you talked with Mr. Lindsay for six and a half hours. You made your diagnosis relying on I guess the input from staff but of tests of any kind, but your opinion based on what information you did have, did you reach a conclusion as to whether or not at the time of this offense Mr. Lindsay was in fact suffering from such a severe mental disease or defect that he could not appreciate the nature and quality or wrongfulness of his acts?
>
> > "[Defense counsel]: Your Honor, I'm going to object. That's calling for a legal conclusion.
> >
> > "[Prosecutor]: No.
> >
> > "The Court: Overrule.
>
> "[Prosecutor]: That's what we asked you to do. Did you reach an opinion regarding that?
>
> "[Dr. Bare]: Yes.

"[Prosecutor]: What was your opinion about that?

"[Dr. Bare]: My opinion was that if given the circumstances around the time of the alleged offense, that if he were experiencing psychotic symptoms as a result of mental illness, I could not disentangle or pull apart whatever those psychotic symptoms were from his substance use at the time of the alleged offense.

"[Prosecutor]: So you're unable as you sit here today to tell this jury that in your opinion that at the time of this offense that Mr. Lindsay was legally insane?

"[Defense counsel]: Again, calls for a legal conclusion.

"[Prosecutor]: Was suffering from such a severe mental disease or defect that he could not appreciate the nature and quality or wrongfulness of his actions? You can't tell this jury that in your opinion, can you?

"[Dr. Bare]: That because of that?

"[Prosecutor]: Right.

"[Dr. Bare]: No, I can't."

(R. 1941-43.)

The State argues that Lindsay initiated the questioning on direct examination when he asked Dr. Bare if Lindsay's hallucinations could have been caused by drugs. The State also argues that pursuant to Rule 11.2(b)(2), Ala. R. Crim. P., the results of Lindsay's mental examination were admissible into evidence at his trial.

Rule 11.2(b)(2), Ala. R. Crim. P., provides:

> "The results of mental examinations made pursuant to subsection (a)(2) of this rule and the results of similar examinations regarding the defendant's mental condition at the time of the offense conducted pursuant to Rule 11.4 shall be admissible in evidence on the issue of the defendant's mental condition at the time of the offense only if the defendant has not subsequently withdrawn his or her plea of not guilty by reason of mental disease or defect. Whether the examination is conducted with or without the defendant's consent, no statement made by the defendant during the course of the examination, no testimony by an examining psychiatrist or psychologist based upon such a statement, and no other evidence directly derived from the defendant's statement shall be admitted against the defendant in any criminal proceeding, except on an issue respecting mental condition on which the defendant has testified."

Here, Lindsay pleaded not guilty by reason of mental disease or defect and that plea was not withdrawn at any time in the proceedings. In fact, Lindsay called Dr. Bare to testify as to his mental condition. Dr. Bare testified that he had evaluated Lindsay's competency to stand trial and his mental state at the time of the murder. He testified that it was his opinion that Lindsay suffered from paranoid schizophrenia and a personality disorder. On cross-examination, the State questioned Dr. Bare about his opinion of Lindsay's mental state at the time of the murder. As the

State correctly argues, Dr. Bare's opinion was admissible pursuant to Rule 11.2(b)(2), Ala. R. Crim. P.

Moreover, in Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013), this Court addressed this issue and stated:

> "Rule 704, Ala. R. Evid., provides: 'Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact.' '"An ultimate issue has been defined as the last question that must be determined by the jury."' Fitch v. State, 851 So. 2d 103, 116 (Ala. Crim. App. 2001) (quoting Tims v. State, 711 So. 2d 1118, 1125 (Ala. Crim. App. 1997)). In Fitch, this Court recognized that when the testimony at issue is given by an expert, Rule 704 must be read in conjunction with Rule 702(a), Ala. R. Evid., which provides: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.' See Fitch, 851 So. 2d at 117.
>
> "In Fitch, this Court also noted:
>
> > "'This Court has said:
> >
> > > "'"Rule 704, Ala. R. Evid., provides that '[t]estimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact.' However, in the case of expert testimony, enforcement of this rule has been lax. C. Gamble, Gamble's Alabama Rules of Evidence § 704 (1995).

> We have noted previously in Travis v. State, 776 So. 2d 819 at 849 (Ala. Cr.App. 1997), that expert testimony as to the ultimate issue should be allowed when it would aid or assist the trier of fact, and the fact that '"'a question propounded to an expert witness will elicit an opinion from him in practical affirmation or disaffirmation of a material issue in a case will not suffice to render the question improper'"' (citations omitted); see also Rule 702, Ala. R. Evid. (stating that expert testimony should be allowed when it will aid or assist the trier of fact).'
>
> "'Henderson v. State, 715 So. 2d 863, 864–65 (Ala. Crim. App. 1997).'

"Fitch, 851 So. 2d at 117.

"Furthermore, this Court recently held that 'an expert may testify as to mental deficiency or illness in Alabama as an exception to the ultimate issue rule.' Smith v. State, 112 So. 3d 1108, 1134 (Ala. Crim. App. 2012) (citing §§ 127.02(1) and 128.04, C. Gamble, McElroy's Alabama Evidence (6th ed.2009)). Specifically, this Court stated:

> "'There is no violation of the prohibition against testimony concerning the ultimate issue where a physician testifies concerning his opinion as to a diagnosis, including a mental diagnosis. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

> training, or education may testify thereto in the form of an opinion or otherwise." Rule 702(a), Ala. R. Evid. See J. Colquitt, Alabama Law of Evidence 1990) (noting that lay and expert opinion evidence is allowed on certain issues, including mental condition, regardless of whether such opinion evidence goes to an ultimate issue in a case).'

"Smith, 112 So. 3d at 1134.

> "In the present case, the ultimate issue to be decided by the jury was whether Lockhart intended to cause Burk's death, as required by the definition of murder found in § 13A-6-2(a)(1), Ala. Code 1975. Dr. King never testified that Lockhart intended to cause Burk's death. Instead, Dr. King testified that, in his professional opinion, based on Lockhart's actions, Lockhart was not suffering from a mental disease or defect and could understand the nature and quality and the wrongfulness of his acts on March 4, 2008. Dr. King explained that, in his expert opinion, on March 4, 2008, Lockhart was not suffering from a mental disease or defect because he engaged in a series of premeditated, organized, and goal-oriented actions. Certainly, that expert testimony would aid or assist the jury in determining a fact at issue, i.e., whether Lockhart was suffering from a mental disease or defect that would render him unable to appreciate the nature and quality or the wrongfulness of his acts at the time he caused Burk's death."

163 So. 3d at 1101-02.

Dr. Bare's testimony concerning his opinion of Lindsay's mental state at the time of the murder did not violate the ultimate-issue rule and was admissible for the reasons set out in Lockhart. Lindsay is due no relief on this claim.

B.

Second, Lindsay argues that it was error for the circuit court to allow Dr. Bare to testify that it was his opinion that Lindsay was competent to stand trial. Specifically, Lindsay challenges the following testimony admitted during Dr. Bare's cross-examination by the prosecutor:

> "[Prosecutor]: And after you had evaluated him, you had talked with family, you had done everything you could do to make a reasoned opinion as to whether or not he was competent, you reached a conclusion on that, did you not?
>
> "[Dr. Bare]: Yes, sir.
>
> "[Prosecutor]: And what was it?
>
> "[Dr. Bare]: Well, ultimately that's the decision for the Court. But I felt like he was able to proceed, ready to go."

(R. 1899.)

Lindsay did not object to Dr. Bare's testimony concerning his competency to stand trial; therefore, we review this claim only for plain error. See Rule 45A, Ala. R. App. P.

As Lindsay argues, and the State concedes, evidence of Dr. Bare's opinion concerning Lindsay's competency to stand trial should not have been admitted. Specifically, Rule 11.2(b)(1), Ala. R. Crim. P., states:

> "The results of examinations conducted pursuant to subsection (a)(1) [competency to stand trial] of this rule ... shall not be admissible as evidence in a trial for the offense charged and shall not prejudice the defendant in entering a plea of not guilty by reason of mental disease or defect."

(Emphasis added.)

However, the State argues that, pursuant to this Court's holding in Lockhart v. State, supra, admission of evidence of a defendant's competency to stand trial may be evaluated under the harmless-error analysis adopted in Rule 45, Ala. R. App. P., and Chapman v. California, 386 U.S. 18 (1967). The Lockhart Court stated:

> "'The apparent purpose behind the prohibition in Rule 11.2, and the suggested prohibition in the Committee Comments to that rule, is to prevent a jury from confusing a defendant's competence to stand trial with his sanity at the time of the offense and from using a defendant's competence to negate his insanity defense. Competency to stand trial deals with a defendant's "present ability" to assist in his or her defense, Rule 11.1, Ala. R.Crim. P., while sanity deals with a defendant's mental state "at the time of the commission of the acts constituting the offense," § 13A-3-1(a), Ala. Code 1975. Rule 11.2(b)(1), in expressly prohibiting the admission of the results of competency examinations during the trial of the offense charged, specifically provides that those results "shall not prejudice the defendant in entering a plea of not guilty by reason of mental disease or defect."

> (Emphasis added.) The Committee Comments, stating that any finding of competency is inadmissible during the trial of the offense charged, provide that the purpose of the rule is to ensure the factual distinction between competency to stand trial and sanity at the time of the offense so as "to avoid any prejudice to the defendant." (Emphasis added.)'
>
> "[Lewis v. State,] 889 So. 2d [623] at 666 [(Ala. Crim. App. 2003)].
>
> "In the present case, to the extent that the admission of Dr. King's testimony concerning Lockhart's competency to stand trial was error, it was harmless. There is no reason to believe that the jury was confused as to the distinction between Lockhart's competence to stand trial and his sanity at the time of the offense or that the jury used Lockhart's competence to stand trial to negate his insanity defense. In the trial court's instructions to the jury, the court was very clear that the jury needed to determine whether 'at the time of the commission of the acts constituting the crime' Lockhart was suffering from a mental disease or defect that rendered him unable to appreciate the nature and quality or the wrongfulness of his acts. (R. 4354, 4357.)"

Lockhart, 163 So. 3d at 1109-10.

Here, there is no reason to believe that the jury could not distinguish between Lindsay's competency to stand trial and his mental condition at the time of the murder. The circuit court instructed the jury that it must determine whether Lindsay was suffering from a mental disease or defect at the time of the offense. The jury was not instructed that

it had to determine Lindsay's competency to stand trial. We are confident that if any error occurred it was harmless. See Lockhart. Lindsay is due no relief on this claim.

C.

Third, Lindsay argues that the circuit court erred in allowing Dr. Bare to testify concerning Lindsay's religious beliefs because, he says, Dr. Bare was not an expert on the Yahweh religion.

Lindsay did not make this objection at trial; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record shows that during cross-examination, the prosecutor questioned Dr. Bare concerning whether, in order to properly evaluate Lindsay, Dr. Bare had to learn what Lindsay thought about his religious beliefs. Dr. Bare testified that he did limited independent studies into Yahweh, that "the people who believe in Yahweh believe that there are -- that in some way Christianity and Judaism sort of diverted from what the true teachings should have been," that Lindsay told him that Yahweh is not the same as the Christian God, that other people share faith in Yahwehism, and that there are churches

and houses of Yahweh "all around the country." (R. 1908-09.)

The following then occurred:

> "[Prosecutor]: Well, if the evidence has been that he held his hand over her mouth so she couldn't scream so nobody could hear it and then chopped away at her neck until he almost completely severed her head? And then he cleaned up all the blood so clean you couldn't even get a swab for DNA analysis, completely cleaned it up, then put her body in a bag, a plastic bag, another plastic bag, and then a duffel bag and took her out and threw her in the woods, and then he took two swords and maybe a hatchet and threw it away somewhere else, then lied about it for a week --
>
> > "[Defense counsel]: Is there a question here?
> >
> > "The Court: Yes.
> >
> > "[Prosecutor]: Eventually.
> >
> > "[Defense counsel]: Or is that closing argument?
>
> "[Prosecutor]: And then lied about if for a week? Is that consistent with this statement that he claimed he did it all to glorify Yahweh so Yahweh would come?
>
> "[Dr. Bare]: It could be."

(R. 1919-20.)

Dr. Bare's testimony was properly admitted to explain his professional opinion concerning Lindsay's defense and was consistent with Lindsay's defense. If any error occurred, that error was harmless beyond a reasonable doubt. See

Chapman v. California, supra. Lindsay is due no relief on this claim.

X.

Lindsay next argues that the prosecutor's argument in closing in the guilt phase that a verdict of not guilty by reason of mental disease or defect would mean that Lindsay would be "turned loose" was erroneous and warrants a new trial. Lindsay cites a number of cases in support of his contention. See Ex parte Smith, 581 So. 2d 531 (Ala. 1991); Berard v. State, 486 So. 2d 476 (Ala. 1985); Allred v. State, 291 Ala. 34, 277 So. 2d 339 (Ala. 1973); Dunn v. State, 166 So. 2d 878 (Ala. 1964); Wise v. State, 38 So. 2d 553 (Ala. 1948).

Lindsay asserts that the prosecutor commented in both his initial and his final closing argument that if he were to be found not guilty by reason of mental disease or defect Lindsay would be "turned loose." The prosecutor did not make this argument in its initial closing argument. However, in its final closing, the prosecutor argued:

> "So they're not asking you to go by the evidence. They're trying to imply that we're asking you to speculate. They're asking you to speculate. They're asking you to think just because this man believed in Yahweh, just because he did some strange

> things, wrote a lot of strange things and said a lot of strange things -- without a doctor to say this is the case, they want you to speculate and say, well, he must be crazy. They're asking you to speculate, not us. We gave you the evidence. We gave you what you need to find this man guilty of what he is charged with and what he is guilty of. Killing that baby.
>
> "But if y'all aren't satisfied, if you think they presented -- if you somewhere in all this evidence find something clear and convincing on this part, on this side, to say he's not guilty? That he is excused? We're going to give him a pass? Because he had got some mental health issues and because he believes in Yahweh? If y'all want to do that, y'all have got the right to do it. You got the power to do it. Turn him loose. If you find him not guilty by reason of mental disease or defect. We'll honor your verdict and we'll respect it.
>
> "But if you find as we think you should based on the evidence, he knew what he was doing, he knew it every time he did it, what he was doing; he knew he was going to kill her, and he knew he was going to leave a lot of blood, and he knew he was going to clean all that blood up, and he knew he was going to throw her in that bag and wrap her up real good and take her away, and then lie about it until he couldn't lie anymore, if you think he didn't know that was wrong, turn him loose or find him not guilty by reason of mental disease or defect. Say it's excused; it's okay; we'll let him go; we'll give him a pass."

(R. 2081-83 (emphasis added).)

In several of the cases cited by Lindsay, the court found reversible error because the prosecutor argued in closing that if the defendant "got loose" after a verdict of not guilty by

reason of mental disease or defect he was going to kill again. See Ex parte Smith, 581 So. 2d at 534 (prosecutor argued "if this defendant ever gets loose again, he's going to do it again."); (State v. Berard, 486 So. 2d at 478) (prosecutor questioned mental-health expert about whether the defendant would have another psychotic episode and shoot someone else); (Allred v. State, 291 Ala. at 35, 277 So. 2d at 340) (prosecutor made recurrent arguments in closing: "There's no way on earth, within good conscience, that you can find that this woman is not guilty by reason of insanity on that day. And let her back out to walk the streets of this county and any other county that she wants to go into and kill whoever else she wants to.").

In Dunn v. State, supra, the Supreme Court reversed Dunn's conviction based on several errors, and stated: "Here, the solicitor not only expressed his opinion as to what he thought would happen [if the defendant was found not guilty by reason of insanity] but also stated that he thought the members of the jury, "as men of good common sense know" that appellant would remain in the State mental institution not more than ten days." 277 Ala. at 43, 166 So. 2d at 882. In Wise v. State, supra, the prosecutor stated in closing "'If he

is insane, don't convict him, but if they put him in Bryce's [an institution for the mentally ill], perhaps he may be back here in a few months.'" The defense counsel objected to the argument, and the court did not give an instruction to the jury.

The cases cited by Lindsay are distinguishable from this case. First, the prosecutor did not state that Lindsay would kill again if he were released. Nor did the prosecutor state his personal opinion. Also, there was no objection to the prosecutor's argument.

This case is similar to State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440 (2002). In affirming the prosecutor's argument, the North Carolina Supreme Court stated:

> "[D]efendant attributes error to the State's argument to the jurors that if they found defendant insane, they should 'let him go.' According to defendant, combined with the State's prior argument concerning mental illness being an excuse, this argument implied to the jury that defendant would be able to freely move throughout society if the jury found him not guilty by reasons of insanity. At the time of this statement, however, after defendant's objection, the trial court told the jury, 'I'll instruct you on the consequences at a later time.' Indeed, the trial court did later instruct the jury that 'a defendant found not guilty by reason of insanity shall immediately be committed to a state mental facility.' The trial court further explained to the jury the hearing process defendant would go through and the burden he would have to meet in

> order to be released. Accordingly, any alleged error was properly handled via the trial court's instruction."

356 N.C. at 240, 570 S.E.2d at 474.

Here, immediately after the circuit court instructed the jury on mental disease or defect the court gave the following instruction:

> "I also charge you, ladies and gentlemen of the jury, that at this stage of the trial you're not to concern yourselves and during your deliberations should not consider the punishment this defendant is subject to should he be convicted. At this time your deliberations should concern only the guilt or innocence of the defendant and nothing more."

(R. 2102 (emphasis added).)

Based on the facts in this case we hold that if any error did occur in the prosecutor's argument it was rendered harmless by the circuit court's thorough instructions to not consider any punishment when determining whether Lindsay was guilty of the charged offense. See State v. Prevatte. Accordingly, we find no plain error. Lindsay is due no relief on this claim.

XI.

Lindsay next argues that the circuit court's jury instructions in the guilt-phase of his capital-murder trial

were erroneous. He makes several different arguments in support of this contention.

> "'A trial court has broad discretion when formulating its jury instructions....' Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999) (citing Williams v. State, 710 So. 2d 1276, 1305 (Ala. Crim. App. 1996)). 'When reviewing a trial court's jury instructions, [this Court] must view [the instructions] as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them.' Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).
>
> > "'Although ... [a] defendant is entitled to have the trial court instruct the jury on his theory of defense, it is ... well established that [t]he trial judge may refuse to give a requested jury charge when the charge is either fairly and substantially covered by the trial judge's oral charge or is confusing, misleading, ungrammatical, not predicated on a consideration of the evidence, argumentative, abstract, or a misstatement of the law.'
>
> "Reeves v. State, 807 So. 2d 18, 41 (Ala. Crim. App. 2000) (citations and quotations omitted). See also Riley v. State, 875 So. 2d 352, 358 (Ala. Crim. App. 2003) (holding that 'the trial judge properly refused the charge because the charge was substantially covered by the trial judge's oral charge')."

Miller v. State, 63 So. 3d 676, 701 (Ala. Crim. App. 2010). "When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a

reasonable juror would have interpreted them." Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).

There were no objections to the jury instructions now challenged on appeal. Thus, our review is limited to a plain-error analysis. See Rule 45A, Ala. R. App. P.

> "'In setting out the standard for plain error review of jury instructions, the court in United States v. Chandler, 996 F.2d 1073, 1085, 1097 (11th Cir. 1993), cited Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), for the proposition that "an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner." Williams v. State, 710 So. 2d 1276, 1306 (Ala. Cr. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998).'"

Broadnax v. State, 825 So. 2d 134, 196 (Ala. Crim. App. 2000), quoting Pilley v. State, 789 So. 2d 870, 882–83 (Ala. Crim. App. 1998), reversed on other grounds, 789 So. 2d 888 (Ala. 2000).

A.

First, Lindsay argues that the circuit court erred in failing to instruct the jury on the definition of the terms contained in the second prong of the not-guilty-by-reason-of-mental-disease-or-defect defense. Specifically, he argues

that the circuit court should have defined the terms "unable to appreciate the nature and quality of his/her acts" and "unable to appreciate the wrongfulness of his/her acts."

Section 13A-3-1, Ala. Code 1975, states:

> "(a) It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts.'

(Emphasis added.)

The State argues that Lindsay did not request that the court give an addition instruction on these definitions. The record shows that immediately after voir dire the circuit court discussed jury instructions with both attorneys. Defense counsel's requested instructions on mental disease or defect did not include a definition of the phrase "nature and quality or wrongfulness of his acts." (C. 277.) The defendant requested only that the instructions include the following:

> "The Defendant must prove by clear and convincing evidence that he was affected by disease of the brain when the offense was committed as to render him so insane that he did not know right from wrong with respect to the particular offense charged, or by reason of such mental disease he could not resist doing the wrong, and the crime must have been the product solely of such diseased mind."

(C. 277.) At the charge conference, defense counsel also stated:

> "At the beginning of this trial we presented the Court and I believe the state with a requested jury charge regarding what's listed in the commentaries of the mental disease or defect defense, Your Honor, and also in Ditch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010).
>
> "It's changed a little bit. But where you have it where we could put it in your charges that under a plea of not guilty by reason of severe mental disease or defect, the burden is on the defendant to clearly prove by clear and convincing evidence to the jury that he was so affected by disease of the brain when the offense was committed as to render him so insane that he did not know right from wrong with respect to the particular offense charge or by reason of such severe mental disease or defect he could not resist doing the wrong and the crime must have been the product solely of the diseased mind."

(R. 1987-88.)

When declining to give Lindsay's requested instructions, the circuit court stated:

> "I also want to state that by refusing the defense's charge, I feel that it is duplicative in many areas. The Court does completely cover in more than one occasion the severe mental disease or defect as required in the pattern jury instruction in the introduction of the pattern jury charges and also in section three of the pattern jury charges where it talks about the affirmative defense with the elements as well. So I think I have sufficiently covered that. It's not that I'm denying the charge in its entirety. It does encompass some of that that I am already giving."

(R. 2011.)

We agree with the State that Lindsay did not request that the circuit court instruct the jury on the definitions cited above. Therefore, our review is limited to determining whether there was plain error. See Rule 45A, Ala. R. App. P.

Here, the circuit court gave the following jury instructions on not guilty by reason of mental disease or defect:

> "As to the defendant's plea of not guilty by reason of severe mental disease or defect, it is an affirmative defense to a prosecution for any crime that at the time of the commission of the acts constituting the crime, that the defendant, one, was suffering from a severe mental disease or defect, and, two, that a result of such severe mental disease or defect he either, (a), was unable to appreciate the nature and quality of his acts or, (b), was unable to appreciate the wrongfulness of his acts.
>
> "However, every person over fourteen years of age is presumed by law to be responsible for his acts. In other words, he is presumed to have sufficient mental capacity to appreciate the fact that certain types of conduct are criminal or that they are acts which are against the law.
>
> "He is also presumed to possess sufficient mental capacity to appreciate the nature and quality of his acts.
>
> "The presumption that a person has sufficient mental capacity to appreciate the criminal nature of certain conduct and to appreciate the nature and quality of his acts is a fact in the case which must

be considered by the jury along with all the evidence. This presumption is rebuttable by evidence to the contrary.

"By entering this plea, the defendant does not waive or give up his general plea of not guilty. Likewise, he does not give up the presumption that he is innocent until proven guilty. The burden is still on the state to prove each and every essential element of the crime charged beyond a reasonable doubt.

"By entering his plea of not guilty by reason of severe mental disease or defect, the defendant does assume the burden of proving by clear and convincing evidence to the reasonable satisfaction of the jury, (1) that at the time of the commission of the alleged acts constituting all or an essential element of the crime with which he is charged he was suffering from a severe mental disease or defect. And (2) was unable to appreciate the wrongfulness of his acts. Whether or not the defendant was suffering from such severe mental disease or defect is for you the jury to determine from all the evidence to your reasonable satisfaction.

"Now, ladies and gentlemen of the jury, clear and convincing evidence means evidence that when weighed against opposing evidence produces in your mind a firm conviction about every element of the claim and a high probability that your conclusion is correct.

"Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt."

(R. 2098-2101.)

The circuit court's instructions were very similar to the Alabama Pattern Jury Instructions. The Alabama Pattern Jury Instructions: Criminal also provide that "if appropriate" a court may give the following instructions:

> "Appreciating the nature of his/her acts refers to the defendant's ability to know what he/she was doing -- the physical aspects of his/her act.
>
> "Appreciating the quality of his/her acts refers to whether the defendant was aware of the consequences of his/her acts or understood the significance of his/her actions.
>
> "Being unable to appreciate the wrongfulness of his/her acts refers to the defendant's ability to understand that his/her act was morally or legally wrong."

The pattern instructions note that the above definitions are not necessary in every case. "The appellate courts of this state endorse the use of the Alabama Pattern Jury Instructions in criminal cases." Ex parte McGriff, 908 So. 2d 1024, 1033 (Ala. 2004).

In Ivery v. State, 686 So. 2d 495 (Ala. Crim. App. 1996), this Court considered whether it was plain error for the trial court to fail to define the term "wrongfulness" as that term is used in the insanity statute.

> "During his closing, ... defense counsel did not distinguish between moral and legal wrongfulness. Instead, defense counsel argued that because of an

> alleged directive from God, Ivery was unable to appreciate the wrongfulness of his acts. ...
>
> "Under these circumstances, it was not plain error for the trial court not to consider 'wrongfulness' as a distinct issue in Ivery's defense. Under the defense's theory, it was not even an issue. Thus, we find no plain error in the trial court's failure to define 'wrongfulness' for the jury. We believe that the meaning of 'wrongfulness,' to the extent that word was used in this case, could be 'understood by the average juror in [its] common usage.' Thornton [v. State], 570 So. 2d [762] at 772 [(Ala. Crim. App. 1990)]."

686 So. 2d at 502.

In this case, Lindsay's counsel in closing made the following argument:

> "[Lindsay] believed Yahweh told him to do this. That is what he believed and that he had no choice but to do this because that is what Yahweh demanded of him. You heard that in his statement.
>
> "Teri Farris sat up here and said that [Lindsay] told her he did not want to do this, but Yahweh commanded it, commanded that he do this act.
>
> "....
>
> "[Lindsay] came to Taylor Hardin with the grandiose ideas, with these hallucinations. You heard Dr. Bare say that people with command hallucinations like Mr. Lindsay was having on the day of this crime and grandiose ideology, or grandiose ideas, that they were more prone to act on those hallucinations. You heard that from Dr. Bare.
>
> "So we would submit to you that there is absolutely no other reason why this should have happened, none, other than this man's mental illness

> affected him so greatly that he could not help what he was doing."

(R. 2053-57.)

Here, defense counsel made an argument similar to the argument made in Ivery and made no distinction between moral or legal wrong or the other terms in the insanity statute. Thus, we are confident that the jury properly applied the "common usage" to the terms in that statute. Accordingly, there was no plain error in the circuit court's failure to define the specific terms highlighted above. See Ivery, supra. Lindsay is due no relief on this claim.

B.

Lindsay next argues that the circuit court erred in failing to instruct the jury on voluntary intoxication and manslaughter.

Lindsay did not object when the circuit court failed to instruct the jury on intoxication and manslaughter. Therefore, we review this claim for plain error.[11] See Rule 45A, Ala. R. App. P.

[11]The circuit court first indicated that it was inclined to give an intoxication instruction. However, no instruction was given, and Lindsay did not object on that basis at the conclusion of the instructions.

"Voluntary intoxication and manslaughter as a lesser included offense of intentional murder are interrelated and often overlapping subjects. 'Voluntary drunkenness neither excuses nor palliates crime.' Ray v. State, 257 Ala. 418, 421, 59 So. 2d 582, 584 (1952). 'However, drunkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime.' Commentary to Ala. Code 1975, § 13A-3-2. Where the defendant is charged with a crime requiring specific intent and there is evidence of intoxication, '"drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent."' Silvey v. State, 485 So. 2d 790, 792 (Ala. Cr. App. 1986) (quoting Chatham v. State, 92 Ala. 47, 48, 9 So. 607 (1891)). Consequently, when the crime charged is intentional murder '"and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter."' McNeill v. State, 496 So. 2d 108, 109 (Ala. Cr. App. 1986) (quoting Gray v. State, 482 So. 2d 1318, 1319 (Ala. Cr. App. 1985)).

"It is clear that '[a] defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position.' Ex parte Oliver, 518 So. 2d 705, 706 (Ala. 1987). This is true regardless of 'however weak, insufficient, or doubtful in credibility' the evidence concerning that offense. Chavers v. State, 361 So. 2d 1106, 1107 (Ala. 1978). When there is evidence that would support a charge on a lesser included offense, the defendant is entitled to the charge 'even where "the defendant denies the charge," Ex parte Pruitt, 457 So. 2d 456, 457 (Ala. 1984), and [where] "the evidence supporting the defendant's position is offered by the State." Silvey v. State, 485 So. 2d 790, 792 (Ala. Cr. App. 1986). Accord, Ex parte Stork, 475

> So. 2d 623, 624 (Ala. 1985).' Starks v. State, 594 So. 2d 187, 195 (Ala. Cr. App. 1991).
>
> "A charge on intoxication should be given if '"there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt"' on the element of intent. Coon v. State, 494 So. 2d 184, 187 (Ala. Cr. App. 1986) (quoting Government of the Virgin Islands v. Carmona, 422 F.2d 95, 99 n. 6 (3d Cir. 1970)). See also People v. Perry, 61 N.Y.2d 849, 473 N.Y.S.2d 966, 966-67, 462 N.E.2d 143, 143-44 (App. 1984) ('[a] charge on intoxication should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis'). An accused is entitled to have the jury consider the issue of his intoxication where the evidence of intoxication is conflicting, Owen v. State, 611 So. 2d 1126, 1128 (Ala. Cr. App. 1992); Crosslin v. State, 446 So. 2d 675, 682 (Ala. Cr. App. 1983), where the defendant denies the commission of the crime, Coon v. State, 494 So. 2d at 187; see Moran v. State, 34 Ala. App. 238, 240, 39 So. 2d 419, 421, cert. denied, 252 Ala. 60, 39 So. 2d 421 (1949), and where the evidence of intoxication is offered by the State, see Owen v. State, 611 So.2d at 1127-28."

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

Here, the exact time of death was speculative because Maliyah had been absent for six days when her body was discovered. There were only vague assertions that Lindsay was under the influence of drugs "around" the time that Maliyah was murdered. In his confession, Lindsay did not state a specific time that he killed Maliyah. "[E]vidence that the

defendant ingested alcohol or drugs, standing alone, does not warrant a charge on intoxication." Pilley v. State, 930 So. 2d 550, 562 (Ala. Crim. App. 2005). "'[T]here must be evidence that the ingestion caused a disturbance of the person's mental or physical capacities and that that mental or physical disturbance existed at the time the offense was committed.'" Mashburn v. State, 148 So. 3d 1094, 1126 (Ala. Crim. App. 2013), quoting Lee v. State, 898 So. 2d 790, 838 (Ala. Crim. App. 2001) (emphasis added in Mashburn). There was no plain error in failing to instruct the jury on intoxication. See Fletcher. Lindsay is due no relief on this claim.

C.

Lindsay next argues that the circuit court's jury instructions on not guilty by reason of mental disease or defect as a defense were confusing and erroneous.

Lindsay did not object to the now challenged instructions. Therefore, we review these claims for plain error. See Rule 45A, Ala. R. App. P.

1.

Lindsay first argues that the circuit court erroneously defined the standard of "clear and convincing evidence" when it stated the following in explaining the verdict forms:

> "[I]f after you have considered all the testimony, all the evidence, all reasonable and proper inferences therefrom, the law as given to you by the Court, and if from all of that you are satisfied beyond clear and convincing evidence that the defendant is not guilty of capital murder, as charged by way of the indictment by reason of severe mental disease or defect, then it would be your duty to find the defendant not guilty by reason of severe mental disease or defect and the form of your verdict in that case would be as follows: We, the jury, find defendant, Stephon Lindsay, not guilty by reason of severe mental disease or defect of the offense of capital murder as charged in the indictment."

(R. 2101-12 (emphasis added).) He argues that the instructions implied a higher standard of proof than provided by law.

It is clear after reading the instructions as a whole that the word "beyond" was a slip of the tongue when explaining the verdict forms. "A cardinal principle of appellate review of jury instructions is that 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed to the context of the overall charge.'" Kennedy v. State, 472 So. 2d 1092, 1104 (Ala. Crim.

App. 1984). However, the circuit court correctly instructed the jury as follows:

> "If you find that the defendant has met the burden of proof and from all the evidence you are reasonably satisfied from clear and convincing evidence that at the time the acts which constitute all or an essential element of the offense charged occurred, the defendant was suffering from a severe disease or defect. ...
>
> "However, if from your consideration of all the evidence you find that the state has proved the defendant guilty but that the defendant has not proved his defense by clear and convincing evidence to your reasonable satisfaction.
>
> "....
>
> "By entering his plea of not guilty by reason of severe mental disease or defect, the defendant does assume the burden of proving by clear and convincing evidence to the reasonable satisfaction of the jury, one . ...
>
> "Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt."

(R. 2097-2101.)

The circuit court repeatedly stated the correct burden of proof, and the circuit court's slip of the tongue when explaining the verdict forms did not constitute reversible error. "The jury could not have been confused or misled by this slip of the tongue. '[A] mere verbal inaccuracy in a

charge, which results from a palpable slip of the tongue, and clearly could not have misled or confused the jury is not reversible error.'" Graham v. State, 242 Ga. App. 361, 362, 529 S.E.2d 641, 644 (2000). See also State v. Mahon, 97 Conn. App. 503, 519, 905 A.2d 678, 688 (2006) ("We have held that an inadvertent slip of the tongue in summarizing jury instructions does not mean that a defendant was deprived of his right to a fair trial when the record reveals that the court properly instructed the jury on the elements of the crime."); Morris v. State, 153 Md. App. 480, 521, 837 A.2d 248, 271 (2003) ("[W]e are dealing with an inadvertent slip of the tongue that nobody at the time noticed. It may have been a human frailty, but it was by no means egregious. Nor was it extraordinary. Nor was it flagrant and outrageous."). Lindsay is due no relief on this claim.

2.

Lindsay next argues that the circuit court's instructions on the use of the verdict forms were confusing. Specifically, Lindsay argues that "the jury's final instructions were that it could stop at the first verdict form if it found Mr. Lindsay guilty of capital murder." (Lindsay's brief at pp. 86-87.)

Lindsay did not object to the instructions on the verdict forms. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The circuit court gave the following instructions on the three verdict forms that it gave to the jury:

> "Now as I go through these verdict forms, take no lead from the way that I have read these verdict forms. I have just prepared them this way to insure that I have given you everything you need to do your duty.
>
> "First, after you have considered the charge against the defendant, all the testimony, all the evidence, all the proper and reasonable inferences therefrom, if you are satisfied beyond a reasonable doubt that the defendant is guilty of capital murder as charged by the -- by way of the indictment, then your verdict should be as follows: We, the jury, find defendant, Stephon Lindsay, guilty of the offense of capital murder as charged in the indictment.
>
> "....
>
> "Next, on the other hand, if after you have considered all the testimony, all the evidence, all reasonable and proper inferences therefrom, the law as given to you by the Court, and if from all that you are not satisfied beyond a reasonable doubt that the defendant is guilty of capital murder as charged by way of the indictment, then it would be your duty to find the defendant not guilty, and the form of your verdict in that case would be as follows: We, the jury, find the defendant, Stephon Lindsay, not guilty of the offense of capital murder as charged in the indictment. And this is the verdict form, would also have a line for the foreperson's signature.

> "Third form, on the other hand, if after you have considered all the testimony, all the evidence, all reasonable and proper inferences therefrom, the law as given to you by the Court, and if from all of that you are satisfied beyond clear and convincing evidence that the defendant is not guilty of capital murder, as charged by way of the indictment by reason of severe mental disease or defect, then it would be your duty to find the defendant not guilty by reason of severe mental disease or defect, and the form of your verdict in that case would be as follows: We, the jury, find the defendant, Stephon Lindsay, not guilty by reason of severe mental disease or defect of the offense of capital murder as charged in the indictment."

(R. 2109-12.)

In Ditch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010), this Court addressed a similar issue concerning the verdict forms in that case. In finding no error, the Ditch Court stated:

> "Ditch cites two sentences by the trial court during these instructions that he claims confused the jury. After the trial court charged the jury that it should first consider the charged offenses, it stated, 'If you find guilt on one or both of those offenses, that will be your verdict. That will be it. You stop there.' (R. 1398; emphasis added.) The court, however, gave the following charge immediately after, 'If you find the State has failed to prove beyond a reasonable doubt the elements of both of those charges, then you'll go to the first lesser included of murder, which I've just charged you.' (R. 1398.)
>
> "Ditch has pulled the two emphasized sentences out of context. The trial court sequentially instructed the jury as to its duty in arriving at

> its verdict, including its consideration of Ditch's special plea if the jury were to find him guilty of a charged or a lesser-included offense."

Ditch v. State, 67 So. 3d 936, 979 (Ala. Crim. App. 2010).

Here, the circuit court did not use the stronger language that the prosecutor used in Ditch that the jury should "stop" if it found the defendant guilty. The circuit court merely said if the jury found Lindsay guilty it should fill out the first verdict form it cited. The circuit court then proceeded to give instructions on the remaining two verdict forms. There was no error, much less plain error, in the court's instructions concerning the verdict forms. Lindsay is due no relief on this claim.

Penalty-Phase Issues

XII.

Lindsay argues that his mental condition as a paranoid schizophrenic renders his death sentence unconstitutional. He cites Ford v. Wainwright, 477 U.S. 399 (1986), to support his argument.

This issue is raised for the first time on appeal; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

> "In Ford v. Wainwright, [477 U.S. 399 (1986),] the United States Supreme Court drew on long-established principles of the common law to hold that the Eighth Amendment prohibits execution of the insane. In Ford, Justice Powell stated in a concurrence to the four-justice plurality opinion that prisoners are insane for the purposes of execution if they are 'unaware of the punishment they are about to suffer and why they are to suffer it.' Justice Powell also opined that a state may, consistent with due process, presume a prisoner who was competent to stand trial is sane at the time of execution, and 'may require a substantial threshold showing of insanity merely to trigger the hearing process.' Because there was no majority opinion, Justice Powell's concurrence became the controlling opinion in Ford and 'constitutes "clearly established" law.'"

Green v. State, 374 S.W.3d 434, 442-43 (Tex. Crim. App. 2012).

"[W]e recently held that a diagnosis of paranoid schizophrenia does not necessarily prohibit the imposition of the death penalty where the defendant is competent to be executed." Berry v. State, 703 So. 2d 269, 293 (Miss. 1997). Death sentences have been upheld after a defendant has been diagnosed with schizophrenia. See Ferguson v. State, 1112 So. 3d 1154 (Fla. 2012); Corcoran v. State, 774 N.E.2d 495 (Ind. 2002); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849 (1998).

Here, Lindsay was deemed competent to stand trial. Lindsay's sentence of death is not due to be vacated on this basis.

XIII.

Lindsay next argues that the circuit court erred in the penalty phase by allowing Det. Thomas Hammonds to testify concerning Lindsay's religion and his opinion as to whether the murder was especially heinous, atrocious or cruel when compared to other capital offenses. Specifically, he argues that Det. Hammonds's testimony on Yahweh was outside his area of expertise and his testimony as to whether the murder was heinous was improper and went to the ultimate matter at issue.

"The Rules of Evidence do not apply to sentencing hearing. Rule 1101(b)(3), Ala. R. Evid., provides that the Rules do not apply to '[p]roceedings for extradition or rendition; preliminary hearing in criminal cases; sentencing, or granting or revoking probation.'" Whatley v. State, 146 So. 3d 437, 486 (Ala. Crim. App. 2010).

In regard to sentencing hearings in death-penalty cases, § 13A-5-45(d), Ala. Code 1975, provides:

> "Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility

> under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama."

A.

Lindsay argues that Det. Hammonds should not have been allowed to testify, at the penalty phase, concerning the accuracy of Biblical references Lindsay made in his confession and the significance of beheadings in the Yahweh religion. The following occurred in the sentencing hearing:

> "[Prosecutor]: Have you had occasion to do any independent research about any of the stuff that Stephon Lindsay told you on that interview?
>
> "[Det. Hammonds]: I have.
>
> "[Prosecutor]: What have you done?
>
> "[Det. Hammonds]: I attended a couple of semesters at Briarwood Seminary.
>
> "[Prosecutor]: The Biblical references that he made, are they correct?
>
> "[Det. Hammonds]: They're correct. There's a twist to it. It's not something that he is putting -- It's not his interpretation, but it is an interpretation of -- through the book of in the teachings of Yahweh ben Yahweh.
>
> "[Prosecutor]: You have done some research on the teachings of Yahweh ben Yahweh?

"[Det. Hammonds]: Yes.

"[Prosecutor]: Was there -- in those teachings is there a particular significance to beheading?

> "[Defense counsel]: Object, Your Honor. I don't think -- we are talking about Yahweh and different types of -- I don't know if there are sects of Yahweh. I don't know if these seminars were specifically about Yahweh, the religion of Yahweh, that he had at Briarwood. I don't think he's been designated as an expert to theology.
>
> "The Court: Overruled.

"[Prosecutor]: Have you read anything about the significance of beheadings in the Yahweh religion?

"[Det. Hammonds]: I have read and actually just had watched, two weeks after this investigation. The History Channel had a documentary on it.

"[Prosecutor]: And was there a significance to beheading?

"[Det. Hammonds} A very large significance to beheadings.

"[Prosecutor]: Do you know anything else about that?

"[Det. Hammonds]: It was used as a form of punishment."

(R. 2349-51.) This testimony was elicited on rebuttal after Lindsay had presented witnesses that testified concerning Yahweh.

The testimony elicited was helpful to Lindsay and supported the reasons Lindsay gave for killing Maliyah. This

testimony was also elicited at the sentencing hearing, at which the Rules of Evidence do not apply. This evidence had "probative value" and was "relevant" to the sentencing. See § 13A-5-45(d), Ala. Code 1975.

Moreover, if any error did occur it was harmless beyond a reasonable doubt. See Chapman v. California, supra. Lindsay is due no relief on this claim.

B.

Lindsay next argues that Det. Hammonds should not have been allowed to testify concerning his opinion whether the murder was especially heinous, atrocious, or cruel as compared to other capital murders. Specifically, he argues that this testimony violated the ultimate-issue rule and requires a new penalty-phase hearing. The following occurred during Det. Hammonds's testimony:

> "[Prosecutor]: So it is your opinion as compared to other capital murder cases this case is particularly heinous, atrocious, and cruel?
>
> "[Det. Hammonds]: It was just knowing that that child lay there and took that first chop to the neck which obviously she was still alive, and reaching her hands up to try to block each one, imagine that child looking at her father, wondering why was he doing this to her. And each chop with that child alive, it was very difficult. It was very difficult for me.

> "When we went to the area to locate the body, knowing what he had done to her, describing how he had chopped her neck and knowing what was going to be found in the bag, one of the techs opened it up and asked me did I want to come and look to observe to be sure the body was there. I just told them, I said, 'I can't look at it; you just tell me there is a body in there because I can't do this.'
>
> "[Prosecutor]: Is this the worst one you have ever had?
>
> "[Det. Hammonds]: This is the worst one I have ever had."

(R. 2164-65.)

Lindsay did not object to Det. Hammonds's testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

This Court has held that the ultimate-issue rule does not apply to sentencing hearings. See Wilson v. State, 777 So. 2d 856 (Ala. Crim. App. 1999). In Wilson, officers testified that in their opinion the murder was especially heinous, atrocious, or cruel. In finding no error, this Court stated:

> "[W]e do not agree with the appellant's argument that the testimony of the law enforcement officers constituted improper testimony about the ultimate issue before the jury. As we stated in Smith v. State, 756 So. 2d 892 (Ala. Cr. App. 1997), aff'd, 756 So. 2d 957 (Ala. 1999):
>
> > "'In determining whether a capital offense is especially heinous, atrocious, or cruel, the factfinder can compare the murder at

> issue with other capital crimes. The testimony of an experienced police officer who had investigated many capital crimes could be invaluable in making such a determination.'

"Furthermore,

> "'[a]ny evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.'

"§ 13A-5-45(d), Ala. Code 1975. Therefore, the ultimate issue rule did not apply during the sentencing proceedings, and the testimony was not improper on that basis. See Rule 1101(b)(3), Ala. R. Evid. Furthermore, although the officers incorrectly concluded that the execution-style nature of the killings established that they were heinous, atrocious, or cruel, their testimony was still relevant and probative. During direct examination, the prosecutor defined the terms 'heinous,' 'atrocious,' and 'cruel' separately. He then asked the officers whether, in their opinion based on their law enforcement experience and their observations, these killings were heinous, atrocious, or cruel. Later, he asked additional questions about the execution-style nature of the killings. Therefore, the execution-style nature of the killings, combined with the testimony of the survivors about the torture the decedents suffered before their deaths, was relevant in determining whether the especially heinous, atrocious, or cruel aggravating circumstance applied. Therefore, the testimony of the officers was not improper.

"Finally, error, if any, in the admission of the testimony of the officers was harmless. See Rule 45, Ala. R. App. P. In its oral charge, the trial court

instructed the jury on the correct standard to apply in determining whether the aggravating circumstance existed, stating as follows:

> "'The second aggravating circumstance, as I understand it, that the State alleges in this case is that this capital offense was especially heinous, atrocious or cruel. We can understand that murder is in and of itself sometimes heinous and sometimes atrocious and sometimes cruel. It's sometimes all of those things. But in order to be an aggravating circumstance for the purpose of invoking the death penalty our law says that it must be especially so when compared to other capital offenses. The term "heinous" has been defined to mean extremely wicked or shockingly evil. The term "atrocious" has been defined to mean outrageously wicked and violent. The term "cruel" has been defined to mean designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. It has at times been defined as unnecessary torture.'

"(R. 1838-39.) The trial court also instructed the jury that it would ultimately decide whether the aggravating circumstance existed. As set forth throughout this opinion, there was overwhelming evidence from which the jury could conclude that the offense was especially heinous, atrocious, or cruel compared to other capital offenses. Finally, in its sentencing order, the trial court made the following findings about the applicability of this aggravating circumstance:

> "'The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. As noted above, some 19 rounds were fired. Prior to the discharge of the weapons, the victims were subjected to threats and intimidation.

> Some were struck. At least two were struck with a bottle and one was stomped by the defendant. The victims were restrained at gunpoint and required to remove portions of their clothing. They were taunted and abused for a lengthy period of time. By any standard acceptable to civilized society, this crime was extremely wicked and shockingly evil. The defendant was unnecessarily torturous in his commission of the crimes. While the Court recognizes that all capital offenses are heinous, atrocious and cruel to some extent, the degree of heinousness, atrociousness and cruelty which characterizes this offense exceeds that which is common to all capital offenses.'
>
> "(C.R. 263-64.) There is no indication that the jury or the trial court applied an incorrect standard in finding that this aggravating circumstance existed. The evidence more than adequately supports a finding that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Therefore, viewed in the context of the entire trial, error, if any, in the admission of the testimony of the officers was harmless. See Rule 45, Ala. R. App. P."

777 So. 2d at 881-82.

For the reasons stated in Wilson v. State, any error in the admission of Det. Hammonds's opinion was harmless beyond a reasonable doubt. The circuit court gave thorough instructions on the application of the aggravating circumstance of especially heinous, atrocious, or cruel. The jury completed verdict forms indicating that it unanimously

found that the murder was especially heinous, atrocious, or cruel as compared to other capital murders. Indeed, this murder meets the definition of especially heinous, atrocious, or cruel as defined in Ex parte Clark, 728 So. 2d 1126 (Ala. 1998), and Ex parte Kyzer, 399 So. 2d 317 (Ala. 1979). Lindsay is due no relief on this claim.

XIV.

Lindsay next argues that the circuit court erred in allowing the unredacted videotape of his entire confession to be admitted into evidence at the penalty phase because, he says, Lindsay referenced "irrelevant, non-probative, and extremely prejudicial prior bad acts evidence." (Lindsay's brief, at pp. 45-46.)[12]

We have reviewed the unredacted videotape that was admitted in the penalty phase. (State's exhibit 160.) In the videotape Lindsay stated that before he found Yahweh he was not a good person -- that he had molested people, that he had shot at people, that he had lied, and that he had stolen. Lindsay stated that he found Yahweh when he was in prison

[12]The record shows that Lindsay's confession was redacted before it was admitted into evidence in the guilt phase. References to Lindsay's prior convictions, his prison time, and the Yahweh religion were redacted.

around 1997.[13] A good portion of the tape consists of Lindsay discussing his relationship with Yahweh and his strong faith in that religion.

As previously stated in this opinion, § 13A-5-45(d), Ala. Code 1975, allows for the broad admission of evidence at the penalty phase of a capital-murder trial. Indeed, any evidence that has probative value towards sentencing, regardless of its admissibility under the Alabama Rules of Evidence, is admissible. The circuit court correctly allowed Lindsay's unredacted videotaped confession to be admitted at the penalty phase of Lindsay's capital-murder trial. Lindsay is due no relief on this claim.

XV.

Lindsay next argues, in three paragraphs in his brief, that he was denied his right to meaningful expert assistance under Ake v. Oklahoma, 470 U.S. 68 (1985).

> "The United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 83 (1985), held that, when an indigent defendant makes a preliminary showing that his mental condition at the time of the offense is likely to be a significant factor at trial, due

[13]At the sentencing hearing the State presented evidence that Lindsay had been convicted of six counts of robbery in the first degree.

> process requires that, at a minimum, a state provide access to a competent psychiatrist who will evaluate the defendant 'and assist in evaluation, preparation, and presentation of the defense' at the guilty phase and at sentencing."

Morris v. State, 956 So. 2d 431, 444 (Ala. Crim. App. 2005).

Lindsay did not request that he be appointed an "independent expert" to examine him after he had been examined at Taylor Hardin. In fact, Lindsay's motion requested:

> "That an order issue allowing the Defendant to undergo examination on an inpatient basis by a psychologist or psychiatrist under contract with or employed by the Alabama Department of Mental Health and Mental Retardation to conduct a clinical evaluation as to whether [Lindsay] has sufficient present ability to assist in his defense, by consulting with counsel, with a reasonable degree of rational understanding of the facts and the legal proceedings against [Lindsay]."

(1 Supp. R. 50.) This motion was granted by the court as was the motion for a second mental evaluation. Lindsay did not request an independent expert to assist in his defense.

In McWilliams v. Dunn, 582 U.S. ___, 137 S.Ct. 1790 (2017), the United States Supreme Court revisited its holding in Ake v. Oklahoma, and noted that three preliminary conditions were present to trigger Ake. The Supreme Court stated:

> "First, no one denies that the conditions that trigger application of Ake [v. Oklahoma, 470 U.S. 68

(1985),] are present. McWilliams is and was an 'indigent defendant,' 470 U.S., at 70. See supra, at 1794. His 'mental condition' was 'relevant to ... the punishment he might suffer,' 470 U.S., at 80. See supra, at 1794–1795. And, that 'mental condition,' i.e., his 'sanity at the time of the offense,' was 'seriously in question,' 470 U.S., at 70, 105 S.Ct. 1087. See supra, at 1794–1795. Consequently, the Constitution, as interpreted in Ake, required the State to provide McWilliams with 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.' 470 U.S., at 83.

"Second, we reject Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of Dr. Rosenszweig, the psychologist at the University of Alabama who 'volunteer[ed]' to help defense counsel 'in her spare time' and suggested the defense ask for further testing, P.C.T. 251–252. Even if the episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that Dr. Rosenszweig was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. Alabama does not refer to any specific record facts that indicate that she was available to the defense at this time.

"Third, Alabama argues that Ake's requirements are irrelevant because McWilliams 'never asked for more expert assistance' than he got, 'even though the trial court gave him the opportunity to do so.' Brief for Respondent 50–51. The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed 'to have someone else review' the Goff report and medical records. App. 193a. See, e.g., id., at 196a ('[I]t

> is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered'); id., at 207a ('[W]e really need an opportunity to have the right type of experts in this field, take a look at all of these records and tell us what is happening with him'); id., at 211a ('I told Your Honor that my looking at these records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me'). Counsel also explicitly asked the trial court what else he was supposed to ask for to obtain an expert: 'Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?' Id., at 212a. We have reproduced a lengthier account of the exchanges, supra, at 1796–1797. They make clear that counsel wanted additional expert assistance to review the report and records—that was the point of asking for a continuance. In response, the court told counsel to approach the bench and sentenced McWilliams to death. Thus the record, in our view, indicates that McWilliams did request additional help from mental health experts."

582 U.S. at ___, 137 S.Ct. at 1798-99.

Here, Lindsay used Dr. Bare as his own expert -- he called Dr. Bare to testify concerning Lindsay's mental health. Also, unlike the defendant in McWilliams v. Dunn, who repeatedly asked for an additional expert, Lindsay never requested an independent expert. Based on the United States Supreme Court's decision in McWilliams v. Dunn, we cannot say that Ake was violated in this case. Lindsay is due no relief on this claim.

XVI.

Lindsay argues that the United States Supreme Court's decisions in Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), mandate that his death sentence be set aside because, he says, the judge, and not the jury, must determine the aggravating circumstances that warrant the imposition of a death sentence and ultimately sentence him to death.

The Alabama Supreme Court has held that Alabama's capital sentencing scheme does not violate Ring or Hurst. See Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016); Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002).

Moreover, in this case, the circuit court gave verdict forms to the penalty-phase jury concerning the aggravating circumstances that the State was relying on to warrant a sentence of death. The jury unanimously found, and indicated on the verdict forms, that Lindsay had previously been convicted of another felony involving the use or threat of violence to the person, an aggravating circumstance in § 13A-5-49(2), Ala. Code 1975, and that the murder was especially heinous, atrocious, or cruel as compared to other capital murders, an aggravating circumstance in § 13A-5-49(8), Ala.

Code 1975. The verdict forms also indicate that the jury voted, 12 to 0, to impose a sentence of death. There is no Ring or Hurst violation in this case. Lindsay is due no relief on this claim.

XVII.

Lindsay argues that the circuit court misled the jury as to its importance in sentencing by referring to its verdict in the penalty phase as a recommendation.

> "'[W]e reaffirm the principle that, in Alabama, the 'judge, and not the jury, is the final sentencing authority in criminal proceedings." Ex parte Hays, 518 So. 2d 768, 774 (Ala. 1986); Beck v. State, 396 So. 2d [645] at 659 [(Ala. 1980)]; Jacobs v. State, 361 So. 2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979).' Ex parte Giles, 632 So. 2d 577, 583 (Ala. 1993), cert. denied, [512] U.S. [1213], 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994). 'The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only.' Bush v. State, 431 So. 2d 555, 559 (Ala. Crim. App. 1982), aff'd, 431 So. 2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983). See also Sockwell v. State, [675] So. 2d [4] (Ala. Cr. App. 1993). 'We have previously held that the trial court does not diminish the jury's role or commit error when it states during the jury charge in the penalty phase of a death case that the jury's verdict is a recommendation or an "advisory verdict." White v. State, 587 So. 2d 1218 (Ala. Cr. App. 1990), aff'd, 587 So. 2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992).' Burton v. State, 651 So. 2d 641 (Ala. Cr. App. 1993)."

Taylor v. State, 666 So. 2d 36, 50–51 (Ala. Crim. App. 1994). Lindsay is due no relief on this claim.

Sentencing-Order Issues

XVIII.

Lindsay next argues that the circuit court's order sentencing him to death was erroneous for several reasons. First, he argues that the court failed to find any statutory mitigating circumstances. Second, he argues that the court used the wrong standard when weighing the aggravating and the mitigating circumstances and fixing his sentence at death.

A review of the circuit court's sentencing order reflects that the order fails to comply with the provisions of § 13A-5-47(d), Ala. Code 1975.[14]

> "At the time that Collins was sentenced § 13A–5–47(d), Ala. Code 1975, provided:
>
> > "'Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A–5–49, each mitigating

[14]Effective April 11, 2017, § 13A-5-47, Ala. Code 1975, was amended. The language in subsection (d) is now contained in subsection (b) of § 13A-5-47.

> circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.'
>
> "This statute contains the word shall and is mandatory. '[W]ritten findings of fact are a component necessary to channel the trial court's discretion in determining a sentence, and they are critical to the mandatory appellate review of the death sentence.' Largin v. State, 233 So. 3d 374, 425 (Ala. Crim. App. 2015).
>
> In this case, the circuit court not only did not make specific findings of facts concerning the application of the aggravating and the mitigating circumstances, but it also failed to enter written findings of fact summarizing the offense and Collins's involvement in the murder.

Collins v. State, [Ms. CR-14-0753, October 13, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017).

Here, the circuit court failed to make written findings of fact concerning each of the aggravating circumstances contained in § 13A-5-49, Ala. Code 1975, and each of the mitigating circumstances found in § 13A-5-51, Ala. Code 1975. The court is required to make specific findings of fact concerning each of the circumstances contained in both statutes, whether any of those circumstances are applicable. Also, the circuit court found the existence of two aggravating

circumstances but failed to make specific findings of fact concerning those circumstances.[15] Last, the order does contain the following misstatement: "The Court further finds that the evidence presented in support of the statutory mitigating circumstances was not persuasive in this case, and that the non-statutory mitigating circumstances heretofore enumerated are insufficient to outweigh the aggravating circumstances." (C. 119) (emphasis added).[16] The correct standard is contained in § 13A-5-46, Ala. Code 1975, and provides that the aggravating circumstances must outweigh the mitigating circumstances.

Accordingly, for the reasons stated above, we affirm Lindsay's capital-murder conviction and remand this case to the Etowah Circuit Court for that court to fully comply with

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[15]The order does not state what felony conviction triggered application of the aggravating circumstance contained in § 13A-5-49(2), Ala. Code 1975, although Lindsay's prior convictions are contained in the record. Nor does the order state the facts surrounding the murder that warrant application of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Section 13-5-49(8), Ala. Code 1975.

[16]We are confident that this was a misstatement and that the circuit court was well aware of the law. The circuit court gave a thorough and correct instruction on the weighing process in the penalty phase.

the provisions of § 13A-5-47(d), Ala. Code 1975 (now codified at § 13A-5-47(b), Ala. Code 1975). Due return should be filed in this Court within 60 days from the date of this opinion.

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

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