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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-16-1039

Jamal O'Neal Jackson

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-15-5909)

KELLUM, Judge.

The appellant, Jamal O'Neal Jackson, was convicted of murdering Satori Richardson during the course of an arson. See § 13A-5-40(a)(9), Ala. Code 1975. The jury unanimously found beyond a reasonable doubt the existence of one

aggravating circumstance -- that Jackson had previously been convicted of a felony involving the use or threat of violence, see § 13A-5-49(2), Ala. Code 1975 -- and, by a vote of 10 to 2, recommended that Jackson be sentenced to death for his capital-murder conviction. The trial court followed the jury's recommendation and sentenced Jackson to death.[1] This appeal followed.

The evidence adduced at trial indicated the following. On the morning of July 3, 2014, Jackson and Richardson, who were dating, went to the home of Jackson's cousin, Jans'sica, to visit. Jans'sica said that Jackson drank vodka during the visit. Jackson then spent the afternoon visiting his grandfather, where Jackson continued drinking alcohol. Jackson's grandfather did not know how much alcohol Jackson drank during that time. Later that night, at approximately 11:00 p.m., Jackson and Richardson returned to Jans'sica's

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[1]"Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury." DeBlase v. State, [Ms. CR-14-0482, November 16, 2018] ___ So. 3d ___, ___ (Ala. Crim. App. 2018). Section 13A-5-47.1, Ala. Code 1975, specifically provides: "Sections 13A-5-45, 13A-5-46, and 13A-5-47 shall apply to any defendant who is charged with capital murder after April 11, 2017 ...." Jackson was charged with capital murder in 2015.

house with Richardson's four-year-old daughter, Tiauna, where they stayed until 2:00 or 3:00 a.m. the morning of July 4, 2014. While at Jans'sica's house, Jackson, Richardson, Jans'sica, and Jans'sica's boyfriend drank almost three bottles of vodka. Jackson, Richardson, and Tiauna then went back to Richardson's apartment on Navco Road in Mobile. Testimony indicated that at 3:50 a.m., the emergency 911 center in Mobile received a telephone call from Richardson's cellular telephone. A recording of that call was played for the jury. During the call, a woman can be heard screaming.

Dorneshia Bendolph, Richardson's cousin who lived in the same apartment complex as Richardson, testified that around 4:30 a.m. the morning of July 4, 2014, Tiauna knocked on her front door and said that "[h]er momma was dead in the tub and her dad just killed her momma." (R. 1766.) Bendolph further testified:

> "[Prosecutor]: What did you do when [Tiauna] told you that?
>
> "[Bendolph]: And I asked her again, I said her dad because I know that wasn't -- her dad was in prison, and that's when she told me Jamal. And I grabbed my phone, I went outside and I seen next-door neighbor standing outside, then I noticed the car was gone. So the next-door neighbor told me that she seen Jamal sitting in the car and [Tiauna]

> come from around the car, then he pulled off. So I went in the house. There was one light on above the stove and you could see smoke, but I didn't think it was that heavy, so I was calling [Richardson's] name and I didn't get no response.
>
> "[Prosecutor]: Okay. Let's talk about the stove real quick. What was the condition of the stove?
>
> "[Bendolph]: All the eyes [of the stove] were on, the oven was on and there was a T-shirt in the oven and it had blood splatter across the top of the stove, like where the knobs were.
>
> "[Prosecutor]: Did you do anything to the stove when you saw that the eyes were on?
>
> "[Bendolph]: Yes, I turned all of them off."

(R. 1766-67.) Richardson tried to go upstairs to the second level of Richardson's two-story apartment but was unable to breathe because of the smoke.

Janet Roberts, who also lived in the same apartment complex as Richardson, testified that, in the early morning hours of July 4, 2014, she was awakened by a smoke alarm going off in her apartment. She said that the second level of her apartment was filling with smoke. Roberts looked out her window and saw a man sitting in an automobile in the parking lot; a young girl was walking around the front of the vehicle. Roberts had previously seen both the man and the young girl around the apartment complex, and she knew that the young girl

was Richardson's daughter.[2] Roberts then went outside and found the young girl standing with another resident of the apartment complex, who she believed to be Richardson's cousin. Roberts telephoned emergency 911 to report the fire and then asked the young girl where her mother was. The girl said: "My momma is dead." (R. 1462.)

Law-enforcement officers were the first to arrive at the scene. When Joseph Law, a corporal with the Mobile Police Department, arrived, he saw smoke billowing from the apartment complex and several people standing outside, including Tiauna. According to Cpl. Law, Tiauna said to him: "My Daddy killed my Mommy and set the house on fire." (R. 1489.) At the time of trial, Tiauna was seven years old. She testified at trial, in relevant part:

> "[Prosecutor]: What do you remember that was bad that happened [to your mommy]?
>
> "[Tiauna]: Well, she was screaming and I went in the room and then I saw him telling her to get in the bathtub. He went in the bathroom and he runs some water and then he put her in the tub.
>
> "....

[2]Roberts testified that she did not know Richardson's name at that time.

"[Prosecutor]: When she started screaming, what did you see?

"[Tiauna]: I saw him putting her in the bathtub.

"[Prosecutor]: Do you remember how he was choking her?

"[Tiauna]: Just how regular people choke people. And then when he was about to leave the house, then he had set the house on fire and then he had -- he thr[ew] up on the stairs, he went out, and I went out too when he went out.

"[Prosecutor]: Okay. When you went out, was there anything filling up the air?

"[Tiauna]: No, but when I went outside, I went to [Bendolph's] house.

"[Prosecutor]: You said that he set the house on fire; do you know where he did that?

"[Tiauna]: In the house.

"[Prosecutor]: Do you know if it was upstairs or downstairs?

"[Tiauna]: On the stairs."

(R. 1750-51.) Tiauna identified the man as "Jamal" and said that "Jamal" had a hammer and a knife and that he "[d]id something to my mommy with [the knife], but I don't know because I was in the bathroom downstairs." (R. 1764.)

Firefighters arrived on the scene shortly after law enforcement. They found Richardson in the bathroom on the

second level of the apartment; she was in the bathtub, which was full of water. Firefighters took her outside and paramedic Thomas Manning began performing cardiopulmonary resuscitation on Richardson. Manning said that Richardson had no pulse, had an electrical cord wrapped around her neck, and had numerous lacerations and punctures on her body. Richardson was transported to Spring Hill Medical Center, where she was pronounced dead.

Dr. Staci Turner, a medical examiner with the State of Alabama, testified that Richardson suffered 32 sharp-force injuries to her body that varied in depth and size. Richardson also "had hemorrhages in the soft tissue of her neck and the soft tissue surrounding her voice box, and the soft tissue surrounding her hyoid bone" and "petechia hemorrhages in her eyes." (R. 1825.) It was Dr. Turner's opinion that Richardson died of multiple sharp-force injuries and strangulation.

Kenneth Gillespie, a detective with the homicide unit of the Mobile Police Department, examined Richardson's apartment after the fire was extinguished. He said that there was soot on the stairs; that the upstairs bathtub was filled "with a

dark red liquid believed to be a mixture of blood and water;" and that there was a pile of clothes that appeared to be burned on the floor in the upstairs bedroom. (R. 1773.) In addition, Richardson's driver's license, some cash, and a bent kitchen knife were on the bed. The knife, Det. Gillespie said, was bent "almost completely into like a horseshoe." (R. 1773.)

Rufus Watkins, a captain with the Mobile Fire & Rescue Department who was an arson investigator in July 2014, testified that he investigated the fire at Richardson's apartment. Capt. Watkins testified that the area of the apartment with the most damage was a closet in an upstairs bedroom and that the origin of the fire was clothing that was located on the floor of that closet. Capt. Watkins further testified:

> "[Prosecutor]: And how did you rule out any kind of accidental starting of this fire?
>
> "[Capt. Watkins]: Based on the circumstances surrounding what took place that evening, I ruled that it was highly probable that it was an incendiary fire."

(R. 1693.) It was Capt. Watkins's opinion that the fire was not accidental but was intentionally set.

Henry Guess, a cashier at a gasoline station/convenience store located on Gulf Breeze Drive in Gulf Breeze, Florida, testified that at approximately 5:45 a.m. the morning of July 4, 2014, a man, later identified as Jackson, drove into the parking lot and parked his automobile. Jackson stayed in his vehicle "for a long period of time, longer than normal" before he got out and entered the store. (R. 1503.) Guess said that Jackson was disheveled and had what appeared to be dried blood on his clothes and shoes; he also appeared to be intoxicated. According to Guess, Jackson wandered up and down the aisles in the store but did not look at any of the merchandise; instead, he kept looking at the area where the cash register was located. Guess testified to what happened next:

> "[Jackson] walked into the men's restroom and he stayed in there an inordinate amount of time. When he came out, there was a floor display of some hats and shirts and miscellaneous. He ran into it and knocked it over and then bumped into the counter and continued to just sort of wander around the store and continue to eyeball me. And at that point in time, I got a little concerned that he might be looking to do harm to the store or to rob the store. He then went out to his automobile, sat in it for a few minutes .... That's when I called the police."

(R. 1504.)

Officers with the Gulf Breeze Police Department responded to Guess's telephone call and approached Jackson as he was still sitting in his vehicle in the parking lot of the gasoline station/convenience store. Jackson did not respond to the officers' questions or commands. After a minute or two of not responding, Jackson sped away in the vehicle, hitting a light pole before leaving the parking lot. Police pursued him. During the pursuit, Jackson drove east in the westbound lane of traffic. Eventually, Jackson entered the median and struck a tree. Because Jackson did not comply with the officers' commands to turn off the vehicle and to exit the vehicle, they used a Taser stun gun on him and then removed him from the vehicle and secured him. At that point, they saw "a noticeable amount of blood on [Jackson's] tennis shoes and the lower area of his legs." (R. 1530.) The blood appeared to be dried but police summoned paramedics, and Jackson was taken to the Gulf Breeze Hospital, where he was treated and released into police custody. Medical records from the hospital indicated that Jackson's blood-alcohol level was over twice the legal limit of .08 and that he also had benzodiazepine in his system.

Standard of Review

Because Jackson was sentenced to death, this Court must search the record of the lower-court proceedings for "plain error" in accordance with Rule 45A, Ala. R. App. P., which provides:

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

In discussing the scope of Rule 45A, the Alabama Supreme Court has stated:

> "'"To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations."' Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15 [105 S.Ct. 1038, 84 L.Ed.2d 1] (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
>
> > "'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 [102 S.Ct. 1584, 71 L.Ed.2d 816] (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157],

> at 160 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S., at 163, n.14.'

"See also Ex parte Hodges, 856 So. 2d 936, 947-48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

Ex parte Brown, 11 So. 3d 933, 938 (Ala. 2008).

"'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Although [the appellant's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992)."

Knight v. State, [Ms. CR-16-0182, August 10, 2018] ___ So. 3d ___, ___ (Ala. Crim. App. 2018).

Guilt-Phase Issues

I.

Jackson argues that his absence at multiple phases of his capital-murder trial violated his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and under Alabama law. Specifically, Jackson asserts that he was not present during three "critical stages" of his trial -- the beginning of general voir dire, a discussion of potential juror misconduct, and a substantial portion of the charge conference.[3] Jackson did not object to any of the now challenged instances where he was absent from the courtroom. Therefore, we review these issues under the plain-error standard. See Rule 45A, Ala. R. App. P.

Rule 9.1(a), Ala. R. Crim. P., provides that "[t]he defendant has the right to be present at the arraignment and at every stage of the trial, including the selection of the

[3]Historically, in Alabama a capital defendant could not waive his right to be present. See Ex parte DeBruce, 651 So. 2d 624 (Ala. 1994). However, Rule 9.1(b)(2)(ii), Ala. R. Crim. P., was amended in 1997 to allow a capital defendant to waive his right to be present at all proceedings except his sentencing hearing.

jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing."

> "A defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). This right extends to all hearings that are an essential part of the trial -- i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare Hopt v. Utah, supra (defendant has right to be present at empaneling of jurors); Bartone v. United States, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); with United States v. Howell, 514 F.2d 710 (5th Cir. 1975); cert. denied, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at in camera conference concerning attempted bribe of juror); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1971) [1972] (right to presence does not extend to evidentiary hearing on suppression motion.)"

Proffitt v. Wainwright, 685 F.2d 1227, 1256 (11th Cir. 1982).

> "A person charged with a felony has a fundamental right to be present at every stage of the trial. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). That right includes the right to be present at voir dire examination of jurors and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912). The right of presence derives

> from the Confrontation Clause of the Sixth Amendment to the United States Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)."

Ex parte Clemons, 720 So. 2d 985, 989 (Ala. 1998).

However, Alabama courts have recognized that not every absence of a defendant from a critical stage of the trial constitutes reversible error. In Jackson v. State, 791 So. 2d 979, 1003-05 (Ala. Crim. App. 2000), this Court held that the defendant's absence during the exercise of the State's and the defense's first six peremptory strikes did not constitute reversible error because there was no prejudice to the defendant. In Hodges v. State, 856 So. 2d 875, 926-28 (Ala. Crim. App. 2001), aff'd, 856 So. 2d 936 (Ala. 2003), we held that the defendant's absence from the hearing on his motion for a new trial did not constitute reversible error because there was no testimony taken and only issues of law were involved. In Dobyne v. State, 672 So. 2d 1319, 1329-30 (Ala. Crim. App. 1994), aff'd, 672 So. 2d 1354 (Ala. 1995), this Court held that no reversible error occurred when the defendant was absent during a pretrial hearing where no witnesses testified.

Other states have also applied a harmless-error analysis to a defendant's claim that he or she was denied the right to be present during a critical stage of trial. See People v. Guzman-Rincon, 369 P.3d 752, 758 (Colo. App. 2015) ("We apply constitutional harmless error analysis to claims of denial of a defendant's right to be present at trial."); State v. Irby, 170 Wash. 2d 874, 885, 246 P.3d 796, 802 (2011) ("A violation of the due process right to be present is subject to harmless error analysis."); Hernandez v. State, 761 N.E.2d 845, 853 (Ind. 2002) ("A denial of the right to be present during all critical stages of the proceedings, like the right to counsel at a critical stage, is a constitutional right that is subject to a harmless error analysis."); State v. Bell, 266 Kan. 896, 920, 975 P.2d 239, 254 (1999) ("In determining whether the denial of a defendant's right to be present at all critical stages of the trial is reversible error, this court has applied the same harmless error test as for other constitutional errors.").

With these principles in mind, we review each instance Jackson was absent during trial.

A.

Jackson first asserts that his absence when general voir dire began resulted in prejudice to him because, he says, "the jury [was likely] to draw adverse inferences about his absence at the outset of voir dire." (Jackson's brief, p. 24.). He cites United States v. Alikpo, 944 F.2d 206 (5th Cir. 1991), and United States v. Mackey, 915 F.2d 69 (2d Cir. 1990), to support his argument. The State argues that the record refutes Jackson's assertion that he was not present for the beginning of general voir dire because, it says, the trial court identified Jackson and asked him to stand during the beginning of the voir dire process.

Voir dire began the morning of Monday, March 13, 2017. After the oath was administered, the trial court gave the venire preliminary instructions, asked general qualifying questions, and excused several prospective jurors for hardship. A recess was then taken. After the recess, the proceedings resumed and a notation in the record states: "Defendant not present." (R. 215.) At this time, prospective jurors were given questionnaires to complete and were told to return on Wednesday, March 15, 2017. When the proceedings

resumed on March 15th, a notation in the record again states: "Defendant not present." (R. 227.) After a short discussion between the trial court and the parties regarding minor issues that had arisen with two prospective jurors the previous day, the venire was again administered an oath, and the trial court explained to the venire the process of voir dire, read the indictment to the venire, and briefly explained the purpose of an indictment and the principle of presumption of innocence. The trial court then introduced various court personnel and had the prosecutor identify the employees of the district attorney's office as well as any potential witnesses. At that point, the trial court introduced Jackson to the venire and asked Jackson to stand, thus indicating that Jackson was present at that time. (R. 242.) General voir dire of the entire venire then commenced.

The cases cited by Jackson are distinguishable from the facts here. In Alikpo, supra, the defendant was absent for "most of the jury selection process." 944 F.2d at 207, and in Mackey, supra, one of the defendants was absent for the entire jury-selection process, as well as a "substantial portion of the testimony." 915 F.2d at 74. In both cases, the reviewing

courts found reversible error. The facts in this case are not nearly as egregious as the facts in Alikpo and Mackey.

Rather, the facts in this case are more akin to the facts presented to this Court in Jackson, supra, where the defendant was absent when the State and the defense exercised the first six peremptory strikes. We held that the defendant's absence was not reversible error because there was no prejudice to the defendant. We explained:

> "Rule 9.1(a), Ala. R. Crim. P., provides that a 'defendant has the right to be present at the arraignment and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing.' At the time of Jackson's trial, a capital defendant could not waive his right to be present. See Rule 9.1(b)(2)(I), Ala. R. Crim. P. However, Alabama courts held 'that if a capital defendant is absent from noncritical stages of trial and if his presence would not have benefitted his defense, no error occurs.' Burgess v. State, 723 So. 2d 742, 760 (Ala. Cr. 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), citing Harris v. State, 632 So. 2d 503, 510-12 (Ala. Cr. App. 1992), aff'd, 632 So. 2d 543 (Ala. 1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995).
>
> "'"Because the basis of the right to be present at trial is the constitutional mandate [that one be provided] an opportunity to defend oneself, due process requires that the defendant be personally present 'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent

only.'"' Burgess v. State, 827 So. 2d 134, 186 (Ala. Cr. App. 1998), quoting Finney v. Zant, 709 F.2d 643, 646 (11th Cir. 1983), quoting, in turn, Snyder v. Massachusetts, 291 U.S. 97, 107-8, 54 S.Ct. 330, 78 L.Ed. 674 (1934). In Harris, supra, this court stated:

> "'"A defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). This right extends to all hearings that are an essential part of the trial -- i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare Hopt v. Utah, supra (defendant has right to be present at empaneling of jurors); Bartone v. United States, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); with United States v. Howell, 514 F.2d 710 (5th Cir. 1975); cert. denied, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at in camera conference concerning attempted bribe of juror); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1972) (right to presence does not extend to evidentiary hearing on suppression motion.)"'

> "632 So. 2d at 511, quoting Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983).
>
> "Here, the record reflects that Jackson was absent from the courtroom during the State's first six peremptory strikes and during the defense's first six peremptory strikes. ... Although we recognize that jury selection is a critical stage of the trial, we fail to see how Jackson was prejudiced by his absence from the first six peremptory strikes, or how the outcome of the trial might have changed if he had been present during those strikes."

791 So. 2d at 1004-05.

Also, in Gaston v. State, 265 So. 3d 387 (Ala. Crim. App. 2018), we hold that no reversible error occurred when the defendant was unable to hear the responses of prospective jurors during individual voir dire. We explained:

> "The record reflects that Gaston was present during voir dire examination, where he had the opportunity to learn about the members of the jury panel and to assess the potential composition of the jury; he was present during all the challenges for cause; he was present during the State's peremptory strikes and during the defense's peremptory strikes; and he was present when the trial court formally announced the members of the jury at the conclusion of the striking process. Additionally, the record does not indicate that Gaston was denied an opportunity to consult with his counsel during or after voir dire examination regarding his challenges for cause and peremptory strikes. Importantly, nothing in the record indicates that Gaston was somehow prevented from being with his counsel while those discussions took place.

> "Although we recognize that jury selection is a critical stage of the trial, we fail to see how Gaston was prejudiced by his inability to hear the discussions that were taking place between the circuit judge, certain veniremembers, his defense counsel, and the prosecution, or how the outcome of his trial might have been different if he had been present during those strikes. Under these circumstances, we simply cannot conclude that Gaston's inability to listen to those discussions was error, plain or otherwise."

265 So. 3d at 423.

Here, it appears that Jackson was absent only briefly on March 13 when prospective jurors were given questionnaires and told when to return, and only briefly again on March 15 when the trial court explained the process of voir dire, read the indictment to the venire, and explained the purpose of an indictment and the presumption of innocence. Jackson may also have been absent when court personnel, employees of the State, and potential witnesses were identified, but he was clearly present when he and his attorneys were identified -- before any substantive questioning of the venire began. The facts in this case do not even rise to the level of the circumstances in Jackson, supra, where we found no reversible error and, as we did in Jackson, we fail to see how Jackson's brief absences during a portion of the voir dire proceedings

prejudiced him. Therefore, we find no error, plain error or otherwise, as to this claim.

B.

Jackson next asserts that he was absent when the trial court and the parties had a discussion concerning possible juror misconduct. According to Jackson, he was "undoubtedly prejudiced" by his absence because he was unable "to weigh in on what additional steps might be necessary to address" the juror misconduct. (Jackson's brief, p. 25.)

The record indicates that, during a recess in the middle of trial, a security officer who was responsible for transporting incarcerated defendants to and from the courtroom during trial and whose uniform included a patch with the word "corrections," informed the trial court about statements he had heard one of the jurors make. (R. 1499.) The record contains a notation stating that, when the proceedings resumed after this recess, Jackson was "not present," although it is clear that his counsel was present. (R. 1497.) The trial court informed the parties of the potential issue and asked the security officer, Chase Oliver, to explain what had occurred. Oliver stated:

> "The specific occasion we went down for their smoke break and [juror R.R.[4]] made mention -- he was joking saying that since I was up here, I wouldn't be in the basement and that was not the first comment he made. That's the one I can remember specifically. And I was just afraid that insinuating that I work for Corrections which then they can infer that [Jackson] is in lockup."

(R. 1497-98.) Oliver indicated that other jurors were nearby when R.R. made the statement to him "but they weren't paying attention." (R. 1498.) After discussing how to handle the situation and deciding not to bring more attention to it by questioning R.R. or the other jurors, the trial court instructed Oliver that, if R.R. approached him again, to inform R.R. that he could not speak with him. The trial court then asked if anything else needed to be discussed before the jury was brought into the courtroom and the court reporter stated for the record that "[t]he [d]efendant is not in here." (R. 1500.) The prosecutor then indicated that he was going to play a video for the jury when the trial resumed and the trial court asked if everyone was ready to proceed. At that point, the record contains the following notation: "Defendant present with counsel." (R. 1501.)

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[4]The record shows that juror R.R. worked at the courthouse and knew Oliver.

Nothing in the record indicates the reason Jackson was absent for the brief discussion regarding R.R.'s statements, and defense counsel did not object to Jackson's absence. Nor does the record indicate that defense counsel were in any way concerned about R.R.'s statement to Oliver. In fact, during the discussion, defense counsel indicated that they were unclear what the problem was, other than the fact that the patch on Oliver's arm had the word "corrections" and that counsel did not want the trial court to call attention to the issue. In addition, as explained in Part IX of this opinion, we conclude that no further action was required by the trial court with respect to R.R.

Under the circumstances in this case, we conclude that "[Jackson] has not demonstrated any possibility of prejudice that resulted from his absence." Burgess v. State, 723 So. 2d 742, 761 (Ala. Crim. App. 1997), aff'd, 723 So. 2d 770 (ala. 1998). Therefore, we find no error, plain or otherwise, with respect to this claim.

C.

Jackson further asserts that he was absent during a substantial portion of the charge conference and that his

"inability to participate and consult with counsel about the proper instruction of the jury was prejudicial." (Jackson's brief, p. 26.)

The record reflects that, after the State called its last witness in its case-in-chief, a lunch recess was taken. A notation in the record states that Jackson was "not present" when the proceedings resumed after lunch. (R. 1829.) While Jackson was absent, the trial court asked general questions about exhibits and then the charge conference began. The trial court and the parties discussed several of the State's requested instructions, including requested instructions on capital murder during an arson, flight, and intent, and were about to discuss the State's requested instructions on intoxication when the following occurred:

> "THE COURT: ... Oh, where's the Defendant. I thought he was out here. Let's bring him out. I apologize for that. I'm going to finish the State's, that way I'll logically know where we are.
>
> "(Defendant present with counsel.)
>
> "THE COURT: Okay. Back on the record. Defendant is in the courtroom. <u>Just to recap what we talked about</u>, State's Requested Number 1, which is the pattern charge for murder during arson in the first degree, capital murder, it's the pattern. No objection from the Defense. The Court will give that one.

> "State's Requested Number 8 is the flight charge. It's out of the patterns that are attached to the law library link on the Supreme Court website, no objection from the Defense. Court will give that.
>
> "The charges that intent may be formed in an instant, Charge Number 7, intent may be inferred if the act is done deliberately, et cetera.
>
> "Charge Number 6, no objections from the Defense. Court is going to give those.
>
> "And so we were to the question of whether, and if so, which ones or both of the State's intoxication charges the Court is going to give. ..."

(R. 1835-36; emphasis added.)

Although Jackson was absent from a small portion of the charge conference, he was not absent from a substantial portion as he now asserts. In addition, when Jackson entered the courtroom, the trial court reiterated what had occurred in Jackson's absence and Jackson had the opportunity to participate in the discussion. As this Court explained in addressing a defendant's absence during an in camera examination of a witness who later testified during the trial in the defendant's presence:

> "In the present case, a fair and just hearing was not thwarted by [the appellant's] absence from the in camera examination or his absence from the brief exchange between the trial court and the

> prosecutor immediately before the examination. The examination concerned determining a preliminary evidentiary question, not the merits of the charges. It was merely a preliminary inquiry where guilt or innocence was not at stake. The exchange between the trial court and the prosecutor immediately before the examination did not appear to state anything that had not been stated earlier other than the fact that the State desired to be excluded from the in camera examination. [The appellant] does not cite any authority holding that such an examination is a critical stage in the proceedings. Furthermore, later, Jones testified in front of the jury, and [the appellant] had the opportunity to fully cross-examine her. Therefore, we hold that the trial court did not commit reversible error concerning this issue."

Craft v. State, 90 So. 3d 197, 225-26 (Ala. Crim. App. 2011).

Under the circumstances here, we again conclude that "[Jackson] has not demonstrated any possibility of prejudice that resulted from his absence." Burgess, 723 So. 2d at 761.[5]

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[5]We note that our neighboring State of Georgia has held that a charge conference is not a critical stage of the trial:

> "Since the charge conference involves essentially legal argument about which the defendant presumably has no knowledge, he would not have made a meaningful contribution nor gained anything by his presence. Thus, we agree with the conclusion of the Court of Appeals that a charge conference 'is not one of those proceedings at which a defendant has an unequivocal right to be present.'" Huff v. State, 274 Ga. 110, 111-112, 549 S.E.2d 370, 372 (2001), quoting in part Aleman v. State, 227 Ga. App. 607, 613, 489 S.E.2d 867, 872 (1997)."

Therefore, we find no error, plain or otherwise, with respect to this claim.

II.

Jackson argues that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), and J.E.B. v. Alabama, 511 U.S. 127 (1994), because, he says, the State struck prospective jurors based solely on their race and gender. Because Jackson did not make a Batson objection or a J.E.B. objection at trial, we review these claims 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)."

Huff v. State, 274 Ga. 110, 111-112, 549 S.E.2d 370, 372 (2001). See also Campbell v. State, 292 Ga. 766, 770, 740 S.E.2d 115, 118 (2013) ("We have previously held that the constitutional right to be present is not violated when the defendant's absence occurs during conferences addressing legal matters to which the defendant cannot make a meaningful contribution.").

Henderson v. State, 248 So. 3d 992, 1016 (Ala. Crim. App. 2017).[6]

> "In [Ex parte] Branch, [526 So. 2d 609 (Ala. 1987),] this Court discussed a number of relevant factors ... to establish a prima facie case of racial discrimination; those factors are likewise applicable in the case of a defendant seeking to establish gender discrimination in the jury selection process. Those factors ... are as follows: (1) evidence that the jurors in question shared only the characteristic of [race or] gender and were in all other respects as heterogenous as the community as a whole; (2) a pattern of strikes against jurors of one [race or] gender on the particular venire; (3) the past conduct of the state's attorney in using peremptory challenges to strike members of one [race or] gender; (4) the type and manner of the state's questions and statements during voir dire; (5) the type and manner of

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[6]On appeal, the State argues that the Alabama Supreme Court has held that the "three-step Batson inquiry cannot be initiated for the first time on appeal under plain-error review." (State's brief, p. 26.) While some members and former members of the Alabama Supreme Court have expressed the inherent problems in reviewing a Batson issue where there has been no contemporaneous objection, this Court is still obliged to review such claims under a plain-error analysis because a majority of that Court has not reversed existing law on this issue. See Ex parte Phillips, [Ms. 1160403, October 19, 2018] ___ So. 3d ___, ___ (Ala. 2018) (Stuart, C.J., joined by Main and Wise, J.J., concurring specially) ("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."), and (Sellers, J., concurring specially) ("I also concur with Justice Stuart's discussion of the Batson v. Kentucky, 476 U.S. 79 (1986), issue.").

> 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 [race or] gender."

Ex parte Trawick, 698 So. 2d 162, 167–68 (Ala. 1997).

In this case, after prospective jurors were excused for hardship or removed for cause, the venire consisted of 48 prospective jurors. The State and Jackson were each afforded 18 peremptory strikes, with the last two strikes for each party serving as alternates.[7] The State used 9 of its 18 strikes to remove black prospective jurors and 14 of its 18 strikes to remove women from the venire. Jackson used 13 of

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[7] "'As provided in Rule 18.4(g)(3), [Ala.] R. Crim. P., 'The last person or persons struck shall be the alternate or alternates....' Thus, the trial court should view the alternate jurors as having been struck for purposes of Batson and this court must 'evaluate the State's explanation for striking [the alternate].' Ex parte Bankhead, 625 So. 2d 1146, 1147 (Ala. 1993).'"

Hall v. State, 820 So. 2d 113, 129 n. 4 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001) (quoting Ashley v. State, 651 So. 2d 1096, 1099 (Ala. Crim. App. 1994)).

his 18 strikes to remove white prospective jurors. The petit jury consisted of 10 white jurors and 2 black jurors, 7 women and 5 men. The two alternates were also women.

The record contains no indication that the struck jurors shared only the characteristic of race or gender; that there was a pattern of strikes against jurors of one race or gender; or that there was disparate treatment of jurors who had the same characteristics or who answered a question in the same manner or in a similar manner. The record also contains no indication that the State engaged in disparate or desultory questioning of jurors. Jackson's assertion that the Mobile County District Attorney's office has a "recent" history, dating from 1987 to 1999, of violating Batson is unavailing.[8]

> "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

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[8]See Ex parte Nguyen, 751 So. 2d 1224 (Ala. 1999), and Williams v. State, 507 So. 2d 566 (Ala. Crim. App. 1987).

> argument that Madison County has a long history of violating Batson and that the number of strikes used by the State indicated prejudice).' Dotch 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 v. State, 222 So. 3d 457, 483 (Ala. Crim. App. 2015), aff'd, 222 So. 3d 525 (Ala. 2016). See also Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). After carefully reviewing the record of voir dire examination and the juror questionnaires and considering Jackson's arguments, we find no inference in the record that the State engaged in purposeful discrimination against blacks or women.

In addition, we point out that the record reflects valid race- and gender-neutral reasons for the State's strikes. The State struck black prospective jurors J.B., C.M., A.D., J.R., D.B., D.F., T.B., S.J., and J.M. J.B. had two relatives who have been convicted of robbery; C.M. had a relative who was incarcerated at the time of trial; D.B. had been convicted of assault; D.F. had a brother who was in jail; T.B. had relatives who had been arrested for disorderly conduct and firearms violations; and S.J.'s daughter had previously been arrested. A.D., J.R., D.B., and S.J. stated on their

questionnaires that they were opposed to capital punishment and, as the State correctly asserts in its brief, all the struck black jurors expressed reservations about the death penalty when questioned during voir dire examination.[9] Of the 14 women struck by the State, 12 expressed reservations about the death penalty (prospective jurors J.B., C.M., A.D., J.R., K.H., D.B., S.J., J.S., L.C., J.M., M.B., and S.A.), and the other 2 (prospective jurors E.I. and D.O.) had a relative or friend who had a criminal conviction. "[P]revious criminal charges, prosecutions, or convictions of potential jurors or their relatives [is] a race-neutral reason" for a strike, Johnson v. State, 43 So. 3d 7, 12 (Ala. Crim. App. 2009), as is "opposition to the death penalty." Ex parte Travis, 776 So. 2d 874, 882 (Ala. 2000).

Therefore, we find no plain error as to this claim.

III.

Jackson also argues that death-qualifying prospective jurors produces a biased jury prone to convict and that

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[9]We note that the State also struck white prospective jurors D.P., R.C., and M.B., all of whom had relatives who had been convicted of crimes or were currently incarcerated, and white prospective juror E.I., who was opposed to capital punishment.

permitting the exclusion of jurors based on their views toward the death penalty violates the "right [of jurors] to the free exercise of religion under the First Amendment." (Jackson's brief, p. 99.)

Appellate courts in Alabama have repeatedly held that there is no violation of state or federal law in death-qualifying prospective jurors in a capital case, even if it results in a more conviction-prone jury. See Graham v. State, [Ms. CR-15-0201, July 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019); Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019); Largin v. State, 233 So. 3d 374 (Ala. Crim. App. 2015); Shanklin v. State, 187 So. 3d 734 (Ala. Crim. App. 2014); Wiggins v. State, 193 So. 3d 765 (Ala. Crim. App. 2014); Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011); and Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007), aff'd, 11 So. 3d 933 (Ala. 2008).

In addition, federal courts have held that death qualifying prospective jurors does not violate a juror's First Amendment right to freedom of religion, and we agree.

> "Defendant ... argues that the [Federal Death Penalty Act] and the First Amendment preclude the 'death qualification' process. The Court finds that no provision of the [Federal Death Penalty Act]

precludes the 'death qualification' process. Further, the Court finds the Defendant's argument that a prospective juror's First Amendment right to freely practice his or her religion is impaired by the 'death qualification' process to be similarly without merit. The 'death qualification' process eliminates from the prospective jury pool only those persons who state that they are unable to render a verdict based on the evidence presented during trial and the Court's instructions on the law. It does not require the Court or the parties to look to the sources of an excluded juror's beliefs. Cf. United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003) (noting that a peremptory strike based on religious belief would be constitutional if the religious belief might interfere with a juror's ability to follow the law). For the abovementioned reasons, the Court denies Defendant's motion to strike the 'death-qualification' process as unconstitutional."

United States v. Roof, 225 F.Supp.3d 413, 416-17 (D. S.C. 2016).

"Ofomata argues that the death-qualification process necessarily excludes jurors based on their religion in violation of their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ('RFRA'), and the First Amendment. The Court will address these arguments separately.

"RFRA provides that the '[g]overnment shall not burden a person's exercise of religion even if the burden results from a rule of general applicability.' § 2000bb-1(a). 'To claim RFRA's protections, a person "must show that (1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government's action or policy substantially burdens that exercise by, for example, forcing the plaintiff to engage in conduct that seriously violates his or her religious beliefs."' United States v. Comrie,

842 F.3d 348, 351 (5th Cir. 2016) (quoting Ali v. Stephens, 822 F.3d 776, 782–83 (5th Cir. 2016)) (internal quotations omitted). The law was designed to provide greater protection for religious exercise than that afforded by the First Amendment. Id.

"RFRA includes an exception, however: the '[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.' § 2000bb-1(b). However, '[o]nly "if the [religious person] carries [his or her] burden" does the government 'bear[] the burden of proof to show that its action or policy' meets the exception. See id. (quoting Ali, 822 F.3d at 783).

"As an initial matter, Ofomata has not met his burden of demonstrating that the process of selecting a death-qualified jury substantially burdens the free exercise of religion. Ofomata's conclusory argument is that jurors' views on the death penalty often 'reflect[] [their] religious convictions' and that '[e]xcluding someone from a capital jury based on his or her religious beliefs violates ... RFRA.'

"The death-qualification process 'focuses on whether the jurors' views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath.' Thompson v. Premo, No. 15-1313 ... (D. Or. Jan. 16, 2018). Indeed, the Fifth Circuit has held that 'a veniremember may not be excluded from sitting on a capital jury simply because she ... expresses conscientious or religious scruples against its infliction.' Ortiz v. Quarterman, 504 F.3d 492, 500 (5th Cir. 2007), cert. denied, 553 U.S. 1035 (2008). '[J]urors are not excluded simply because they are opposed to the death penalty on

religious grounds, but only if they are unable to set those views aside and apply the law impartially.' United States v. Mitchell, 502 F.3d 931, 954 (9th Cir. 2007).

"Even assuming that Ofomata was able to show that the death-qualification process constitutes a substantial burden, his RFRA claim fails because '[t]he question [of] whether a juror is able to follow the law and apply the facts in an impartial way ... is a compelling government interest.' Id. at 954 (rejecting the assertion that excluding jurors because of their religion and corresponding views on the death penalty violated RFRA); see also Lockhart v. McCree, 476 U.S. 162, 175–76 (1986) ('"Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the [the government's] concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.'). 'And the rule excluding jurors who are unable to do so is the least restrictive means to achieve that end[.]' Mitchell, 502 F.3d at 954. ...

"Ofomata's First Amendment claim under the Free Exercise Clause fails for substantially the same reasons. The Free Exercise Clause provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' U.S. Const. amend. I. Unlike claims evaluated under RFRA, 'a neutral, generally applicable governmental regulation will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest.' Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292 (5th Cir. 2001) (citing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990)); see also Cornerstone Christian Sch. v. University Interscholastic League, 563 F.3d 127, 135

(5th Cir. 2009) ('The government does not impermissibly regulate religious belief, however, when it promulgates a neutral, generally applicable law or rule that happens to result in an incidental burden on the free exercise of a particular religious practice or belief.').

"As the Court has already explained, the death-qualification process does not exclude jurors based on their religious beliefs. Instead, the process ensures that jurors' views on the death penalty do not preclude them from performing their duties in accordance with their oath and a court's instructions. Cf. Lockhart, 476 U.S. at 176 ('[N]ot all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'); Cain v. Woodford, No. 96-2584 ... (C.D. Cal. June 12, 2003) ('[A] juror excluded not merely because of his religious beliefs, but because he indicates that he would not be willing to subordinate his personal views, has not been categorized according to his religion.').

"The Supreme Court has expressly held that 'a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.' Morgan v. Illinois, 504 U.S. 719, 728 (1992). Accordingly, courts have rejected Ofomata's argument. See United States v. Casey, No. 05-277 ... (D.P.R. Jan. 23, 2013) (noting that Supreme Court standards 'base[] for-cause removal upon ethical or moral principles which do not necessarily stem from any religious affiliation or belief'); [United States v.] Roof, 225 F.Supp. 3d [413,] 416 [(D. S.C. 2016)] ('The "death qualification" process eliminates from the prospective jury pool only those persons who state that they are unable to render a

> verdict based on the evidence presented during trial and the Court's instructions on the law' and 'does not require the Court or the parties to look to the sources of an excluded juror's beliefs.'); Thompson, ... (rejecting the defendant's argument that death-qualification violated jurors' rights to the free exercise of their religion).

United States v. Ofomata, (No. 17-201, February 11, 2019)(E.D. La. 2019)(not selected for publication F.Supp).

Therefore, Jackson is due no relief on this claim.

IV.

Jackson argues that the State erred in questioning the lead investigator, Det. Kenneth Gillespie, about Jackson's invocation of his right to remain silent when he was questioned by police. Specifically, Jackson argues that a Doyle v. Ohio, 426 U.S. 610 (1976), violation occurred when Det. Gillespie was asked about Jackson's demeanor during the interview. He asserts that this error was compounded because "Jackson admitted to being present at the scene of the crime, argued that he was too intoxicated to form intent, and then exercised his right not to testify at trial." (Jackson's brief, p. 19.) Jackson did not object to Det. Gillespie's testimony, and the granting of his pretrial motion in limine was not sufficient to preserve this issue for review. See

Saunders v. State, 10 So. 3d 53, 87 (Ala. Crim. App. 2007) (holding that, unless a ruling on a motion in limine is absolute or unconditional, the ruling does not preserve the issue for appeal and that a timely objection must be made when the evidence is introduced). Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that Jackson had been driving Richardson's automobile at the time he was taken into custody in Florida, and the Gulf Breeze Police Department notified the Mobile Police Department that it had Richardson's vehicle in its possession and Jackson in custody. Det. Gillespie drove to Gulf Breeze and interviewed Jackson at approximately noon the day of the murder. Before trial, Jackson moved in limine to prohibit the State from presenting evidence or referring to the fact that he had invoked his right to remain silent and that he requested an attorney during that interview. The State did not object to the motion in limine and indicated that it would redact from Jackson's statement his request for an attorney and his invocation of his right to remain silent and anything that happened thereafter. The trial court granted the motion in limine. Little else about this issue

appears in the record, and the State ultimately did not introduce Jackson's statement into evidence.

The record reflects the following exchange during direct examination of Det. Gillespie:

> "[Prosecutor]: What was [Jackson's] demeanor during that interview?
>
> "[Det. Gillespie]: <u>He was very -- let me see, acted like he didn't know what we were talking about, didn't really want to answer our questions</u>. When we initially were gathering information from him, asking for his personal information, you know, obviously he was very responsive, he gave the answers pretty much immediately.
>
> "[Prosecutor]: What kind of personal information were you asking for?
>
> "[Det. Gillespie]: Name, date of birth, Social Security number, that type of stuff.
>
> "[Prosecutor]: And he was very responsive to that?
>
> "[Det. Gillespie]: He was.
>
> "[Prosecutor]: Did his demeanor then change when you started asking him further questions?
>
> "[Det. Gillespie]: It did.
>
> "[Prosecutor]: Now, only talking about his demeanor, how did it change?
>
> "[Det. Gillespie]: <u>He became very -- his answers were very short-based, very abrupt, just didn't want to answer certain questions we would ask. He wouldn't answer them</u>.

> "[Prosecutor]: In your many years of law enforcement, have you come into contact with people that are intoxicated?
>
> "[Det. Gillespie]: I have.
>
> "[Prosecutor]: About how many times?
>
> "[Det. Gillespie]: I would say probably at least a hundred times.
>
> "[Prosecutor]: Have you ever come into contact with people that are intoxicated to the point that they have no awareness of what's going on around them?
>
> "[Det. Gillespie]: I have.
>
> "[Prosecutor]: About how many times?
>
> "[Det. Gillespie]: Probably about four or five times.
>
> "[Prosecutor]: Did you form any opinion as to whether [Jackson] was intoxicated at the time that you spoke to him?
>
> "[Det. Gillespie]: I couldn't tell a hundred percent if he was intoxicated, but if he was, he was not to the point to where he couldn't comprehend what was going on or answer any questions or anything like that. But as far as, I didn't smell any kind of alcohol. I didn't observe anything that I could say for sure he was intoxicated. But I can say that he was to the point that he was able to answer those questions."

(R. 1775-76; emphasis added.)

"The receipt into evidence of testimony concerning an accused's post-Miranda exercise of the constitutional right to

remain silent is itself a violation of the accused's constitutional right to remain silent." Harris v. State, 611 So. 2d 1159, 1160-61 (Ala. Crim. App. 1992) (citing Doyle, supra). However, "Doyle only prohibits the prosecutor's making the defendant's silence the subject of comment. '[A] defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent.'" Kidd v. State, 649 So. 2d 1304, 1307 (Ala. Crim. App. 1994) (quoting Anderson v. Charles, 447 U.S. 404, 408 (1980)).

This Court in Pettibone v. State, 91 So. 3d 94 (Ala. Crim. App. 2011), addressed the holding in Doyle and stated:

> "'In Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), the United States Supreme Court "clarified that 'the holding of [Doyle v. Ohio, 426 U.S. 610 (1976),] is that the Due Process Clause bars "the use for impeachment purposes" of a defendant's post-arrest silence.'" United States v. Stubbs, 944 F.2d 828, 834 (11th Cir. 1991), quoting Greer, 483 U.S. at 763, 107 S.Ct. at 3108, in turn quoting Doyle, 426 U.S. at 619, 96 S.Ct. at 2245. Furthermore, "[w]hile a single comment alone may sometimes constitute a Doyle violation, the Supreme Court's opinion in Greer makes clear that a single mention does not automatically suffice to violate defendant's rights when the government does not specifically and expressly attempt to use -- as was attempted in Doyle and Greer -- the improper comment to impeach the

> defendant. See Lindgren v. Lane, 925 F.2d 198, 201 (7th Cir. 1991)." Stubbs, 944 F.2d at 835. (Emphasis in original.)'"

91 So. 3d at 114-15 (quoting Wilkerson v. State, 686 So. 2d 1266, 1272 (Ala. Crim. App. 1996)).

Initially, we agree with the State that the record is unclear as to when during the interview Jackson invoked his right to remain silent. As noted, there is little discussion in the record about Jackson's statement, and the State ultimately did not introduce that statement into evidence during trial. In addition, Det. Gillespie's testimony sheds no light on when Jackson invoked his right to remain silent, i.e., before or after he began providing "short-based" and "abrupt" answers and refusing to answer "certain questions." (R. 1775.) As the State correctly argues, this Court cannot predicate error on a silent record. See Gaddy v. State, 698 So. 2d 1100, 1130 (Ala. Crim. App. 1995), aff'd, 698 So. 2d 1150 (Ala. 1997). Moreover, whether the prosecutor's questioning Det. Gillespie about Jackson's demeanor and whether Jackson appeared intoxicated was an unconstitutional use of Jackson's silence is debatable. As the Connecticut Supreme Court explained:

> "The defendant further argues that the state violated Doyle when [the officer] testified that the defendant had declined to give a written statement and thereafter ended the interview. We disagree. In State v. Kirby, supra, 280 Conn. [361,] 397, 908 A.2d 506 [2006)], a police officer testified that after the defendant had made a statement, the officer again explained the Miranda [v. Arizona, 384 U.S. 436 (1966)] rights form to him. In response, the defendant 'just bowed his head and closed his eyes,' after which the officers stopped questioning him. Id. We concluded that this testimony did not constitute a Doyle [v. Ohio, 426 U.S. 610 (1976)] violation, reasoning that 'to the extent that any silence by the defendant after he made [the] statement [to police] was implicated,' that implication was permissible 'evidence of the defendant's assertion of [the right to remain silent] for the purposes of demonstrating the investigative effort made by the police and the sequence of events as they unfolded....' (Internal quotation marks omitted.) Id., at 401, 908 A.2d 506. Similarly, in the present case, [the officer's] testimony was a permissible description of the end of the interview and was not an unconstitutional use of the defendant's post-Miranda silence."

State v. Lockhart, 298 Conn. 537, 585-86, 4 A.3d 1176, 1203-04 (2010). Therefore, we seriously question whether a Doyle violation even occurred.

> "Regardless of the application of Doyle to the facts in this case, the United States Supreme Court in Brecht v. Abrahamson, 507 U.S. 619 (1993), held that a Doyle violation is subject to a harmless-error analysis under Chapman v. California, 386 U.S. 18 (1967). This Court has applied the harmless-error analysis to a Doyle violation in the following death-penalty cases: Kelley v. State, 246 So. 3d

> 1032 (Ala. Crim. App. 2014); Shaw v. State, 207 So. 3d 79 (Ala. Crim. App. 2014); Wilson v. State, 777 So. 2d 856 (Ala. Crim. App. 1999); Arthur v. State, 575 So. 2d 1165 (Ala. Crim. App. 1990)."

Bohannon v. State, 222 So. 3d 457, 489 (Ala. Crim. App. 2015), aff'd, 222 So. 3d 525 (Ala. 2016). "The determination of whether a Doyle violation is harmless should be made on a case-by-case basis under the specific facts of each case." Qualls v. State, 927 So. 2d 852, 856 (Ala. Crim. App. 2005).

Here, there was no direct reference to the fact that Jackson had invoked his right to remain silent. As noted, Det. Gillespie testified only that Jackson would not answer "certain questions." (R. 1775.) After carefully reviewing the record, we are confident that if any Doyle violation did, in fact, occur, it was harmless beyond a reasonable doubt.

For the foregoing reasons, we find no error, much less plain error, as to his claim.

V.

Jackson also argues that the trial court erred in allowing Det. Gillespie to testify about what Tiauna said to him the day of the murder. Specifically, Jackson argues that Tiauna's statement was hearsay and that it did not fall within the excited-utterance exception to the hearsay rule because,

he says, Tiauna's statement was "quintessential retrospective narration." (Jackson's brief, p. 33.) According to Jackson, "Alabama courts have applied the [excited-utterance] exception only if the startling condition has continued in some way or if an intervening event has revived the declarant's distress spontaneously" and no Alabama case has applied the exception to a statement made as a result of police questioning several hours after the startling event. (Jackson's brief, p. 33.) Jackson also argues that admission of Tiauna's statement was not harmless error because, he says, the statement was the only evidence that established that the fire was set intentionally. This argument is meritless.

At trial, the State asserted that the fire had been set intentionally, but Jackson argued that the fire was accidental. At trial, Tiauna, who was then seven years old, testified that Jackson "had set the house on fire." (R. 1751.) In addition, when law enforcement first arrived at the scene, Tiauna told Cpl. Law: "My Daddy killed my Mommy and set the house on fire." (R. 1489.)[10] Before trial, Jackson

[10]Jackson does not argue that this statement by Tiauna was inadmissible as an excited utterance.

moved in limine to prohibit the State from introducing a statement Tiauna had made to Det. Gillespie at approximately 7:00 a.m. the morning of the murder while she was being questioned at the police station. After two hearings on the issue, the trial court denied the motion. At trial, over defense counsel's objection, Det. Gillespie testified that, when he spoke with Tiauna, who was four years old at that time, after the murder, she appeared scared and frightened, was not moving around, and was speaking just a few words at a time. Nonetheless, Tiauna managed to tell Det. Gillespie that Jackson had started the fire by lighting some clothes with a cigarette.

"Hearsay" is defined in Rule 801, Ala. R. Evid., as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth fo the matter asserted." Hearsay is generally not admissible unless it falls within an one of the exceptions in Rule 803, Ala. R. Evid., or Rule 804, Ala. R. Evid. See Rule 802, Ala. R. Evid. An excited utterance is an exception to the hearsay rule. Rule 803(2), Ala. R. Evid., defines an excited utterance as "[a] statement relating to a startling

event or condition made while the declarant was under the stress of excitement caused by the event or condition."

> "'This rule [Rule 803(2), Ala. R. Evid.] sets out three conditions which must be met for admission of the statement. There must be a startling event or condition, the statement must relate to the circumstances of the occurrence and the statement must be made before time has elapsed sufficient for the declarant to fabricate. The statement must be the apparently spontaneous product of that occurrence operating upon the visual, auditory, or other perceptive sense of the speaker. The declaration must be instinctive rather than deliberative. In short, it must be the reflex product of the immediate sensual impressions, unaided by retrospective mental action. Whether a statement qualifies as an excited utterance is a preliminary and discretionary question for the trial court.'"

A.C.M. v. State, 855 So. 2d 571, 575 (Ala. Crim. App. 2002) (quoting Charles W. Gamble, McElroy's Alabama Evidence 265.01(1) (5th ed. 1996) (footnotes omitted)). We further stated in A.C.M.: "[A] statement made in response to a question is admissible as a spontaneous exclamation if the person was still under the influence of the excitement or shock of the crime." 855 So. 2d at 577.

Some jurisdictions have liberally applied the excited-utterance exception when the statements are made by a young child. As the Wisconsin Supreme Court explained:

> "A broad and liberal interpretation is given to what constitutes an excited utterance when applied to young children. Love v. State, 64 Wis.2d 432, 219 N.W.2d 294 (1974); Bertrang v. State, 50 Wis.2d 702, 184 N.W.2d 867 (1971); Bridges v. State, 247 Wis. 350, 19 N.W.2d 529, reh'g denied, 247 Wis.2d 350, 19 N.W.2d 862 (1945). In this special circumstance, the court has held that stress is present even some time after the triggering event. This ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Bertrang, 50 Wis.2d at 707-08, 184 N.W.2d at 870. Second, it is often unlikely that a child will report this kind of highly stressful incident to anyone but the mother. Cf. Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945). Third, the characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults. It is unlikely a young child will review the incident and calculate the effect of the statement. See United States v. Nick, 604 F.2d 1199, 1204 ([9th Cir.] 1979)."

State v. Padilla, 110 Wis. 2d 414, 419, 329 N.W.2d 263, 266 (1982). "In the context of statements made by children, 'there is more flexibility concerning the length of time between the startling event and the making of the statements because the stress and spontaneity upon which the exception is based is often present for longer periods of time in young

children than adults.'" State v. Burgess, 181 N.C. App. 27, 36, 639 S.E.2d 68, 75 (2007).

> "Under Rule 803(2) of the North Carolina Rules of Evidence, hearsay that fits the requirements of an excited utterance is admissible as an exception to the general rule against hearsay. For a statement to fall within the excited utterance exception, there must be: '"(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication."' State v. Wright, 151 N.C. App. 493, [496], 566 S.E.2d 151, 154 (2002) (quoting State v. Maness, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (citation omitted)). Further, our Supreme Court has been more lenient with respect to the passage of time between the two essential elements of an excited utterance in cases involving statements made by children. By doing so, it has recognized that 'the stress and spontaneity upon which the [excited utterance] exception [to the hearsay rule] is based is often present for longer periods of time in young children than in adults.' State v. Smith, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (emphasis added). The statement, therefore, does not have to be contemporaneous with the startling event, but, as the Smith Court held, '[s]pontaneity and stress are the crucial factors.' Smith at 88, 337 S.E.2d at 842."

State v. Lowe, 154 N.C. App. 607, 611, 572 S.E.2d 850, 854 (2002). We agree.

In this case, Tiauna was only four years old when she made the statement to Det. Gillespie no more than three hours after she had witnessed the murder of her mother. Det. Gillespie testified that Tiauna appeared to still be in shock

when he questioned her. Under these circumstances, we conclude that the trial court correctly found Tiauna's statement to Det. Gillespie to be admissible as an excited utterance under Rule 803(2).

Moreover, we agree with the State that, even if the admission of Tiauna's statement to Det. Gillespie was error, it was harmless. Contrary to what Jackson argues in his brief, Tiauna's statement to Det. Gillespie was not the only evidence that the fire was intentional and, indeed, the statement was cumulative to other evidence presented. Tiauna testified at trial that Jackson had set the apartment on fire, and she told Cpl. Law at the scene that Jackson had set the apartment on fire. "The erroneous admission of evidence that is merely cumulative is harmless error." Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995), aff'd, 675 So. 2d 905 (Ala. 1996). In addition, Capt. Watkins testified that it was "highly probable that the fire was intentionally set," and evidence was presented indicating that the smoke detectors in the apartment had been knocked off the walls, that every burner element on the stove had been turned on, and that a T-shirt was found in the oven. (R. 1694.)

> "In determining whether the admission of improper testimony is reversible error, this Court has stated that the reviewing court must determine whether the 'improper admission of the evidence ... might have adversely affected the defendant's right to a fair trial,' and before the reviewing court can affirm a judgment based upon the 'harmless error' rule, that court must find conclusively that the trial court's error did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993). See also Rule 45, Ala. R. App. P. After carefully reviewing the record, we conclude that any error in the admission of Tiauna's statement to Det. Gillespie was harmless and did not affect the outcome of the trial or otherwise prejudice Jackson's substantial rights.

Therefore, Jackson is due no relief on this claim.

VI.

Jackson argues that the trial court erred in allowing Capt. Watkins to testify that it was his opinion that the fire had been intentionally set. Specifically, Jackson argues that the trial court failed to comply with Rule 702, Ala. R. Evid., because, he says, Capt. Watkins's testimony was not reliable or based on sufficient facts.

Rule 702, Ala. R. Evid., provides:

> "(a) 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.
>
> "(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
>
> > "(1) The testimony is based on sufficient facts or data;
> >
> > "(2) The testimony is the product of reliable principles and methods; and
> >
> > "(3) The witness has applied the principles and methods reliably to the facts of the case."

Capt. Watkins testified that, at the time of the fire, he was an arson investigator; that he had taken several courses at the National Fire Academy located in Baltimore, Maryland; that he had a combined total of 19 years' fire experience from military and the fire department; that he had training in the origin and cause of fires from the National Fire Academy; and that he had about one year of experience in arson investigation. He then detailed the steps he took when assessing the fire and indicated that he had determined the

cause of the fire by a process of elimination. Capt. Watkins then testified about his opinion as to the cause of the fire:

> "[Prosecutor]: So where nothing remains, there is no evidence left that might lead you to a conclusion of undetermined?
>
> "[Capt. Watkins]: Yes, sir.
>
> "[Prosecutor]: And what was that conclusion about the origin, about the cause of the fire?
>
> "[Capt. Watkins]: The conclusion I formed on this fire was that it was incendiary causes.
>
> "[Prosecutor]: And what's an incendiary cause?
>
> "[Capt. Watkins]: When you have common combustibles which basically fall under a Class A fire to where, like I noted earlier, you can either, you can use an accelerant or some cause of an open flame.
>
> "[Prosecutor]: Okay. So you've got accelerant and you've got open flame, what's an accelerant?
>
> "[Capt. Watkins]: Gasoline. Things of that nature, I'm sorry.
>
> "[Prosecutor]: Do you have to have an accelerant to start a fire?
>
> "[Capt. Watkins]: No, sir.
>
> "[Prosecutor]: Was there an accelerant detected in this case?
>
> "[Capt. Watkins]: We have hydrocarbon detectors, and based off of the reading I received from that machine, I did not detect any accelerants.

> "[Prosecutor]: So that leaves open flame. What was your determination regarding an open flame having been used possibly in this case?
>
> "[Capt. Watkins]: In order for the fire to start within that area, without -- like I said, I didn't notice any accelerants, so it had to be some form of a flame either taken from the common combustibles that was in that location or it was brought from another location and placed on those combustibles.
>
> "[Prosecutor]: And how did you rule out any kind of accidental starting of this fire?
>
> "[Capt. Watkins]: Based on the circumstances surrounding what took place that evening, I ruled out that it was highly probable that it was an incendiary fire."

(R. 1691-93.)

Jackson did not object to Capt. Watkins's testimony. Thus, we review this claim for plain error. See Rule 45A, Ala. R. App. P. We also note that Jackson did not object to Capt. Watkins's being qualified as an expert or to the admission of Capt. Watkins's written report.

> "The vast majority of courts that have addressed the issue have concluded that the process of elimination can be a reliable scientific method. For example, in Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1236 (10th Cir. 2004), the court concluded that the process of elimination, or 'differential diagnosis,' 'is a valid scientific technique to establish causation.' Noting the method's roots in the medical context, the court observed that federal courts have regularly found differential diagnosis reliable. Id. Other courts have reached similar

conclusions. See, e.g., Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 459 (2d Cir. 2007); Hickerson v. Pride Mobility Prods. Corp., 470 F.3d 1252, 1257 (8th Cir. 2006); Superior Aluminum Alloys, LLC. v. U.S. Fire Ins. Co., (N.D. Ind. No. 1:05-CV-207, June 25, 2007)(unpublished order); see also U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., (D. Colo. No. 01-CV-02056-JLK, Sept. 29, 2006) (unpublished order) (process of elimination accepted methodology to determine causation in accident investigations); Thirsk v. Ethicon, Inc., 687 P.2d 1315, 1318 (Colo. App. 1983)(in products liability case, generally discussing use of testimony by medical expert based on process of elimination); Rivers v. State, 393 Md. 569, 903 A.2d 908, 916 (2006) (the process of elimination, if properly conducted, is a reliable scientific methodology).

"Although the federal district court in Stibbs v. Mapco, Inc., 945 F.Supp. 1220, 1224 (S.D. Iowa 1996), relied on by Chief, found the expert testimony based upon a process of elimination was not reliable, it did not rule out the possibility that such a technique could be reliable in some cases. Id. ('[I]t may be that this sort of reasoning could pass muster in some cases where the obvious result explains the etiology.' (quoting Sorensen v. Shaklee Corp., 31 F.3d 638, 649 (8th 1994))).

"Furthermore, a number of courts have held that the Guide for Fire and Explosion Investigations published by the National Fire Protection Association (NFPA 921), relied on by both Nelson and Chief's experts, is an accepted reference for fire investigators. See Fireman's Fund Ins. Co. v. Canon U.S.A., Inc., 394 F.3d 1054, 1057-58 (8th Cir. 2005) (holding NFPA 921 qualifies as a reliable scientific method endorsed by a professional organization); see also Nationwide Mut. Ins. Co. v. Nat'l RV Holdings, Inc., 2007 WL 954258 (M.D. Pa. No. CIV A

> 105-CV-2509, Mar. 28, 2007)(unpublished memorandum) (collecting cases)."

Farmland Mut. Ins. Cos. v. Chief Indus., Inc., 170 P.3d 832, 836 (Colo. App. 2007).

> "The National Fire Protection Association 921 Guide for Fire and Explosion Investigations ('NFPA 921') is a peer reviewed and generally accepted standard in the fire investigation community. Royal Ins. Co. v. Joseph Daniel Const., Inc. (S.D.N.Y. 2002), 208 F.Supp. 423, 426; Travelers Property & Cas. Corp. v. General Electric Co. D. Conn. 2001), 150 F.Supp. 360, 366.
>
> "Section 16.2.5 of NFPA 921 recognizes the process of elimination and deductive reasoning as an appropriate methodology for determining the cause and origin of a fire: ' ... when the origin of a fire is clearly defined, it is occasionally possible to make a credible determination regarding the cause of the fire, even where there is no physical evidence of that cause available. This finding may be accomplished through the credible elimination of all other potential causes, provided the remaining cause is consistent with all known facts.' With respect to incendiary fires, Section 16.2.5 of NFPA 921 further provides: '... the "elimination of all other causes other than application of an open flame" is a finding that may be justified in limited circumstances, where the area of origin is clearly defined and all other potential heat sources at the origin can be examined and credibly eliminated. It is recognized that in cases where a fire is ignited by the application of an open flame, there may be no evidence of the ignition source remaining.'
>
> "The courts have also found deductive reasoning and the process of elimination to be credible, scientific evidence. Royal Ins. Co. v. Joseph Daniel Const., Inc., supra 208 F.Supp. at 427;

> Travelers Property & Cas. Corp. v. General Electric Co., supra 150 F.Supp. at 366; State v. Funk, 10th Dist. No. 00AP-1352, 2001-Ohio-4110 at 5; State v. Hinkle (Aug. 23, 1996), 11th Dist. No. 95-P-0069."

Abon, Ltd. v. Transcontinental Ins. Co., (No. 2004-CA-0029)

(Ohio Ct. App. June 16, 2005) (not reported in N.E.2d).

> "In Farmland Mutual Insurance Cos. v. Chief Industries, Inc., 170 P.3d 832, 835 (Colo. App. 2007), a contractor installed a crop drying heater manufactured by Chief Industries. After a fire caused extensive damage, Farmland filed an action for subrogation against Chief and the installer, alleging that the drying unit was negligently designed, manufactured, and installed. Farmland's expert witnesses included a forensic mechanical engineer. Chief contended the engineer's methodology was not reasonably reliable because he used a process of elimination to determine the cause of the fire, which, according to Chief, was not a reliable scientific method. Chief also argued that the engineer did not confirm his conclusions through testing. Farmland, 170 P.3d at 835. A division of this court rejected Chief's arguments.
>
> "The division in Farmland joined the majority of courts that have held the process of elimination is a reliable scientific method of showing causation. See Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1236 (10th 2004) (concluding the process of elimination, or 'differential diagnosis,' 'is a valid scientific technique to establish causation'). The Farmland division also concluded '[t]esting was not a prerequisite to admissibility.' 170 P.3d at 837."

Estate of Ford v. Eicher, 220 P.3d 939, 944 (Colo. App. 2008).

> "Forensic fire investigation is a highly technical subject that requires specialized knowledge of both the potential causes of fires and

> the procedures for determining a fire's point of origin. The record shows that the State's expert witness was a captain in the fire department who had served for nine years as a fire inspector and had received special training in fire investigation. His testimony explained, in clear terms, the accepted method for eliminating accidental causes of fires. He described to the jury both how he applied that method in this case and how he reached his conclusion that the fire was intentionally set. Such testimony was clearly instructive to the jury. We find no error in its admission."

State v. English, 95 N.C. App. 611, 614, 383 S.E.2d 436, 438 (1989).

There are sufficient facts in the record, even though no objection was made and no formal hearing held, for us to conclude that Capt. Watkins's testimony did not violate Rule 702, Ala. R. Evid. Therefore, we find no error, much less plain error, in the admission of Capt. Watkins's opinion that the fire had been intentionally set.

Moreover, even if error occurred, we are confident that that error was harmless. Bendolph testified that, when she entered the apartment, all the eyes on the stove had been turned on, the oven was on, and a T-shirt was in the oven. That evidence strongly supports the conclusion that the fire was not accidental but was intentionally set. In addition, Tiauna told Cpl. Law at the scene and Det. Gillespie later,

and also testified at trial, that Jackson had set the fire. After carefully reviewing the record, we conclude that, if error occurred in Capt. Watkins's testimony, that error was harmless. See Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993), and Rule 45, Ala. R. App. P. Therefore, Jackson is due no relief on this claim.

VII.

Jackson argues that the trial court erred in allowing Charles Miller, an officer with the identification unit of the Mobile Police Department, to testify as an expert on the subject of bloodstain analysis. He argues that Off. Miller's testimony was "incomprehensible" and that, therefore, it should have been excluded. (Jackson's brief, p. 76.)

Off. Miller testified that he had been employed by the Mobile Police Department for 15 years; that he was in the identification unit; that it was his job to "photograph and document the [crime] scenes with notes and sketches"; and that he collected and processed evidence in this case. (R. 1578.) Off. Miller identified all the evidence and photographs he had collected and compiled from the crime scene. The following

then occurred when the prosecutor asked Off. Miller about State's Exhibit 188:

> "[Prosecutor]: [Exhibit] 188?
>
> "[Off. Miller]: That is a mid-range photograph of bloodstain patterns on the wall.
>
> "....
>
> "[Prosecutor]: I want to go back to 188. Do you have any kind of experience in any kind of blood-stain pattern analysis?
>
> "[Off. Miller]: Yes, I do.
>
> "[Prosecutor]: Do you have training in that field?
>
> "[Off. Miller]: On-the-job training, yes.
>
> "[Prosecutor]: Did you form any kind of opinion as to the type of bloodstain pattern this might be or what could have caused it to imprint that way?
>
>> "[Jackson's counsel]: Your Honor, if it please the Court, we object to him having an opinion about that. He's not been proffered as an expert before to us. I have no idea about his opinion and what it's going to be or what it's based on."

(R. 1590-91.) The trial court and the parties then engaged in a lengthy discussion concerning Jackson's objection, and the trial court directed the State to question Off. Miller on voir dire regarding his expertise in the area of bloodstain

analysis. (R. 1593.) Jackson's counsel also questioned Off. Miller on voir dire.

On voir dire, Off. Miller testified to his training:

> "I've had basic crime scene training with the FBI. I've had advanced crime scene training through Ron Smith and Associates and FBI training. I've done latent fingerprints through the FBI, advanced FBI latent fingerprints, certified crime scene analyst through the International Association for Identification."

(R. 1594.) Off. Miller further testified that he had taken numerous formal classes regarding bloodstains; that he had nine years of on-the-job training in analyzing blood evidence; that he had come into contact with blood evidence "[c]ountless" times; and that his training had focused on blood patterns on walls and what caused blood to be spread across walls. (R. 1594.) After considering numerous arguments regarding the admissibility of Off. Miller's expert testimony, the trial court found that Off. Miller was qualified to render testimony in the form of an expert on blood patterns. (R. 1609.) Off. Miller subsequently testified that, based on his expertise, the bloodstain depicted in State's Exhibit 188 was a "smear," where blood had been wiped on the wall. (R. 1617.)

"Whether a witness is qualified to testify as an expert is a question within the sound discretion of the trial court." Payne v. State, 239 So. 3d 1173, 1184 (Ala. Crim. App. 2017). "[W]e will not disturb the trial court's ruling on that issue unless there has been an abuse of that discretion." Kennedy v. State, 929 So. 2d 515, 518 (Ala. Crim. App. 2005).

> "A witness may be qualified as an expert by evidence of that person's 'knowledge, skill, experience, training, or education' in the area of expertise. Rule 702, Ala. R. Evid. ... Moreover, a challenge to the qualifications of an expert go to the weight, not the admissibility, of the expert's testimony. See Smoot v. State, 520 So. 2d 182, 189 (Ala. Crim. App. 1987)."

Kennedy, 929 So. 2d at 518.

Certainly, Off. Miller was qualified by "knowledge, skill, experience, training, or education," Rule 702(a), Ala. R. Evid., to state his opinion concerning what caused the bloodstain on the wall that was depicted in State's Exhibit 188 and the trial court properly admitted his testimony. Any questions about the reliability of his testimony went to the weight of his testimony and not its admissibility. See Kennedy. Therefore, Jackson is due no relief on this claim.

VIII.

Jackson also argues that the trial court erred in allowing Tiauna to testify at trial because, he says, she was not a competent witness based on her young age and the alleged unreliability of her testimony. Tiauna was seven years old at the time of Jackson's trial and four years old at the time she witnessed her mother's murder. Jackson also argues that his right to confront Tiauna was violated because, he says, she was too young to be effectively cross-examined. Jackson did not object to Tiauna's testimony on either of these grounds. Therefore, these issues will be reviewed for plain error. See Rule 45A, Ala. R. App. P.

The record reflects that before Tiauna testified, the trial court indicated that she was too young to take a traditional oath and that it would talk with Tiauna instead. Both parties agreed that that was the best course of action. (R. 1743.) The trial court asked Tiauna what it meant to tell the truth and Tiauna stated that you have to tell what is "real" and that she would tell the truth. (R. 1745.) At the beginning of Tiauna's testimony, the prosecutor also questioned Tiauna about the truth and her answers indicated

that she knew the difference between the truth and a lie. (R. 1746-47.)

Rule 601, Ala. R. Evid, provides that "[e]very person is competent to be a witness except as otherwise provided in these rules."

> "[Rule 601] acknowledges the prevailing sentiment that very few persons are incapable of giving testimony useful to the trier of fact and that the historic grounds of incompetency -- mental incapacity, conviction, etc. -- should go to the credibility of the witness and the weight the trier of fact gives to the witness's testimony. See H. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53 (1965); E. Cleary, McCormick on Evidence § 71 (3d ed. 1984) (referring to rules of incompetency as 'serious obstructions to the ascertainment of truth'); C. Mueller & L. Kirkpatrick, 3 Federal Evidence § 232 (2d ed. 1994); Comment, The Mentally Deficient Witness: The Death of Incompetency, 14 Law & Psychol. Rev. 106 (1990).
>
> "....
>
> "While Rule 601 imposes no requirement of testimonial competency, it provides that incompetency may arise 'as otherwise provided in these rules.' Both academic writings and judicial opinions suggest that this provision vests in the trial court the discretion to preclude a witness from testifying in extraordinary circumstances when the witness possesses some significant testimonial deficiency. That discretion is said to arise when the witness's deficiency renders the testimony inadmissible because of its being irrelevant (Rule 401) or too prejudicial (Rule 403), or when the witness is without personal knowledge (Rule 602) or is unable to understand the obligation to tell the

> truth (Rule 603). See, e.g., United States v. Ramirez, 871 F.2d 582 (6th Cir.), cert. denied, 493 U.S. 841 (1989); United States v. Odom, 736 F.2d 104 (4th Cir. 1984); United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982); State v. Fulton, 742 P.2d 1208 (Utah 1987) cert. denied, 484 U.S. 1044 (1988). See also J. Weinstein & M. Berger, Weinstein's Evidence ¶ 601 [04], at 601-27 (1990). It should be noted, however, that the suggestion of these authorities exceeds their reality in terms of witnesses actually excluded by the courts. Indeed, as one author has observed, an analysis of the decided cases reveals that the application of Rule 601 is 'closer to an irrebuttable presumption of competency for every witness.' Comment, The Mentally Deficient Witness: The Death of Incompetency, 14 Law & Psychol. Rev. 106, 114 (1990). The beginning premise remains: all witnesses are competent and any testimonial deficiency goes to weight rather than admissibility. See F. Weissenberger, Weissenberger's Federal Evidence § 601.2, at 181 (1987); 3 D. Louisell & C. Mueller, Federal Evidence § 252 (1979). Compare United States v. Van Meerbeke, 548 F.2d 415 (2d Cir. 1976), cert. denied, 430 U.S. 974 (1977)."

Advisory Committee's Notes to Rule 601, Ala. R. Evid.

A witness's "age at the time of the murders, the length of time between the murders and the trial, and the reliability of [the witness's] memory [are] considerations that [go] to the weight of [the] testimony rather than its admissibility." Brown v. State, 74 So. 3d 984, 1006 (Ala. Crim. App. 2010), aff'd, 74 So. 3d 1039 (Ala. 2011).

> "In the present case the trial court questioned the child before he was allowed to testify. It appears from the record that the child was very

> articulate for a seven-year-old. In fact there was no objection to his testimony during the trial. We find no error in the trial court's acceptance of the child as a competent witness. Cole v. State, 443 So. 2d 1386 (Ala. Cr. App. 1983); Miller v. State, 391 So. 2d 1102 (Ala. Cr. App. 1980)."

Stewart v. State, 601 So. 2d 491, 503 (Ala. Crim. App. 1992), overruled on other grounds, Ex parte Gentry, 689 So. 2d 916 (Ala. 1996). "The appellant ha[s] the burden of establishing that the [witness] was not competent to testify." Michens v. State, 428 So. 2d 202, 204 (Ala. Crim. App. 1983). We have reviewed Tiauna's testimony and find no evidence that she was not competent to testify.

Moreover:

> "The Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 739, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987)) (additional citations omitted). Indeed, confrontation 'includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.' [Delaware v.] Fensterer, 474 U.S. [15] at 21–22, 106 S.Ct. [292] at 295[, 88 L.Ed.2d 15 (1985)]. A child's inability to answer questions [about the offense], by itself, does not render her unavailable for confrontation purposes. State v. Bishop, 63 Wash. App. 15, 816 P.2d 738, 743 (1991)."

State v. Toohey, 816 N.W.2d 120, 128 (S.D. 2012). Here, Jackson had the opportunity to, and, in fact, did cross-examine Tiauna. Therefore, Jackson was not denied his constitutional right to confront Tiauna.

We find no error, much less plain error, in the trial court's allowing Tiauna to testify.

IX.

Jackson argues that the trial court failed to conduct an adequate inquiry into whether extraneous information -- that Jackson was incarcerated during trial -- was introduced to the jury by juror R.R. Jackson did not object to the trial court's handling of the situation. In fact, Jackson's counsel agreed that no further inquiry into the matter was necessary and that any error in this regard was invited by Jackson. See Gobble v. State, 104 So. 3d 920, 945 (Ala. Crim. App. 2010) ("Invited error applies to death-penalty cases and operates to waive the error unless 'it rises to the level of plain error.' Ex parte Bankhead, 585 So. 2d 112, 126 (Ala. 1991)."). Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

As explained in Part I.B. of this opinion, in the middle of trial, security officer Chase Oliver notified the trial court that juror R.R., who worked in the courthouse, had made comments to him. The following occurred:

> "THE COURT: We have a little matter to take up before we bring the panel in. I believe the gentlemen in the upper corner in the back --
>
> "[Oliver]: Fifty-seven. I don't know what his position is.
>
> "THE COURT: ... Mr. Oliver, why don't you just for purposes of being accurate, rather than having me repeat what you told me, just tell us what you told me in as close as you can remember.
>
> "[Oliver]: The specific occasion we went down for [the jury's] smoke break and [juror R.R.] made mention -- he was joking saying that since I was up here, I wouldn't be in the basement and that was not the first comment he made. That's the one I can remember specifically. And I was just afraid that insinuating that I work for Corrections which then they can infer that [Jackson] is in lockup.
>
> "THE COURT: Follow what I'm saying? Follow what he's saying? And so I just bring that to your attention. We can handle it any number of ways, one, do nothing; second, I can have [the juror] just come out and just -- I don't know that the instructions I've given him were quite detailed enough to anticipate that he would say anything about his workplace. And I can just tell him to -- you really can't even talk about even matters at the courthouse, much less about this case. So what's the spirit of the parties on this, if anything, just leave it alone or do you want me to say anything to him?

"[Prosecutor]: I don't see any damage having been done.

"THE COURT: I don't think anything has happened yet either. This was one on one. Nobody else was around. Mr. Oliver, at this point, was anybody else around, Mr. Oliver, at this point? Was anyone else around when he said that?

"[Oliver]: They were but they weren't paying attention. I didn't come up with a rebuttal because I didn't want to show any more attention than it was.

"[Prosecutor]: I don't think we can infer any other meaning other than the words that he said. I don't think any harm comes from the words that he said and I think to do anything would call attention to it and might make him wonder and want to discuss it more or something.

"THE COURT: I just -- I don't want the risk of him saying something more. I remember [juror R.R.] from the voir dire process. He has a lot of personality. He's a good person but he has a lot of personality. What's the defense's perspective? I've heard the State.

"[Jackson's counsel]: Just, [co-counsel] pointed out that it says on [Oliver's] patch on his arm 'Corrections.' I don't know if that's what the concern is, if I'm following it right. I don't want to, you know, wave a flag over him and ring bells and call all attention to it.

"THE COURT: Cuts both ways. I mean, sometimes you ring a bell, you bring more attention to an issue than there is already.

"[Prosecutor]: I don't really see an issue.

"[Jackson's counsel]: It's kind of like when your kids cuss, should I bring attention to that so they start doing it all the time.

"THE COURT: So at this point nothing. But I will say this, I've instructed Mr. Oliver, if he approaches Mr. Oliver again, to tell him, I really can't talk about anything at the courthouse with you from this point forward."

(R. 1497-1500.)

"'There is no per se rule requiring an inquiry in every instance of alleged [juror] misconduct.' United States v. Hernandez, 921 F.2d 1569, 1577 (11th Cir. 1991). '[A] trial judge "has broad flexibility in such matters, especially when the alleged prejudice results from statements by the jurors themselves, and not from media publicity or other outside influences."' United States v. Peterson, 385 F.3d 127, 134 (2nd Cir. 2004), quoting in turn United States v. Thai, 29 F.3d 785, 803 (2d Cir. 1994).

> "'"The trial court's decision as to how to proceed in response to allegations of juror misconduct or bias will not be reversed absent an abuse of discretion." United States v. Youts, 229 F.3d 1312, 1320 (10th Cir. 2000). "[I]t is within the trial court's discretion to determine what constitutes an 'adequate inquiry' into juror misconduct." State v. Lamy, 158 N.H. 511, 523, 969 A.2d 451, 462 (2009).'"

"Shaw v. State, [207] So. 3d [79, 92] (Ala. Crim. App. 2014)."

Luong v. State, 199 So. 3d 173, 186 (Ala. Crim. App. 2015).

As the State correctly points out, nothing in the record supports Jackson's claim that extraneous information, i.e., that he was incarcerated during trial, was introduced to the jury. Jackson's claim is based solely on R.R.'s rather cryptic comment to Oliver during a break in the trial that, because Oliver was with the jury, he was not working in the basement. Nothing in the comment itself indicated that Jackson was incarcerated and, although Oliver indicated that other jurors were present when R.R. made the comment, he stated that they were not paying attention. Jackson's counsel indicated that they were not even sure what the problem was, other than the fact that a patch on Oliver's uniform had the word "corrections" on it, and they stated that they did not want to "wave a flag over him and ring bells and call all attention to it." (R. 1499.)

"To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So. 2d 237 (Ala. 2000). We cannot say that is the case here. Therefore, we find no plain

error in the trial court's not conducting further inquiry into the situation.

X.

Jackson argues that the trial court erroneously allowed the admission of victim-impact evidence during the guilt phase of the trial. Specifically, Jackson argues that it was error for the trial court to admit a photograph of Richardson during Tiauna's testimony and to question Tiauna regarding her memories of her mother. Jackson cites Ex parte Jackson, 68 So. 3d 211 (Ala. 2010), and Ex parte Crymes, 630 So. 2d 125 (Ala. 1993),[11] in support of his argument. Jackson did not

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[11]In Ex parte Jackson, the Alabama Supreme Court held that the admission of testimony from the victim's mother that she believed the defendant had killed the victim was error. The Court stated:

> "Given the highly emotional nature of Loretta's testimony, as well as the prosecutor's 'guarantee [to the jury] that [Loretta was] convinced beyond a reasonable doubt' that Jackson committed the murders, we cannot say that 'the record conclusively shows that the admission of the victim impact evidence ... did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.' [Ex parte] Rieber, 663 So. 2d [999,] 1005 [(Ala. 1995)]."

68 So. 3d at 217. However, in Ex parte Crymes, the Alabama Supreme Court found no reversible error in the admission of evidence "of a murder victim's children and their ages." 630

object to this testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record reflects the following exchange during Tiauna's testimony:

> "[Prosecutor]: Tiauna, have you seen this picture before?
>
> "[Tiauna]: Yes.
>
> "[Prosecutor]: Is that your mommy?
>
> "[Tiauna]: Yes.
>
> > "[Prosecutor]: Judge, I move to admit State's Exhibit 63.
> >
> > "THE COURT: No objection, it's in.
>
> "....
>
> "[Prosecutor]: Tiauna, can you tell us some things that you remember about your mommy?
>
> "[Tiauna]: When we went somewhere.
>
> "....
>
> "[Prosecutor]: Where did you go with her?
>
> "[Tiauna]: We went out to eat.

So. 2d at 126. The Court stated: "The testimony regarding the ages of the victim's children had no probative value on any material question of fact or inquiry and, therefore, was inadmissible. ... Even though the testimony was inadmissible, the trial court's error in admitting the testimony was harmless. ..." 630 So. 3d at 127.

"[Prosecutor]: Okay. You went out to eat with her. Where did you go?

"[Tiauna]: To Golden Corral.

"[Prosecutor]: Golden Corral, that's a good restaurant. What did you eat there?

"[Tiauna]: A steak.

"[Prosecutor]: Okay. Did you like it?

"[Tiauna]: (Witness nods head.)

"[Prosecutor]: Can you say yes or no?

"[Tiauna]: Yes.

"[Prosecutor]: I'll try to help you out with that. What else did you eat at Golden Corral with your mommy?

"[Tiauna]: Mashed potatoes and some potatoes.

"[Prosecutor]: Was that when you were a little kid?

"[Tiauna]: Yes.

"[Prosecutor]: What else do you remember about your mommy?

"[Tiauna]: So we went out for my birthday.

"[Prosecutor]: Was that for your 4th birthday?

"[Tiauna]: My second.

"[Prosecutor]: Your second. Okay. When you were a little, little kid?

"[Tiauna]: (Witness nods head.)

"[Prosecutor]: Is that right?

"[Tiauna]: I was like one.

"[Prosecutor]: One. Well, that's real little. Where did you go for your birthday?

"[Tiauna]: Laser tag.

"[Prosecutor]: Laser tag. Okay. Did you have fun?

"[Tiauna]: (Witness nods head.)

"[Prosecutor]: Did you?

"[Tiauna]: Yes.

"[Prosecutor]: Did your mommy play laser tag?

"[Tiauna]: Yes."

(R. 1748-51.)

"Victim-impact statements typically 'describe the effect of the crime on the victim and his [or her] family.'" Turner v. State, 924 So. 2d 737, 770 (Ala. Crim. App. 2002). Contrary to Jackson's belief, a photograph of a victim before his or her death is not considered victim-impact evidence and is admissible for the purpose of proving the identity of the victim. See McMillan v. State, 139 So. 3d 184, 226 (Ala. Crim. App. 2010). In addition, we cannot say that Tiauna's

testimony about her outings with her mother constituted victim-impact evidence.

In any event, Jackson ignores the Alabama Supreme Court's holding in Ex parte Rieber, 663 So. 2d 999 (Ala. 1995):

> "It would elevate form over substance for us to hold, based on the record before us, that Rieber did not receive a fair trial simply because the jurors were told what they probably had already suspected -- that Ms. Craig was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on her children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S.Ct. 2597, 2615, 115 L.Ed.2d 720 (1991))."

663 So. 2d at 1006. As this Court explained in Smith v. State, 246 So. 3d 1086 (Ala. Crim. App. 2017):

> "[A]s the Alabama Supreme Court made clear in Ex parte Rieber, 663 So. 2d 999 (Ala. 1995), the admission of victim-impact evidence during the guilt phase is not a ground for reversal 'if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.' Ex parte Rieber, 663 So. 2d at 1005. See Scheuing v. State, 161 So. 3d 245, 264–65 (Ala. Crim. App. 2013)."

246 So. 3d at 1097.

As in Ex parte Rieber, "[i]t would elevate form over substance for us to hold ... that [Jackson] did not receive a

fair trial" simply based on Tiauna's testimony. 663 So. 2d at 1006. We find no error, much less plain error, as to this claim.

XI.

Jackson argues that the trial court erred in admitting during the guilt phase of the trial what he claims were prejudicial photographs of the crime scene and Richardson's autopsy. Specifically, in a one-paragraph argument, Jackson contends that numerous photographs of the autopsy, the crime scene, and Richardson's body were gratuitous, inflammatory, and cumulative and that, therefore, they should not have been admitted. Jackson identifies no specific photographs by exhibit number but merely cites the page numbers from the record that contain copies of photographs.

> "'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).

> > "'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)).

"While there were numerous exhibits depicting the crime scene and while several of the exhibits depicting the victim's body were gruesome, we hold that there was nothing improper about their admission into evidence." Aultman v. State, 621 So. 2d 353, 363 (Ala. Crim. App. 1992). The same is true in this case. Jackson is due no relief on this claim.

XII.

Jackson argues that several instances of prosecutorial misconduct during the guilt phase of the trial denied him a fair trial.

> "'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' Bankhead v. State, 585 So. 2d 97, 106 (Ala. Crim. App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd on other

> grounds, 625 So. 2d 1146 (Ala. 1993). See also Henderson v. State, 583 So. 2d 276, 304 (Ala. Crim. App. 1990), aff'd, 583 So. 2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). 'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' Bankhead, 585 So. 2d at 107, quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala.), cert. denied, 5[2]8 U.S. 939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead, 585 So. 2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, McCullough v. State, 357 So. 2d 397, 399 (Ala. Crim. App. 1978), and that court is given broad discretion in determining what is permissible argument.' Bankhead, 585 So. 2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. Id."

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

Furthermore, Jackson did not object to the now challenged instances of prosecutorial misconduct.

> "'"This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful."' Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala. 1991) (quoting Johnson v. Wainwright, 778 F.2d 623, 629 n. 6 (11th Cir. 1985))."

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

More importantly, the trial court instructed the jury as follows:

> "As I told you earlier, the statements made by the attorneys and their arguments to you are not evidence. So again, if during your deliberations and that is your collective recollection of the evidence, if that differs from their statements, you should disregard their statements and be guided by your own collective recollection because you are the sole judges of the facts."

(R. 1967-68.)

A.

First, Jackson argues that the prosecutor improperly told the jury that it would have to "ignore" evidence to find him guilty of a lesser-included offense. (Jackson's brief, p. 80.) The prosecutor stated the following during closing arguments:

> "Now, for you to find him guilty of murder and not capital murder, just murder, you must ignore the

> fact that he committed an intentional arson in the course of its murder. You would just have to ignore that it's an intentional arson to find him guilty of murder. For manslaughter, you must ignore his specific intent to kill and they want you to believe that he didn't have the specific intent to kill because they say he's intoxicated."

(R. 1932.)

Reviewing the argument as a whole and in context of the entire trial, it is clear that the prosecutor was not misstating the law or telling the jury to ignore evidence. Rather, the prosecutor was arguing that the jury should convict Jackson of capital murder because it had proven that Jackson intentionally killed Richardson and intentionally set the apartment on fire. We find no error, plain or otherwise, in the prosecutor's argument.

B.

Second, Jackson argues that the prosecutor misstated the evidence by repeatedly arguing that Richardson had drowned when, he says, there was no evidence indicating that drowning was the cause of Richardson's death. The State argues, on the other hand, that the prosecutor never argued that Richardson had been drowned but, instead, argued that Jackson had attempted to drown her and that the prosecutor's argument was

a reasonable inference that could be drawn from the evidence presented at trial. We agree with the State.

During opening statements, the prosecutor stated that Jackson "drug her out of the bedroom into this bathtub and put her in that bathtub where he tried to drown her." (R. 1444.) During closing arguments, the prosecutor stated that Jackson "tried to drown her in that bathtub, and to cover it all up, [Jackson] set the apartment on fire" (R. 1929), and that Jackson "attempted to drown her in the tub after stabbing her didn't work fast enough." (R. 1937.)

"A prosecutor may argue in closing any evidence that was presented at trial. He may also '"present his impressions from the evidence. He may argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way."'" Williams v. State, 627 So. 2d 994, 996 (Ala. Crim. App 1992), aff'd, 627 So. 2d 999 (Ala. 1993) (quoting Williams v. State, 601 So. 2d 1062, 1073 (Ala. Crim. App. 1991), aff'd, 662 So. 2d 929 (Ala. 1992), quoting in turn, Donahoo v. State, 505 So. 2d 1067, 1072 (Ala. Crim. App. 1986)). Given the fact that Richardson's body was found in a bathtub full of water, it was reasonable to infer that

Jackson may have tried to drown Richardson after stabbing and strangling her. Therefore, the prosecutor did not misstate the evidence, and we find no error, much less plain error, in the prosecutor's comments.

C.

Finally, Jackson argues that the prosecutor improperly compared Richardson's rights to that of his own. Specifically, he challenges the following comments made by the prosecutor at the beginning of the voir dire process:

> "The purpose of this is to select a fair jury for both sides in this case. Very often we hear that the Defendant deserves a fair trial and a fair jury. That is absolutely true. One hundred percent. Jamal Jackson, the Defendant, deserves a fair trial, but the State deserves a fair trial. The victim deserves a fair trial. The victim's family deserves a fair trial in this case. And that's really the purpose of these questions."

(R. 295.)

"Although this Court has frequently noted that a prosecutor should not compare the rights of a victim with those of the defendant, we have held that such arguments rarely rise to the level of plain error." Thompson v. State, 153 So. 3d 84, 171 (Ala. Crim. App. 2012). "'"Plain error" only arises if the error is so obvious that the failure to

notice it would seriously affect the fairness or integrity of the judicial proceedings.'" Ex parte Womack, 435 So. 2d 766, 769 (Ala. 1983).

It is clear that the prosecutor was explaining to the venire why he was going to ask probing questions during the voir dire process. The prosecutor "did not attempt to explain 'victim's rights,' indoctrinate the jurors, inflame the jurors, or improperly appeal to community sentiment." State v. Wilson, 74 Ohio St. 3d 381, 387, 659 N.E.2d 292, 301 (1996). Therefore, the prosecutor's comments did not amount to plain error.

XIII.

Jackson also argues that the trial court's jury instructions on intoxication were erroneous. Specifically, he contends that the court instructed the jury that, to negate the intent to kill, intoxication must amount to insanity but that the court failed to define insanity. During the charge conference, Jackson objected to the trial court's giving the following instruction requested by the State: "[T]he degree of intoxication necessary to reduce a charge from murder to manslaughter when the intoxication is voluntary must be so

great as to amount to insanity." (R. 1836.) However, Jackson argued only that it was not necessary to give the instruction. He did not argue that the proposed instruction was erroneous because it failed to define insanity, nor did he otherwise object to the trial court's failure to define insanity during its instructions. Therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The trial court gave the following instructions on intoxication:

> "A defense asserted in this case is intoxication by use of alcohol. Intoxication is a disturbance of mental or physical capacities resulting from the introduction of any substance into the body. Voluntary intoxication means intoxication caused by substances that the actor knowingly introduced into his body, the tendency of which to cause intoxication he knows or ought to know unless he introduces them under circumstances that would afford a defense to the charge.
>
> "Voluntary intoxication does not excuse a crime, but its excessiveness may produce such a mental condition as to render the intoxicated person incapable of forming a specific intent.
>
> "Intoxication is not a defense to an offense generally. However, intoxication of the Defendant whether voluntary or involuntary is admissible in evidence whenever it is relevant to negate an element of the offense such as intent. Where a certain mental state is an essential element of an alleged crime and a person was so intoxicated that he could not form that mental state, the mental

state would not exist and therefore the crime could not be committed.

"In this case, the specific intent to kill is an essential element of the crime charged in the indictment which was capital murder and of the lesser included offense of murder. If you find from the evidence that the Defendant was so intoxicated from the voluntary use of alcohol as to being capable of forming the specific intent to kill or you have a reasonable doubt about it, you should find the Defendant not guilty of capital murder and not guilty of the lesser included offense of murder. You must first decide whether the Defendant was intoxicated at the time of the alleged crime. And second, whether the Defendant was incapable of forming the specific intent to kill, which again, is a required element of the offense of capital murder and of the lesser included offense of murder.

"....

"I charge you that the degree of intoxication necessary to reduce a charge from murder or capital murder to manslaughter when the intoxication is voluntary must be so great as to amount to insanity.

"I charge you, members of the jury, that if you find from the evidence that the Defendant was intoxicated to the point that he was incapable of forming the specific intent required to commit the offense of capital murder and the lesser included offense of murder, then you must find him not guilty of capital murder or the lesser included offense of murder."

(R. 1982-84.)

"It is the law in Alabama that before intoxication can negate intent as an element of murder it must amount to

insanity. We have approved similar instructions." Woods v. State, 789 So. 2d 896, 934 (Ala. Crim. App. 1999), aff'd, 789 So. 2d 941 (Ala. 2001). In Wesson v. State, 644 So. 2d 1302 (Ala. Crim. App. 1994), this Court considered the validity of an instruction on intoxication when the trial court instructed the jury that the degree of intoxication must amount to insanity but the court did not define the terms "mental defect," "diminished capacity," or "insanity." In upholding the instruction, this Court stated:

> "[W]e note that the intoxication charge given in this case is similar to the charge upheld by the Alabama Supreme Court in Ex parte Bankhead, 585 So. 2d 112, 120-21 (Ala. 1991). The Supreme Court's previous implicit approval of a similar charge is an indicator that the charge in the present case was not erroneous. Cf. Ex parte Harrell, 470 So. 2d 1309, 1314 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985) (Supreme Court declined to find plain error in capital case partially on basis that 'trial court's instruction follow[ed] the pattern jury instruction "recommended" by [the Supreme] Court'). Furthermore, while the trial court did not define 'mental defect,' the charge when read as a whole, as we are required to read it, see, e.g., Alexander v. State, 601 So. 2d 1130, 1133 (Ala. Cr. App. 1992); Adams v. State, 587 So. 2d 1265, 1269 (Ala. Cr. App. 1991), clearly defined for the jury the degree of intoxication that would amount to 'insanity' and that is necessary to negate intent.
>
> "Section 13A-3-1(a), Ala. Code 1975, provides, in pertinent part: '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 a severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts.' The effect of insanity -- that the defendant 'was unable to appreciate the nature and quality or wrongfulness of his acts' -- was clearly conveyed to the jury by the court's instruction that, in order to negate intent, the 'intoxication must be of such character and extent as to render [the defendant] incapable of consciousness that he is committing a crime.' R. 405 (emphasis added). The trial court also twice emphasized that the appellant's intoxication must have been so excessive and extreme that the appellant was unable to form the requisite intent. We find no error in this charge."

Wesson, 644 So. 2d at 1313.

Here, the trial court repeatedly instructed the jury that, for intoxication to be a defense, the defendant had to be incapable of forming a specific intent and it clearly conveyed to the jury the degree of intoxication necessary to negate intent by telling the jury that "[w]here a certain mental state is an essential element of an alleged crime and a person was so intoxicated that he could not form that mental state, the mental state would not exist and therefore the crime could not be committed." (R. 1983.) Based on this Court's decision in Wesson, we find no error, plain or otherwise, in the trial court's instruction on intoxication.

Penalty-Phase Issues

XIV.

Jackson argues that the State failed to allege the aggravating circumstances in the indictment and that the failure to provide notice of the aggravating circumstances on which the State intended to rely to seek a death sentence violated his constitutional rights.

"Contrary to [the appellant's] contentions, 'aggravating circumstances do not have to be alleged in the indictment,' Stallworth v. State, 868 So. 2d 1128, 1186 (Ala. Crim. App. 2001). ..." McCray v. State, 88 So. 3d 1, 82 (Ala. Crim. App. 2010). Moreover, the State did provide notice to Jackson of the aggravating circumstances on which it intended to rely when it filed a pretrial "Notice of Aggravating Factors" stating:

> "Comes now the State of Alabama ... and gives notice that if there is a conviction for capital murder in this case, the State intends to rely on the following statutory aggravating circumstances in seeking the death penalty:
>
> > "1. [Jackson] was previously convicted of another capital offense or a felony involving the use or threat of violence to the person. Ala. Code § 13A-5-49(2).

> "2. The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Ala. Code § 13A-5-49(8)."

(C. 125.)

Therefore, Jackson is due no relief on this claim.

XV.

Jackson argues that the trial court erroneously permitted the State to introduce hearsay evidence at the penalty phase of his trial that denied him his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, Jackson challenges the admission into evidence of two police reports regarding an incident between him and Richardson that occurred a few months before Richardson's murder.

Just before the penalty phase began, the prosecutor stated:

> "I have the certified robbery conviction to prove one of my aggravators that he was convicted of a prior crime of violence against a person. I have two police reports that stem from the same incidents on March 21 of 2014. So this would have been four months prior [to Richardson's murder]. It's a domestic-violence situation. But on March 1, according to these police reports, and also according to some things that [Richardson] told Dorneshia Bendolph to confirm what's in these police reports, [Jackson] and [Richardson] were in an altercation at Cheddar's on Airport. It carried over into a vehicle where [Jackson] was striking

> [Richardson] multiple times. He forced her to drive around town, withdraw money from ATM's. They ended up at a Circle K on Airport where [Jackson] tried to run over [Richardson] in the parking lot and he ran his car into the gas station and injured a clerk inside, but he had the intent to assault ... Richardson when he did that. He then drove her car over to Raven Drive in Mobile and set it on fire.
>
> "....
>
> "It goes to heinous, atrocious, or cruel because it shows prior domestic situation between them which would lead to fear and terror on the part of [Richardson] as the domestic on July 4th turned into the murder that it did.

(R. 2025-26.)[12] The prosecutor also argued that he intended to present testimony from Bendolph because Bendolph knew about the incident that was the subject of the police reports. Jackson argued that the police reports constituted a nonstatutory aggravating circumstance and were not relevant to whether Richardson's murder was especially heinous, atrocious, or cruel as compared to other capital offenses. In addition, although Jackson agreed that the rules of evidence were "relaxed" during the penalty phase of a capital-murder trial, he argued that he was still entitled to rebut any evidence

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[12]Although the State argued during the penalty phase that Richardson's murder was especially heinous, atrocious, or cruel as compared to other capital murders, the jury did not find this aggravating circumstance to exist.

presented by the State and that it would be impossible to rebut police reports without questioning the source of the reports. (R. 2029.) The trial court allowed the reports to be introduced into evidence.

At the penalty phase, Bendolph testified about the incident that formed the basis of the police reports. Her testimony was substantially similar to the reports. She testified that Jackson got mad about a cigarette; that Jackson and Richardson got in Richardson's automobile; and that Jackson started punching Richardson as she drove. Bendolph said:

> "He bit her on her arm. He made her go to the ATM machine to withdraw her money where she had got her income tax. And when she got to the Circle K, he tried to run her over and he ran into the store. And when he pulled off, the car was smoking and she said that he set her car on fire."

(R. 2060.) Bendolph also said that about one month before Richardson was murdered, Richardson and Jackson had a fight and Jackson told Richardson that she was going to end up in a cemetery. (R. 2061.) Jackson had the opportunity to cross-examine Bendolph, and he did so.

"The Rules of Evidence do not apply to sentencing hearings. 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). Section 13A-5-45(d), Ala. Code 1975, states:

> "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."

In Callen v. State, [Ms. CR-13-0099, April 28, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017), this Court stated:

> "While it is true that hearsay is admissible at a sentencing hearing, there are limits to its admissibility.
>
> > "'The trial court may properly consider hearsay at the penalty phase of the trial if the defendant has an opportunity to rebut the evidence.
> >
> > > "'"'Courts are permitted to consider hearsay testimony at sentencing.... While hearsay evidence may be considered in sentencing, due process requires both that the defendant be given an opportunity to refute it and

> that it bear minimal indicia of reliability....'"'
>
> "Ex parte McGahee, 632 So. 2d 981, 982–83 (Ala. 1993), quoting, in part, Kuenzel v. State, 577 So. 2d 474, 526 (Ala. Crim. App. 1990). The same should apply to evidence the defense seeks to introduce at sentencing. Cf. Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997) ('We have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut.').
>
> "....
>
> "'Merely because testimony contains hearsay does not render it per se inadmissible at a sentencing hearing. [People v.] Harris, 375 Ill.App.3d [398] at 409, 313 Ill.Dec. 960, 873 N.E.2d 584 [(2007)]. If the evidence is "double hearsay[, it] should be corroborated, at least in part, by other evidence." People v. Spears, 221 Ill.App.3d 430, 437, 164 Ill.Dec. 19, 582 N.E.2d 227 (1991).'
>
> "People v. Varghese, 391 Ill.App.3d 866, [873,] 330 Ill.Dec. 917, [924,] 909 N.E.2d 939[, 946] (2009). ..."

___ So. 3d at ___.

In Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003), this Court upheld the admission into evidence during the penalty phase of a capital-murder trial a document entitled "Official Statement of Facts" that had been prepared by a prosecutor and that set forth the facts underlying the defendant's prior conviction for murder. We explained:

"After reviewing the record, we conclude that the 'Official Statement of Facts' was properly admitted under § 13A-5-45(d). The document had probative value and was relevant to sentencing. As noted above, with respect to the prior conviction, the State pursued two aggravating circumstances -- that Gavin was on parole at the time of Clayton's murder and that Gavin had previously been convicted of a capital offense or a felony involving the use or threat of violence to the person. The facts surrounding Gavin's prior murder conviction were relevant and probative and properly admitted to show the violent nature of the prior offense. See Dill v. State, 600 So. 2d 343, 364 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992) (holding that hearsay evidence of the circumstances surrounding the defendant's prior robbery conviction 'was properly admitted to show the violent nature of the offense'); Siebert v. State, 562 So. 2d 586, 598 (Ala. Crim. App. 1989), aff'd, 562 So. 2d 600 (Ala. 1990) (holding that 'testimony regarding the violence of the appellant's prior manslaughter offense was relevant and of probative value in the sentencing aspect of the trial'); and Johnson v. State, 399 So. 2d 859, 864 (Ala. Crim. App. 1979), aff'd in pertinent part, rev'd on other grounds, 399 So. 2d 873 (Ala. 1979) (holding that hearsay evidence '[t]hat the defendant had been involved in a prior robbery where great violence had been perpetrated against the victim' was properly admitted under § 13-11-3, Ala. Code 1975, the predecessor to § 13A-5-45(c) and (d), Ala. Code 1975, as probative and relevant to the sentencing determination).

"Moreover, we conclude, as did the trial court, that Gavin was provided a fair opportunity to rebut the facts in the document. Gavin stated at trial that he did not have access to the 'official record' from his previous conviction, but that he had 'investigation only.' (R. 1234.) We do not believe that Gavin's not having the official record of his

> previous trial denied him a fair opportunity to rebut the facts of the document; his reference to 'investigation only' indicates that he had at least some information from the investigation of the prior murder. In addition, in addressing a similar claim regarding the opportunity to rebut hearsay evidence in Ex parte Dunaway, 746 So. 2d 1042 (Ala. 1999), four Justices on the Alabama Supreme Court noted that '[a]lthough he had a constitutional right not to do so, Dunaway, in an effort to rebut the [hearsay] testimony of the State's witnesses ..., could have testified during the sentencing phase, as he chose to do during the guilt phase.' 746 So. 2d at 1048. Although Gavin did not testify at the guilt phase of his trial, as the appellant did in Ex parte Dunaway, he nevertheless could have testified at the sentencing phase in an effort to rebut the facts regarding the prior murder. Therefore, we find that Gavin was afforded a fair opportunity to rebut the facts in the document as required by § 13A-5-45(d)."

891 So. 2d at 953-54.

Similarly, here, Jackson was afforded a fair opportunity to rebut the facts in the police reports. Not only did Jackson have the opportunity to cross-examine Bendolph about the circumstances of the prior incident, he could have testified on his own behalf at the penalty phase in an effort to rebut the facts contained in the police reports and to rebut Bendolph's testimony. Therefore, we find no error in the admission of the police reports.

Moreover, even if admission of the police reports was error, as noted above, the contents of those reports were essentially the same as Bendolph's testimony. "Testimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred." McFarley v. State, 608 So. 2d 430, 433 (Ala. Crim. App. 1992). See also Yeomans v. State, 641 So. 2d 1269, 1272–73 (Ala. Crim. App. 1993).

Accordingly, Jackson is due no relief on this claim.

XVI.

Jackson argues that prosecutorial misconduct during the penalty phase of the trial denied him a fair trial. He did not object to the instances of alleged prosecutorial misconduct he now challenges on appeal. Therefore, we review these claims for plain error. See Rule 45A, Ala. R. App. P.

> "'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. Whitlow v. State, 509 So. 2d 252, 256 (Ala. Cr. App. 1987); Wysinger v. State, 448 So. 2d 435, 438 (Ala. Cr. App. 1983); Carpenter v. State, 404 So. 2d 89,

> 97 (Ala. Cr. App. 1980), cert. denied, 404 So. 2d 100 (Ala. 1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued at their true worth and are not expected to become factors in the formulation of the verdict. Orr v. State, 462 So. 2d 1013, 1016 (Ala. Cr. App. 1984); Sanders v. State, 426 So. 2d 497, 509 (Ala. Cr. App. 1982).'"

Callahan v. State, 767 So. 2d 380, 392 (Ala. Crim. App. 1999) (quoting Bankhead v. State, 585 So. 2d 97, 105–07 (Ala. Crim. App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1992), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993)). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Phillips v. State, 65 So. 3d 971, 1033 (Ala. Crim. App. 2010).

A.

First, Jackson argues that the prosecutor made derogatory remarks about him. The entirety of his argument in brief reads:

> "[A]t the penalty phase, the prosecutor made derogatory comments about Mr. Jackson, referring to

> him as 'a blood thirsty animal' (R. 2175) and 'evil.' (R. 2176). These remarks exceeded the limit of fair argument. Nicks v. State, 521 So. 2d 1018, 1023 (Ala. Crim. App. 1987); see also Mills v. Maryland, 486 U.S. 367, 376 (1988)."

(Jackson's brief, p. 81.)

This Court has recognized that "'there can be no waiver of appellate review in a case in which the death penalty has been imposed.'" Clark v. State, 896 So. 2d 584, 633 n.14 (Ala. Crim. App. 2000) (opinion on return to remand and on application for rehearing) (quoting Nelson v. State, 681 So. 2d 252, 256 (Ala. Crim. App. 1995), aff'd, 681 So. 2d 260 (Ala. 1996)). However,

> "[w]e in no way condone a party's reliance on the mere citing of page numbers from the record, without a discussion of the pertinent facts from those pages and application of the pertinent law to those facts. We consider such reliance an indication of a lack of merit of the contention the party asserts."

Hardy v. State, 804 So. 2d 247, 289 (Ala. Crim. App. 1999), aff'd, 804 So. 2d 298 (Ala. 2000). See also Jackson v. State, 791 So. 2d 979, 1015 (Ala. Crim. App. 2000).

That being said, the record reflects that near the end of the prosecutor's closing argument during the penalty phase, the prosecutor argued: "And he attacked her like a blood-

thirsty animal." (R. 2175; emphasis added). A few moments later the prosecutor stated: "I'm not asking you to just hand out the death penalty for no reason. This is why we have the death penalty. It's for evil men like him doing evil things like this." (R. 2176; emphasis added.)

> "This Court has repeatedly held that the prosecutor may refer to an accused in unfavorable terms, so long as the evidence warrants the use of such terms. E.g., Nicks v. State, 521 So. 2d 1018, 1022–23 (Ala. Cr. App. 1987), affirmed, 521 So. 2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988); Barbee v. State, 395 So.2d 1128, 1134–35 (Ala. Cr. App. 1981), and cases cited therein. See also State v. Wilson–Bey, 21 Conn. App. 162, 572 A.2d 372, cert. denied, 215 Conn. 806, 576 A.2d 537 (1990) (characterization of accused as 'peddling death' borne out by the evidence); State v. Wiles, 59 Ohio St.3d 71, 571 N.E.2d 97, 117 (1991) (reference[s] to the accused as an 'ogre,' a 'man-eating monster,' a 'hideous brutish person,' and an 'animal' were supported by the evidence)."

McNair v. State, 653 So. 2d 320, 341 (Ala. Crim. App. 1992), aff'd, 653 So. 2d 353 (Ala. 1994). See also McCray v. State, 88 So. 3d 1, 43-44 (Ala. Crim. App. 2010), and the cases cited therein.

Here, Jackson stabbed Richardson 32 times and used an electrical cord to strangle her. He then placed her body in a tub full of water. All of this occurred in front of Richardson's four-year-old daughter. Certainly, the

prosecutor's remarks that Jackson was a "blood thirsty animal" and "evil" were more than supported by the facts presented at trial. The prosecutor's remarks did not constitute error, much less plain error.

B.

Second, Jackson argues that the prosecutor improperly argued that the only way justice could be served was to sentence Jackson to death. Specifically, he argues that the prosecutor improperly vouched for the State's case when he made the following remarks during closing argument:

> "I'm not asking you to just hand out the death penalty for no reason. This is why we have the death penalty. It's for evil men like him doing evil things like this. Please don't misunderstand me. Don't misunderstand me. I'm not asking you for this because I take some kind of joy in this. I don't. I'm asking you for this because it is necessary, it is necessary in this situation. It is necessary in this case. It is right and it is just. This is justice. It is necessary to meet evil with justice and stamp it out."

(R. 2176.)

> "When the prosecutor's comments are viewed in context, it is clear that he was properly arguing in favor of a sentence of death and properly reminding the jury of the gravity of its penalty-phase role. For instance, in stating that, 'if this case does not call for the death penalty, what does,' the prosecutor was properly arguing that a death sentence is appropriate and appealing to the jury to

> do justice. See Hall [v. State], 820 So. 2d [113] at 143 [(Ala. Crim. App. 1999)]. Also, the prosecutor's comment that his office does not seek a death sentence lightly was not an improper request for the jury to ignore its penalty-phase duty. Instead, this comment merely reminded the jury of the gravity of its penalty-phase decision by informing the jury that in making its penalty phase decision it has an awesome responsibility -- one that the State does not lightly ask a jury to shoulder. Cf. Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000) (holding that a 'prosecutor['s] [comment to] the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision[, was] a permissible line of commentary')."

Vanpelt v. State, 74 So. 3d 32, 91-92 (Ala. Crim. App. 2009).

We have carefully reviewed the prosecutor's argument as a whole and in the context of the entire trial, and we conclude that the prosecutor was not improperly vouching for the State's case. Rather, the prosecutor was merely commenting on the strength of the State's case. Therefore, we find no error, much less plain error, in the prosecutor's remarks.

XVII.

Jackson also argues that using his prior robbery conviction, which occurred when he was 17 years old, as the sole aggravating circumstance to support the imposition of the

death penalty in this case violates his right to be free from cruel and unusual punishment. Specifically, Jackson argues that, although Roper v. Simmons, 543 U.S. 551 (2005), "does not require that courts 'wipe clean' individuals' records, ... it does insist that individuals not be executed for conduct they engaged in as children." (Jackson's brief, p. 78.) Thus, Jackson concludes, his sentence of death could not be predicated solely on a prior offense he committed when he was a juvenile. The certified copy of Jackson's 2010 conviction for first-degree robbery that the State introduced into evidence during the penalty phase of the trial indicates that, although Jackson was 17 years old when he committed the robbery, he was tried and convicted as an adult.

In Woodward v. State, 123 So. 3d 989 (Ala. Crim. App. 2011), this Court rejected a similar argument:

> "The State presented evidence at the penalty phase of Woodward's trial to establish that Woodward had a prior conviction for manslaughter, and Woodward acknowledged to the jury that he had been convicted of manslaughter and that that conviction could be used as an aggravating circumstance. (R. 1368.) The jury found that aggravating circumstance to exist, as did the trial judge in his sentencing order. Although Woodward was a juvenile when he committed the crime, he was tried as an adult and was convicted and sentenced to 15 years' imprisonment. (C. 918.) Therefore, the conviction

was properly considered by the trial court as an aggravating circumstance. Yancey v. State, 65 So. 3d 452, 477–78 (Ala. Crim. App. 2009). The opinion in Yancey was rendered years after the decision in Roper [v. Simmons, 543 U.S. 551 (2004)]; the reasoning in Roper did not then, and it does not now, prohibit the consideration, as an aggravating circumstance, of a prior adult conviction for a crime of violence, even if the crime was committed when the offender was under the age of 18. We agree with the reasoning expressed in United States v. Wilks, 464 F.3d 1240 (11th Cir. 2006), in which the United States Court of Appeals for the Eleventh Circuit held that the reasoning in Roper did not prohibit using a youthful-offender conviction to enhance the sentence of an adult offender. The Court stated:

> "'Roper held only that the Eighth Amendment prohibits sentencing capital offenders to death if the offender was under the age of eighteen at the time of the offense.
>
> "'Our conclusion that youthful offender convictions can qualify as predicate offenses for sentence enhancement purposes remains valid because Roper does not deal specifically -- or even tangentially -- with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.'

"United States v. Wilks, 464 F.3d at 1243."

Woodward, 123 So. 3d at 1048.

Other states have agreed with this Court's reasoning in Woodward.

> "Lowe claims that his death sentence is unconstitutional because the State used prior convictions which arose from crimes committed by Lowe before he was eighteen years of age to establish an aggravating factor, and that the use of the juvenile convictions is in violation of the Eighth Amendment and Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In Roper, the United States Supreme Court held that '[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.' Id. at 578, 125 S.Ct. 1183. Lowe attempts to expand this prohibition to preclude the State from using as an aggravating factor a conviction for a crime committed by a defendant before he turned eighteen. However, Roper does not stand for this proposition, as this Court has held. See England v. State, 940 So. 2d 389 (Fla. 2006); Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990) (finding that prior juvenile convictions can be considered to support the prior violent felony aggravator)."

Lowe v. State, 2 So. 3d 21, 46 (Fla. 2008).

> "Defendant asks us to apply the Eighth Amendment's ban on imposing the death penalty for crimes committed by juveniles, established in Roper v. Simmons (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, to preclude the state from seeking the death penalty 'solely on the basis of a crime [he] committed while still a minor.' The flaw in this argument is that defendant did not face the death penalty as punishment for the crime he committed as a juvenile. He faced that penalty for murdering Guevara when he was an adult, having suffered a

prior murder conviction. (Cf. [People v.] Bivert, supra, 52 Cal.4th at p. 123, 127 Cal. Rptr.3d 261, 254 P.3d 300 [(2011)].) 'As we have previously noted, Roper v. Simmons, supra 543 U.S. 551 [125 S.Ct. 1183], spoke only to the question of punishment for juvenile offenses....' (Bivert, at p. 122, 127 Cal. Rptr.3d 261, 254 P.3d 300, citing People v. Bramit (2009) 46 Cal.4th 1221, 1239, 96 Cal. Rptr.3d 574, 210 P.3d 1171.) Defendant provides no authority for the proposition that it is unconstitutional to base a special circumstance on a prior conviction for a murder committed as a juvenile. Adults who commit first degree ... murder despite having a previous murder conviction, whether or not the prior offense occurred when they were juveniles, are a distinct subclass of murderers that can 'with reliability be classified among the worst offenders.' (Roper, supra, 543 U.S. at p. 569, 125 S.Ct. 1183; see People v. Bacigalupo, supra, 6 Cal.4th at pp. 467–468, 24 Cal. Rptr.2d 808, 862 P.2d 808.)

"Furthermore, defendant offers no persuasive reason why it should be constitutional for a jury to consider a murder committed as a juvenile for the purpose of its penalty determination, but unconstitutional for the state to include convictions for such murders in the prior-murder-conviction special circumstance. It is true that special circumstances and aggravating factors serve different functions in our capital scheme, but in neither instance is the defendant being punished for juvenile misconduct. In both instances, the past conduct only serves as a guiding consideration: a preliminary one, as a special circumstance determining death eligibility for a murder committed as an adult, and an ultimate one, as an aggravating factor to be weighed in the final determination of the appropriate penalty for that murder."

People v. Salazar, 63 Cal. 4th 214, 225-26, 202 Cal. Rptr. 3d 638, 650-51, 371 P.3d 161, 171-72 (2016).

In essence, Jackson argues that this Court should extend the holding in Roper beyond the express limitations this Court has previously recognized. We decline to do so. Nothing in Roper forbids using the prior adult conviction that occurred when Jackson was a juvenile as an aggravating circumstance to support the death penalty, and Roper does not bar Jackson's sentence of death. Therefore, Jackson is due no relief on this claim.

XVIII.

Jackson argues that two of the trial court's jury instructions during the penalty phase of the trial were erroneous.

"A trial court has broad discretion in formulating its jury instructions, so long as the charge accurately reflects the law and relevant facts." Ingram v. State, 779 So. 2d 1225, 1258 (Ala. Crim. App. 1999), aff'd, 779 So. 2d 1283 (Ala. 2000). "'[T]he court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together."'

Self v. State, 620 So. 2d 110, 113 (Ala. Crim. App. 1992) (quoting Porter v. State, 520 So. 2d 235, 237 (Ala. Crim. App. 1987)). "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), aff'd, 820 So. 2d 883 (Ala. 2001). "'"The language of a charge must be given a reasonable construction, and not a strained and unreasonable one."'" Kennedy v. State, 472 So. 2d 1092, 1103 (Ala. Crim. App. 1984), aff'd, 472 So. 2d 1106 (Ala. Crim. App. 1985) (quoting Harris v. State, 394 So. 2d 96, 100 (Ala. Crim. App. 1981), quoting in turn 23A C.J.S. Criminal Law, § 1318 (1961)).

A.

First, Jackson argues that the trial court erred in instructing the jury "that the crime of robbery in the first degree is a felony involving the use or threat of violence to the person." (R. 2194.) Specifically, he argues that, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), it was for the jury to

determine whether his prior conviction for first-degree robbery was a felony involving the use or threat of violence and, thus, whether the aggravating circumstance that he had previously been convicted of a felony involving the use or threat of violence existed. Jackson did not raise this issue in the trial court. Therefore, we review this claim for plain error. 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), aff'd, 825 So. 2d 233 (Ala. 2001) (quoting Pilley v. State, 789 So. 2d 870, 882-83 (Ala. Crim. App. 1998), rev'd on other grounds, 789 So. 2d 888 (Ala. 2000)). Moreover, "[t]he absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the

defendant's failure to object does weigh against his claim of prejudice." Ex parte Boyd, 715 So. 2d 852, 855 (Ala. 1998).

As the State correctly argues, there is no scenario where the crime of robbery in the first degree is not a felony involving the use or threat of violence. Section 13A-8-41, Ala. Code 1975, provides, in relevant part:

> "(a) A person commits the crime of robbery in the first degree if he violates Section 13A-8-43 and he:
>
> > "(1) Is armed with a deadly weapon or dangerous instrument; or
> >
> > "(2) Causes serious physical injury to another.
>
> "....
>
> "(c) Robbery in the first degree is a Class A felony."

Section 13A-8-43, Ala. Code 1975, provides, in relevant part:

> "(a) A person commits the crime of robbery in the third degree if in the course of committing a theft he:
>
> > "(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or
> >
> > "(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel

> acquiescence to the taking of or escaping with the property."

Because first-degree robbery is a Class A felony that requires either the use or the threat of force and that requires either that the defendant be armed with a deadly weapon or dangerous instrument or cause serious physical injury to another, first-degree robbery necessarily constitutes "a felony involving the use or threat of violence to the person." § 13A-5-49(2), Ala. Code 1975. Accordingly, we find no error, plain or otherwise, in the trial court's instruction in this regard.

B.

Second, Jackson argues that the trial court erred in reading the list of all the statutory mitigating circumstances in § 13A-5-51, Ala. Code 1975, to the jury. Specifically, he contends that, by instructing the jury on mitigating circumstances that were inapplicable, the court "effectively turned the absence of evidence supporting irrelevant statutory mitigators into an improper nonstatutory aggravator." (Jackson's brief, p. 94.)

During the charge conference, when the trial court indicated its intent to read to the jury the list of all

statutory mitigating circumstances, Jackson objected, arguing: "Our concern is you read off all these, none of them apply, but it looks like we missed the boat." (R. 2164-65.) The trial court indicated that its policy was to give the pattern jury instructions and that the pattern instruction "says give them all." (R. 2165.) During its oral charge, the trial court read to the jury each of the statutory mitigating circumstances in § 13A-5-51 and then instructed the jury that

> "mitigating circumstances shall also include any aspect of a Defendant's character, background, or record or any of the circumstances of the offense that the Defendant offers as a basis for a sentence of life imprisonment without parole instead of death and any other relevant mitigating circumstance that the Defendant offers as a basis for a sentence of life imprisonment without parole instead of death."

(R. 2200.) At the conclusion of the court's instructions, Jackson again objected, arguing that the trial court erred in listing all the "mitigators." (R. 2209.)

Although "[t]here is no requirement that the trial court read the entire list of statutory mitigating circumstances to a jury where there was no evidence offered to support each circumstance," that does not mean it is erroneous to do so. Pressley v. State, 770 So. 2d 115, 142 (Ala. Crim. App. 1999), aff'd, 770 So. 2d 143 (Ala. 2000). In Perkins v. State, 808

So. 2d 1041 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds by Perkins v. Alabama, 536 U.S. 953 (2002), this Court rejected an argument similar to Jackson's:

> "The trial court's instructions were materially identical to those set out in the Alabama Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried Under Act No. 81-178. 'A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error.' Price v. State, 725 So. 2d 1003, 1058 (Ala. Cr. App. 1997), aff'd, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999). We have reviewed the trial court's jury instructions in their entirety, and with Perkins's argument in mind, we find that the instruction on mitigating circumstances, which listed all the mitigators in § 13A-5-51, did not unduly emphasize the absence of evidence regarding certain factors. As we stated in Carroll v. State, 599 So. 2d 1253, 1271 (Ala. Cr. App. 1992), aff'd, 627 So. 2d 874 (Ala. 1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994): 'As a practical matter, it would be impossible for the jury to determine the existence of any statutory mitigating factor unless it had been instructed on what those factors were.' Further, the jury was correctly instructed on the only aggravating circumstances it could consider in recommending sentence. Accordingly, we find no error, plain or otherwise, as to this matter."

808 So. 2d at 1134.

Similarly, here, after reviewing the court's instructions in their entirety, we conclude that the instruction listing

all the mitigating circumstances in § 13A-5-51 did not unduly emphasize the absence of evidence concerning certain mitigating circumstance nor could any reasonable juror have construed the instruction to indicate that the lack of evidence as to one or more statutory mitigating circumstances was a nonstatutory aggravating circumstance. The trial court clearly instructed the jury that it could consider only two aggravating circumstances -- that Jackson had previously been convicted of a felony involving the use or threat of violence to the person and that the murder was especially heinous, atrocious, or cruel when compared to other capital murders -- but that it could consider any evidence to be mitigating. The trial court's instruction was substantially similar to the Alabama Pattern Jury Instructions: Criminal, Capital Murder, Penalty Phase then effective (adopted November 9, 2007) (currently found at http://judicial.alabama.gov/library/juryinstructions.)[13] "It is the preferred practice to use the pattern jury instructions in a capital case," Ex parte Hagood, 777 So. 2d 214, 219 (Ala.

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[13]The pattern instructions were subsequently amended to reflect the changes to Alabama's capital-sentencing scheme in Act No. 2017-131, Ala. Acts 2017. See note 1, supra.

1999), and, although "[t]here may be some instances when using those pattern charges would be misleading or erroneous," Ex parte Wood, 715 So. 2d 819, 824 (Ala. 1998), we do not find that to be the case here.

Therefore, we find no error, much less plain error, in the trial court's instructions.

XIX.

Jackson argues that Alabama's capital-sentencing scheme violates the United State Supreme Court's holdings in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), and Ring v. Arizona, 539 U.S. 585 (2016), and that, therefore, his sentence of death must be vacated. In his brief, Jackson acknowledges the Alabama Supreme Court's decisions in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002). The Alabama Supreme Court in Ex parte Bohannon upheld Alabama's capital-murder statute against a claim that it violated Hurst and, in Ex parte Waldrop, the Alabama Supreme Court upheld Alabama's capital-murder statute against a claim that it violated Ring. "'[T]his Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions." Reynolds v.

State, 114 So. 3d 61, 157 n.31 (Ala. Crim. App. 2010) (citing § 12-3-16, Ala. Code 1975). Therefore, Jackson is due no relief on this claim.

Sentencing-Order Issues

XX.

Jackson argues that the trial court's sentencing order is defective because, he says, the court erroneously considered victim-impact evidence when sentencing him to death. Specifically, he argues that the trial court erroneously considered several letters written by Richardson's family about the impact Richardson's death had on them. Two of Richardson's family members expressed their opinions about the murder and indicated that Jackson should be sentenced to death. 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.

At the sentencing hearing before the trial court, the State asked that letters from Richardson's family be admitted as exhibits, and the trial court admitted the letters as Court's Exhibit 9. The court admitted letters written on

behalf of Jackson as Court's Exhibit 10. At the conclusion of the sentencing hearing, the trial court stated:

> "Is there -- and I say this to anyone in the courtroom, is there anyone from the victim's side of the family that wishes to address the Court personally about anything? I have read every letter that's been sent on behalf of the decedent, on behalf of the victim. I've read every one at length. I hope you can see that on my face. But I offer to you personally, anybody on the victim's side, if anybody wants to speak to the Court directly, now is the time."

(R. 2260.) The trial court referenced the letters from Richardson's family, as well as the letters submitted on Jackson's behalf, in that portion of its sentencing order setting out the procedural history of the case.

However, there is no indication that the trial court considered the letters from Richardson's family when weighing the aggravating circumstances and the mitigating circumstances and sentencing Jackson to death. In the absence of a clear indication in the record otherwise, we must presume that the trial court knew the law and correctly applied that law when fixing Jackson's sentence at death. See Woodward v. State, 123 So. 3d 989, (Ala. Crim. App. 2011) ("Apart from the fact that the record discloses no evidence indicating that the trial court relied on improper factors in determining

Woodward's sentence, we note, too, that trial judges are presumed to know and to follow the law."). "[B]ecause the sentencing order reflects proper weighing of the aggravating circumstances and the mitigating circumstances, we apply the doctrine that the trial judge is presumed to disregard any inadmissible evidence and improper facts in sentencing." Sockwell v. State, 675 So. 2d 4, 36 (Ala. Crim. App. 1993), aff'd, 675 So. 2d 38 (Ala. 1995).

> "There is nothing in the trial court's sentencing order that indicates that it considered, in sentencing Whitehead to death, the testimony of [the victim's] family [that Whitehead should be sentenced to death]. We presume that the trial court disregarded any inadmissible or improper considerations in its sentencing determination. See Sockwell v. State, 675 So. 2d 4, 36 (Ala. Cr. App. 1993), aff'd, 675 So. 2d 38 (Ala. 1995), cert. denied, 519 U.S. 838 117 S.Ct. 115, 136 L.Ed.2d 67 (1996)."

Whitehead v. State, 777 So. 2d 781, 848 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 854 (Ala. 2000).

Accordingly, we find no plain error in the trial court's sentencing order.

XXI.

Jackson argues that the trial court erroneously failed to consider and give any weight to the statutory mitigating

circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the murder.

In its order, the trial court stated the following concerning this mitigating circumstance, in relevant part:

> "Ala. Code Section 13A-5-51(6) (1975) defines this mitigating circumstance as:
>
> > "'The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.'
>
> "While [Jackson] generally asserted to the Court that the thrust of the defense during the penalty phase was based on non-statutory mitigators, [Jackson's] attorneys expressly asserted [Jackson's] use of alcohol and 'borderline intellectual functioning' to the jury in closing arguments during the penalty phase.
>
> "During the penalty phase, the defense also offered evidence of [Jackson's] level of intellectual function (through the reports and testimony of Dr. Bennett). However, Dr. Bennett's written report conceded:
>
> > "'There is not a great deal of collateral information available about [Jackson's] mental state at the time of the offense. No conclusions can be drawn about his mental state at that time.'

"See Defendant's Ex. #1 (report after January 2016 examinations), p. 4.

"Also, Dr. Bennett confirmed the following as to the Defendant:

> "'Assessment of adaptive behavior yielded a street survival skills quotient of 95, in the average range for his age. He demonstrated slightly above average ability in understanding of time and time-related concepts. He demonstrated average ability in tasks requiring ability to use common measurements; skill in recognizing and handling money; knowledge of a wide range of public services utilized in community living; ability to recognize signs and symbols used in the community; and understanding of basic spatial and quantitative concepts. He demonstrated slightly below average understanding of personal healthcare, hygiene, first aid, and safety. He demonstrated well below average knowledge of various tools used in the home and in various other situations and in familiarity with the requirements for successfully managing an apartment. In general, his adaptive skills are better than his cognitive skills.

"Defendant's Ex. #2 (report after June/July 2016 examinations), pp. 1-2.

"Dr. Bennett testified that an 'average' IQ score is 90 to 109. He confirmed that 69 and below is 'typically' thought of as 'retarded.' Defendant Jackson's IQ scores were 77 (January 2016, Ex. #1) and 81 (June/July 2016, Ex. #2). Dr. Bennett's 'Diagnostic Impression' was:

> "'Persistent Depressive Disorder with Anxious Distress. Borderline to low

Average Intellectual Functioning, Adult Antisocial Behavior.'

"Defendant’s Ex. #2, p. 2.

"The defense also called witnesses during the guilt phase (Leon Jackson and Jans'sica Jackson) who testified to the level of [Jackson's] alcohol consumption during the 24 hours before the murder. [Jackson's] records from the hospital reflected an alcohol level of 189 mg in [Jackson] and reflected part of the diagnosis as being 'alcohol intoxication.'

"However, by hearing and receiving the evidence from the State and [Jackson] related to [Jackson's] level of alcohol consumption but yet still finding [Jackson] guilty of capital murder during the guilt phase the Jury necessarily found that [Jackson] had sufficient 'intent' to commit the capital murder.

"....

"In addition, the jury's rejection of [Jackson's] argument for the lesser-included offense of manslaughter based on a voluntary intoxication theory demonstrates that the jury believed that [Jackson] was able to 'appreciate the criminality of his conduct' and that this ability to 'conform his conduct to the requirements of law was [not] substantially impaired.' In finding [Jackson] guilty of capital murder, the jury necessarily rejected the theory that he was so intoxicated by alcohol that he failed to form an intent to commit murder. This Court agrees with the jury's conclusion in the regard.

"Further, it is undisputed that after the murder of Satori Richardson, [Jackson] drove over 60 miles from the apartment in Mobile, Alabama, to Gulf Breeze, Florida, where he ultimately was arrested. [Jackson's] ability to drive this significant

> distance clearly bears in favor of a finding that [Jackson] was not substantially impaired in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> "The Court has considered the level of intellectual function of [Jackson] and [Jackson's] diagnosis by Dr. Bennett as having 'adult anti-social disorder,' and, in conjunction with his IQ, gives this evidence some weight. However, the weight given is small.
>
> "Upon consideration of the totality of the evidence, this Court specifically finds that [Jackson] was not 'substantially impaired' in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Accordingly, the Court finds that this statutory mitigator does not exist and gives it no weight."

(C. 78-81.)

"'Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance.'" Simmons v. State, 797 So. 2d 1134, 1182 (Ala. Crim. App. 1999) (quoting Wilson v. State, 777 So. 2d 856, 893 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 935 (Ala. 2000)).

> "'"While Lockett [v. Ohio, 438 U.S. 586 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion

of the sentencing authority."' Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996) (quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)). 'The weight to be attached to the ... mitigating evidence is strictly within the discretion of the sentencing authority.' Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000)."

> "'"[T]he sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. Murry v. State, 455 So. 2d 53 (Ala. Cr. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation."'

"Bush v. State, 695 So. 2d 70, 94 (Ala. Crim. App. 1995) (quoting Clisby v. State, 456 So. 2d 99, 102 (Ala. Crim. App. 1983)). See also Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004) ('We conclude that the trial court did not abuse its discretion in giving little weight to the mitigating facts relating to [the defendant's] abusive childhood.'); Hines v. State, 856 N.E.2d 1275, 1282-83 (Ind. App. 2006) ('The trial court is not obliged to weigh or credit mitigating factors the way a defendant

> suggests.... [or] to afford any weight to [the defendant's] childhood history as a mitigating factor in that [the defendant] never established why his past victimization led to his current behavior.')."

Thompson v. State, 153 So. 3d 84, 189 (Ala. Crim. App. 2012).

The trial court's order clearly reflects that it properly considered this mitigating circumstance but that, based on the evidence presented at trial, it chose not to find this mitigating circumstance to exist. The court complied with the requirements of Lockett v. Ohio, 438 U.S. 586 (1978), and Jackson is due no relief on this claim.

XXII.

Jackson also argues that the trial court's sentencing order indicates that it improperly drew an adverse inference from his not testifying at trial. In support of his claim, he relies on Mitchell v. United States, 526 U.S. 314, 329 (1999), in which the United States Supreme Court held that "[t]he concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing."

Specifically, Jackson challenges the following statement in the court's sentencing order: "There has been no pretense of an explanation during the guilt phase, the penalty phase,

or the arguments of counsel, as to any justification for the brutal, vicious, and unprovoked murderous acts of [Jackson]." (C. 85.) Immediately following this statement in its order, the trial court stated:

> "In fact, the defense never even argued that Jackson did not kill the victim Satori Richardson. Relative to the guilt phase, the defense requested that the Court instruct the jury as to lesser-included offenses of murder and manslaughter and the Court did so instruct the jury. During the guilt phase, the defense argued that the jury should return a verdict of guilty as to the lesser-included offense of manslaughter. However, the jury rejected both of the lesser-included offenses."

(C. 85.) The complained-of statement appears in a section of the order entitled "General Comments," in which the trial court addressed a sentencing memorandum submitted by Jackson, urging the court to sentence him to life imprisonment without the possibility of parole. No objection to this portion of the trial court's order was made at trial; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

When read in context, it is clear that the trial court's statement was not a reference to Jackson's failure to testify. Rather, it was a reference to Jackson's defenses at trial -- that he was too intoxicated to form the intent to kill and

that the fire was an accident -- and the fact that the jury had rejected his defenses. Therefore, we find no violation of the United States Supreme Court's decision in Mitchell, and Jackson is due no relief on this claim.

XXIII.

In accordance with Rule 45A, Ala. R. App. P., we have examined the record for any plain error with respect to Jackson's capital-murder conviction, whether or not brought to our attention or to the attention of the trial court, and we find no plain error or defect in the guilt phase of the proceedings.

In accordance, with § 13A-5-53, Ala. Code 1975, this Court must also review the propriety of Jackson's sentence of death. Section 13A-5-53(a) states:

> "In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in

> the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence."

We find no error adversely affecting Jackson's rights during the penalty phase of the trial or the sentencing proceedings before the trial court.

In its sentencing order, the trial court, in accordance with the jury's verdict, found as the sole aggravating circumstance that Jackson had previously been convicted of an offense involving the use or threat of violence to another person. See § 13A-5-49(2), Ala. Code 1975. The trial court considered and discussed each statutory mitigating circumstance set out in § 13A-5-51, Ala. Code 1975, but found none to exist. The court then made the following findings regarding nonstatutory mitigating circumstances:

> "a. [Jackson's] Character, life, and record
>
> "[Jackson's] biological father was not married to [his] biological mother. [Jackson] had little

interaction with his father and when there was interaction it was generally negative. The Defense called a number of witnesses who testified to the life [Jackson] had led.

"Witness Kayla Jackson (cousin of [Jackson]) said [Jackson] had helped with a child by providing diapers, and had helped with clothes and transportation. She said [Jackson] offered her a place to stay. She said Defendant Jackson always had a job. Witness Peyton Jackson (brother of [Jackson]) said Defendant Jackson was like a father since the biological father was not there. Peyton Jackson said the father had even stolen the kids' Christmas gifts one year. Peyton Jackson said finances were tough for [Jackson's] family and Defendant Jackson was the main bread-winner.

"Witness Jan Jackson (cousin of [Jackson]) also said [Jackson's] family had tough financial times and moved around a lot. She said [Jackson] would give advice about boys and other matters. She said she and [Jackson] often walked a long distance to school. She said [Jackson's] father was in and out of prison and was on drugs. [Jackson's] father used to fight [Jackson's] mother and used to fight [Jackson].

"Witness Tarji Jackson (aunt of [Jackson]) said [Jackson's] father had never been in the life of the children. She said if the father was not on drugs he would be in jail. She saw the father fight with [Jackson's] mother. [Jackson's] mother had a brain aneurysm 17 months earlier and as of the time of trial had cancer. Tarji Jackson said that [Jackson] called his mother every day. She said that [Jackson] and Tarji Jackson's son ([Jackson's] cousin) had a lawn business at 12 or 13 years old and he later worked at McDonalds.

"Witness Aaron Jackson (cousin of [Jackson]) said [Jackson's] father did not contribute money. Aaron

Jackson said [Jackson] would bring food home from wherever he worked. Aaron Jackson said [Jackson] and he quit school to work. [Jackson's] attorneys argued that [Jackson] was a 'provider' for his family.

"However, the Court is also mindful of the evidence offered by the State during the penalty phase relative to the history of domestic violence issues between [Jackson] and [Richardson]. This included evidence that [Jackson] had on about March 1, 2014 (about four months before the killing) made [Richardson] drive around the city taking money off [Richardson's] card,' and, when [Richardson] pulled off at a Circle K 'to get help,' [Jackson] hit [Richardson] and bit her on the arm, and after [Richardson] exited the car [Jackson] drove his car into the Circle K. The witness Dorneshia Bendolph also testified that [Jackson] had taken [Richardson] to Pinecrest Cemetery and told her 'this is where she was going to be.'

"....

"The Court finds that the circumstances of [Jackson's] character, life and record asserted by [Jackson] are nonstatutory mitigating circumstances which exist and gives them some weight. However, in consideration of the totality of the evidence the weight is small.

"b. Mental Status

"The Court has outlined and considered the facts relating to [Jackson's] level of intellectual function. The facts were outlined above under the statutory mitigating circumstances including 'extreme mental or emotional disturbance' and 'substantially impaired capacity.' These facts include, but are not limited to, [Jackson's] IQ, the level of intellectual function of [Jackson], and Dr. Bennett's diagnosis as to [Jackson] (which included

'persistent depressive disorder with anxious distress, borderline to low average intellectual functioning, and adult antisocial behavior'). The Court finds that [Jackson's] mental status is a nonstatutory mitigating circumstance and the Court assigns it some weight, but in consideration of the totality of the evidence the Court finds that this weight is small.

"c. [Jackson's] alcohol use on date of the murder

"In the discussions of the statutory mitigating circumstance ('substantially impaired capacity') the Court outlined the evidence relative to [Jackson's] alcohol use and considered the relevance and weight of [Jackson's] alleged alcohol use on the date of the murder. In consideration of the totality of the evidence the Court finds that the alcohol use is a nonstatutory mitigating circumstance and assigns it some weight, but the weight is small.

"d. Assertion that [Jackson's] life has worth and there is good in [Jackson]

"Through witness testimony and argument of [Jackson's] counsel, [Jackson] argued that [Jackson's] life has worth and that there is good in [Jackson]. The Court finds that this is a non-statutory mitigating circumstance and the Court gives it some weight.

"e. Mercy

"There has been a broad request for mercy put before this Court. That request has been considered as a nonstatutory mitigator and has been given some weight."[14]

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[14]"'"[M]ercy" is a not a mitigating circumstance under Alabama law.'" Townes v. State, 253 So. 3d 447, 495 (Ala. Crim. App. 2015) (quoting Hosch v. State, 155 So. 3d 1048,

(C. 82-85.)

The record shows that Jackson's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975. We have independently weighed the aggravating circumstances and the mitigating circumstances, and we are convinced that the death penalty was the appropriate sentence for Jackson's vicious murder of Richardson in front of her four-year-old daughter. See § 13A-5-53(b)(2), Ala. Code 1975. Finally, we find that Jackson's sentence of death is neither excessive nor disproportionate to penalties imposed in similar cases. See § 13A-5-53(b)(3), Ala. Code 1975. Jackson was convicted of murdering Richardson during the course of an arson, an offense defined as capital by § 13A-5-40(a)(9), Ala. Code 1975, and similar crimes had been punished capitally throughout the state. See Callen v. State, [Ms. CR-13-0099, April 28, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017); Scott v. State, 163 So. 3d 389 (Ala. Crim. App. 2012); Bell v. State, 31 So. 3d 159

1109 (Ala. Crim. App. 2013)). However, any error in the trial court considering mercy as a mitigating circumstance was clearly beneficial to Jackson and was harmless.

(Ala. Crim. App. 2009); and Barbour v. State, 673 So. 2d 461 (Ala. Crim. App. 1994), aff'd, 673 So. 2d 473 (Ala. 1995).

For the foregoing reasons, we affirm Jackson's capital-murder conviction and his sentence of death.

AFFIRMED.

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