REL: May 29, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-13-1416

James Osgood

v.

State of Alabama

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

On Return to Remand

McCOOL, Judge.

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

recommended that Osgood be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Osgood to death. On October 21, 2016, this Court affirmed Osgood's convictions for murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See Osgood v. State, [Ms. CR-13-1416, October 21, 2016) ___ So. 3d. ___ (Ala. Crim. App. 2016). This Court, however, found that the circuit court's jury instructions during the penalty-phase were erroneous and that it was "probable that the [circuit] court's improper penalty-phase instructions adversely affected Osgood's Constitutional rights and, therefore, constituted plain error." ___ So. 3d at ___. Thus, this Court reversed Osgood's sentences and remanded this case for the circuit court to hold a new penalty-phase hearing pursuant to §§ 13A-5-45 and 13A-5-46, Ala. Code 1975, and for the circuit court to subsequently "determine Osgood's sentence as provided in § 13A-5-47, Ala. Code 1975." Id.

On remand, a new penalty-phase hearing was held and the jury-selection process began. However, Osgood ultimately waived the participation of a jury in the new penalty-phase

hearing pursuant to § 13A-5-44(c), Ala. Code 1975. The circuit court subsequently imposed the sentence of death.

Standard of Review

Because Osgood was sentenced to death, this Court must review the record of the lower court proceedings for plain error. Rule 45A, Ala. R. App. P., states:

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

Additionally,

> "'"The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See Ex parte Price, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); Burgess v. State, 723 So.2d 742 (Ala. Crim. App. 1997), aff'd, 723 So.2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521

> (1999); Johnson v. State, 620 So.2d 679, 701 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala. 1993), on remand, 620 So. 2d 714 (Ala. Crim. App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."'

Smith v. State, 795 So. 2d 788, 797-98 (Ala. Crim. App. 2000), quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999). Further,

> "[t]his court has recognized that '"the plain error exception to the contemporaneous objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"' Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim.App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995)."

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

Discussion[1]

I.

Osgood claims that the circuit court erred in accepting his waiver of his right to a jury determination of his sentence because, he claims, his waiver was "unknowing,

[1]This Court addresses Osgood's claims in a different order than the order in which the claims were presented in Osgood's supplemental brief on return to remand.

unintelligent, and involuntary." (Osgood's Supp. brief, 18.)[2] Specifically, Osgood alleges that his decision to "forego [sic] jury participation was not knowing and intelligent, because the District Attorney and trial court repeatedly and consistently provided misrepresentations about the jury's role" as a mere "recommender." (Osgood's Supp. brief, 20-21.) Osgood also argues that his decision to waive his right to jury participation was involuntary because, he says, it was made after the circuit court committed numerous errors, which made having an impartial jury impossible, such as: 1) allowing the State to show the potential jurors "an extremely prejudicial crime scene photograph of the victim;" 2) not allowing a continuance to provide counsel adequate time to prepare for trial; and 3) denying defense counsel's motion for a mistrial after the district attorney commented on Osgood's previous trial and sentencing. (Osgood's Supp. brief, 22.)

[2]On return to remand, both parties were given an opportunity to file supplemental briefs. For the purposes of this opinion, Osgood's principal brief on appeal shall be referred to as "Osgood's brief on appeal, ___," and Osgood's supplemental brief on return to remand will be designated as "Osgood's Supp. brief, ___."

These specific claims -- that these errors affected the validity of his waiver of jury participation at his sentencing hearing -- were never presented to the trial court; therefore, we will review these claims to determine whether there is plain error. Rule 45A, Ala. R. App. P.

Osgood's new penalty-phase proceedings began on Monday, April 9, 2018. Osgood was represented by Robert Bowers, Jr., and Ali Garrett. During the individual voir dire portion of the jury-selection process for Osgood's new penalty-phase hearing, the court indicated that it had been informed that Osgood wished to forgo jury participation in his new penalty-phase hearing. The following transpired:

> "THE COURT: Mr. Osgood, would you state your name on the record to confirm that you are here.
>
> "[Osgood:] James Lee Osgood.
>
> "THE COURT: Mr. Osgood, am I correct in what I said that you want to forego [sic] the process before a new jury as far as a sentencing hearing, meaning you want to waive that process and not have a proceedings before a new jury?
>
> "[Osgood:] Yes, sir.
>
> "THE COURT: Have you had an opportunity to discuss that with Mr. Bowers and/or Mrs. Garrett concerning what that means?
>
> "[Osgood:] Yes, sir.

> "THE COURT: I want to ask you some questions. It might sound like I'm asking them several times. It's just a way for me to get on the record clearly that you know where we are going with this.
>
> "[Osgood:] Yes, sir."

(Supp. R. on RTR, 186-88.)[3] The court continued to question Osgood about his educational background, his ability to read and write, his physical health, his psychological evaluation that indicated that Osgood was competent to stand trial, and whether Osgood was on any mental-health medication. Osgood indicated to the court that he did not have any concerns about the quality of the representation of his counsel in this matter.

The court then discussed with Osgood the process of the proceedings if Osgood did not forgo jury participation, including re-presenting the testimony that had been presented

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[3]The record before this Court contains several sections of court documents, transcripts, and supplements. To avoid confusion, this Court will delineate each portion of the record as follows: 1) The court documents from the record on return to remand will be referred to as "RTR, C.__," and the transcript from the record on return to remand will be referred to as "RTR, R. ___"; 2) The supplemental record on return to remand will be referred to as "Supp. R. on RTR, ___"; and 3) The documents contained in the second supplemental record on return to remand will be referred to as "2nd Supp. C. on RTR, __."

in Osgood's first penalty-phase hearing, including information concerning any aggravating circumstances presented by the State and any mitigating circumstances to be presented by the defense. The court asked Osgood if he knew what the two possible recommendations from the jury could be, and Osgood responded: "Life without the possibility of parole and death." (Supp. R. on RTR, 192.) The court reminded Osgood that, if he chose to go through the process with a jury, the jury would then weigh aggravating factors against mitigating factors and make a decision that would "put forth a recommendation" to the court regarding the sentence. (Supp. R. on RTR, 192.) The court informed Osgood that, in addition to the information that had been presented during the penalty phase in the first trial, his defense counsel could also present any additional information regarding mitigating factors to the new jury.

The following then occurred:

> "THE COURT: ... I will ask you now, knowing that you have the right to continue with this process, is it your decision alone, your independent decision to forgo or waive that process of having a jury make a recommendation to the Court?
>
> "[Osgood:] Yes, sir.
>
> "THE COURT: Has anyone coerced you, influenced you to do this, to waive this process?

> "[Osgood:] No, sir.
>
> "THE COURT: Are you knowingly and voluntarily waiving a jury to make that determination or the recommendation to the Court?
>
> "[Osgood:] Yes, sir.
>
> "THE COURT: And you make this waiver of the jury without any coercion, threat, or promise?
>
> "[Osgood:] Yes, sir.
>
> "....
>
> "THE COURT: With you waiving your right for the jury to make a recommendation to the Court, what that tells me you want to do is you want the Judge individually, me individually, to make the sentencing determination; is that correct?
>
> "[Osgood:] Yes, sir.
>
> "THE COURT: Do you understand that, one, because I heard the testimony in the penalty phase and I have reviewed the record in the penalty phase that I have all your mitigating factors to consider?
>
> "[Osgood:] Yes, sir. You already have all the facts."

(Supp. R. on RTR, 193-95.)

The circuit court informed Osgood that the court would consider the following mitigating factors based on the testimony presented at the penalty phase of his first trial: that Osgood had a poor family life prior to the incident with the victim in this case; that Osgood was sexually abused by a

man at a bar when he was a child; that Osgood fathered a child with a 24-year-old woman when he was 14 years old; that Osgood had sexual encounters with other children when he was 9 years old; that, according to Dr. Mulbry, Osgood's brain development might have been potentially hindered because of some malnutrition that he suffered as an infant; that he was admitted to a psychiatric hospital as a teenager; that Osgood had reported at least one suicide attempt; and that Dr. Mulbry diagnosed Osgood with having an antisocial personality disorder. Osgood acknowledged that those were the enumerated mitigating factors to be considered by the court during its sentencing determination.

The circuit court explained the change in Alabama law regarding judicial override in death-penalty cases since Osgood's trial, i.e., that the circuit court now "has to follow the recommendation of life without parole if that is the recommendation of the jury," and "if the jury returned a recommendation of a death sentence, [the circuit court] can follow [the jury's recommendation] but [the court] also could change that to life without parole." (Supp. R. on RTR, 197.) Osgood acknowledged that he understood the change in the law.

Defense counsel and the State informed the court that it was the motion of both parties to have the circuit court "adopt the entire previous proceeding from the start of the penalty phase to the closing arguments of the penalty phase from the prior trial." (Supp. R. on RTR, 198.) Defense counsel specifically motioned the court to reintroduce and incorporate into the instant proceeding Osgood's exhibits 1-29 as previously admitted, as well as all the mitigation testimony that was received at the first sentencing hearing held on May 12, 2014. The court further informed Osgood of the statutory mitigating factors that the court would consider in addition to the nonstatutory mitigating factors listed above and confirmed that Osgood understood that the court would consider those mitigating factors. The court further confirmed that Osgood understood that the court would also consider the aggravating factors presented by the State -- i.e., that the crime occurred during a rape and that the murder was an especially heinous, atrocious, and cruel crime -- and that the court would weigh the aggravating circumstances it found to exist against the mitigating circumstances it found to exist.

The circuit court confirmed with both of Osgood's defense counsel, individually, whether counsel was satisfied that Osgood had received a "thorough review" and knowledge of the consequences of "waiving a jury determination of a recommendation to the [c]ourt concerning his sentence." (Supp. R. on RTR, 200.)

Finally, the following exchange occurred:

> "[Mr. Bowers:] Your Honor, if I might at this time, part of the questions was had anybody forced or coerced him into this decision. I will bring it to the Court's attention that Mr. Osgood on his own mentioned this scenario to me first thing Monday morning. So we talked about it briefly first thing Monday morning. He brought it up, mentioned it on his own Monday morning. Then again on Tuesday, this morning, he again brought the subject up again on his own. And at that time, then we started exploring it further to make sure that it -- we knew it was a possibility. We wanted to make sure that we knew that it would be a possibility and figure out exactly how to do it to make sure that it was done right. So my point is that I did not bring it up or mention it to him myself nor did Mrs. Garrett. He brought this up and mentioned it on his own. Is that right, Mr. Osgood?
>
> "[Osgood:] Correct.
>
> "THE COURT: Mr. Osgood, is there -- help me understand.
>
> "[Osgood:] Why I'm doing this?

"THE COURT: Yes, sir. And it might be that your explanation would help the rest of the room in this matter.

"[Osgood:] I've always been a firm believer on an eye for an eye, tooth for a tooth, life for a life. If you can't do the time, don't do the crime. Okay. I screwed up. I deserve what I was given. When I was told by the appeal court that this was coming back for a resentence, I was worried because my worry was the jury would come back with a life without [parole], and I didn't want that. I remember when I was sentenced the things you told me, the manner in which you told me. So I took it that if I put it in your hands again, I would get the same sentence which would be death.

"THE COURT: Is that what you are knowingly asking me for?

"[Osgood:] Yes, sir."

"....

"[Prosecutor:] Judge, the only thing I would like to add is when this Court goes to consider the aggravating and mitigating circumstances, for the aggravating circumstances that you just referred to and read, that comes from Section 13A-5-49[, Ala. Code 1975]. It was aggravating circumstance number four is what the jury found by their verdict in the guilt phase. It was the aggravating circumstance number eight where the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses that you have to consider.

"Judge, based off the statement of the defendant, I know that you covered with him the change in the law as to if the jury recommended one you could and if they recommended -- the jury recommended something else, you couldn't. Could you just reiterate that based off of what he said that

> he understands that. I know he said that if it was up to you, I would receive the same. I know there would be a possibility that there could be a different result.
>
> "THE COURT: If the jury came back with a recommendation of life without parole, this Court would resentence you to life without parole. If the jury came back with a recommendation of the death penalty, there is an option with the Court to either give you the death penalty or to give you life without parole. That would be this Court's option. So there is one way. Now the law has changed to where I couldn't go up on the sentence but I can reduce the sentence. You do understand that?
>
> "[Osgood:] Yes, sir.
>
> "THE COURT: That's what the State's attorney was asking.
>
> "[Osgood:] I understand."

(Supp. R. on RTR, 200-03.)

The court stood in recess until the following morning. At the beginning of the proceedings the following morning, Osgood confirmed with the court that, with the consultation with his counsel, he still wished to waive his right to jury participation in the new penalty-phase hearing of his capital-murder trial. The court ultimately sentenced Osgood to death at the conclusion of the new penalty-phase hearing.

Section 13A-5-44(c), Ala. Code 1975, provides:

"Notwithstanding any other provision of the law, the defendant with the consent of the state and with the approval of the court may waive the participation of a jury in the sentence hearing provided in Section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right."

This Court has stated:

> "'The United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), stated:
>
> > "'"This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."
>
> "'428 U.S. at 252, 96 S.Ct. 2960 (footnote omitted). The right to have a jury recommend a sentence in a capital case is a right afforded by statute —- not the Alabama Constitution of 1901. See §

> 13A-5-45, Ala. Code 1975. A waiver of a statutory right requires a lower standard to uphold than a waiver of a constitutional right. See Ex parte Dunn, 514 So. 2d 1300 (Ala. 1987), and Watson v. State, 808 So. 2d 77 (Ala. Crim. App. 2001).'

"924 So.2d at 782."

Belisle v. State, 11 So. 3d 256, 317 (Ala. Crim. App. 2007)(quoting Turner v. State, 924 So. 2d 737 (Ala. Crim. App. 2002)). "When determining the validity of any waiver we look at the particular facts of the case and the totality of the circumstances." Turner, 924 So. 2d at 782.

In Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003), this Court addressed a similar situation and held that a defendant had freely waived his right to the participation of the jury in the sentencing phase of his capital murder trial when the court "thoroughly explained the rights that [the defendant] would be waiving," "questioned [the defendant] extensively about his decision and his understanding of the consequences thereof," and the defendant "remained adamant about his decision to waive jury participation." 897 So. 2d at 1197. We now turn to Osgood's specific arguments concerning the validity of his waiver of jury participation in the new penalty-phase hearing.

A.

Osgood first alleges that his waiver of the jury's participation was involuntary because it was in response to the State's and the circuit court's repeatedly misrepresenting the jury's role in sentencing by referring to the jury's decision as a "recommendation." In his brief on return to remand, Osgood states that the court informed him of "the change in Alabama's judicial override law since [his] last trial"; however, Osgood maintains, he was not correctly informed of the jury's role until after he indicated that he wished to forgo jury participation in his sentencing. (Osgood's Supp. brief, 21.)

In the present case, before accepting Osgood's waiver, the circuit court conducted an extensive colloquy to ensure that Osgood was knowingly and voluntarily waiving his right to jury participation in the new penalty-phase hearing. The circuit court ensured that Osgood was voluntarily making his waiver "without any coercion, threat, or promise." (Supp. R. on RTR, 194.) The court explained to Osgood that he had the right to have the jury make the determination regarding whether to sentence Osgood to life imprisonment without the

possibility of parole or the death penalty. The court also explained the consequences of waiving that right and, thus, allowing the court alone to weigh the aggravating and mitigating circumstances and to make the sentencing determination. Additionally, the court reviewed the aggravating and mitigating factors that it would consider in making its determination and repeatedly sought Osgood's acknowledgment that he understood the consequences of his waiver of jury participation.

Osgood is correct that "[t]he jury's sentencing verdict is no longer a recommendation. Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended, effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury." Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ___ So. 3d ___, ____ n. 1 (Ala. Crim. App. 2019). However, the new law prohibiting the circuit court from overriding a jury verdict in capital cases "shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to

April 11, 2017." § 13A-5-47.1, Ala. Code 1975. (Emphasis added.) See also id.; see also White v. State, [Ms. CR-16-0741, April 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019). Here, Osgood was charged and convicted of capital murder prior to April 11, 2017. Therefore, the new law regarding the court's ability to override a jury verdict in capital cases does not apply to him, and the court's reference to the jury's recommendation was not in error.

The record indicates that the circuit court and both parties presumed that the new capital-sentencing law should have been applied in Osgood's case, and Osgood was informed of the change in the law. See (Supp. R. on RTR, 197.) We note that Osgood does not argue that the circuit court's statement to Osgood regarding the application of the new capital-sentencing law was erroneous or that the court's statement affected his waiver of jury participation at the new penalty-phase hearing. However, regardless of the court's beliefs concerning the applicability of the new law or the references made concerning the jury's role in sentencing, under the facts of this particular case, any potential error in the court's discussion of the jury's role in sentencing was harmless

because the record indicates that Osgood's decision to waive jury participation was done before any such reference. See Rule 45, Ala. R. App. P. ("No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). Here, not only did the record reflect that the circuit court thoroughly explained the process that Osgood would be entitled to if he chose to proceed with a jury during his new penalty-phase hearing, the record further discloses that Osgood had already informed his counsel that he wanted to forgo jury participation in the sentencing phase "first thing Monday morning" prior to the prosecutor's or the court's reference to the jury's role in sentencing. (Supp. R. on RTR, 200.) Thus, viewing the totality of the circumstances and the record as a whole, we cannot say

that the reference to the jury's decision as a recommendation rendered Osgood's waiver invalid. See Turner, 924 So. 2d at 782.

B.

Osgood also claims that his waiver of the jury's participation in the new penalty phase was involuntary because, he says, it was made "after the trial court committed numerous errors," including allowing the State to show the jury venire from which the sentencing-phase jury would be selected what he describes in his brief on return to remand as "an extremely prejudicial crime scene photograph of the victim." (Osgood's Supp. brief, 22.)

Before Osgood informed the court of his intention to waive jury participation in the new penalty phase hearing, the following occurred outside the presence of the jury venire during voir dire:

> "MRS. GARRETT: The objection is not to using any exhibits during voir dire. The objection is to using the crime scene photographs during voir dire of the jury which is what the State indicated to us that their plan was. They planned to use a photograph of the victim's driver's license with her photo which is fine with us. The photos of the crime scene would be extremely shocking to this jury of seventy people that we possibly have as a jury. I just don't think there is any need in order to shock all of those

people with these photos when we could just show them to the jury when we get the jury seated.

"[ASSISTANT DISTRICT ATTORNEY:] Judge, our response to that would be that there is no presumption of innocence here. One of the things we have to prove in our aggravating circumstances is that the death was particularly cruel, heinous, or atrocious compared to other capital crimes. For that reason, leads us to wanting to display that picture as part of the voir dire process.

"MRS. GARRETT: I don't know why they can't just tell the jury that this is going to be -- these pictures are going to be shocking to you. They may be disturbing to you without showing them the photographs.

"THE COURT: Thank you. [Prosecutor,] anything further?

"[ASSISTANT DISTRICT ATTORNEY]: Only, Judge, if the jury cannot view pictures of that nature, that is something we need to know now.

"[DISTRICT ATTORNEY]: Judge, for the record, I'm just planning on showing one photograph for about five, six seconds just to see if they can tolerate it.

"THE COURT: Mrs. Garrett, anything further?

"MRS. GARRETT: Nothing further.

"THE COURT: Mr. Bowers, anything further?

"MR. BOWERS: No, sir.

"THE COURT: Motion to exclude as made by the defendant is overruled, denied."

(Supp. R. on RTR, 27-29.) Defense counsel later renewed the objection to the introduction of the crime scene photograph and also objected at the time the photograph was shown to the jury venire. See (Supp. R. on RTR, 51, 54.)

Although Osgood objected to the introduction of the photograph during voir dire, he did not argue in the circuit court that his waiver of the jury's participation in the new penalty-phase hearing was involuntary because of the court's decision to allow the State to introduce the photograph. Thus, we will review this specific claim under plain-error review. Rule 45A, Ala. R. App. P.

In his brief on return to remand, Osgood argues that "[t]he veniremembers' reactions to the prejudicial photograph made it clear that selecting an impartial jury was no longer an option for [him]" and, thus, his decision to "forego [sic] jury participation at his sentencing proceedings was not voluntary after the venire had been irreparably tainted" by the photograph. (Osgood's Supp. brief, 17.) In making this argument, Osgood points to the statements of two potential jurors, made during individual voir dire, as evidence that the jury was no longer capable of being impartial. Specifically,

one potential juror, in response to a question by defense counsel regarding whether he believed he could return a recommendation of life imprisonment without parole if he felt that was warranted after hearing all the evidence, stated that he was "thinking that he don't [sic] even deserve to be breathing." (Supp. R. on RTR, 170). Another potential juror, when asked what type of punishment he believed would be warranted in this type of case, stated that "there is not a law that allows you to do what should be done legally," and that, in his opinion, the punishment was "not a legal one" and "they should cut off their private parts." (Supp. R. on RTR, 179.)

Although Osgood's waiver of the jury's participation did come after these statements had been made, the statements made by the potential jurors were made during individual voir dire, outside the presence of the other veniremembers. Thus, these statements did not render the entire jury venire "irreparably tainted" as Osgood suggests, nor did the statements show that it would be impossible to select an impartial jury from the remaining veniremembers. Notably, these statements were made well after the photograph had been shown to the jury

veniremembers and were not a direct response to the photograph. Additionally, according to Osgood's defense counsel, Osgood had already notified his counsel twice -- "first thing Monday morning" and again on Tuesday morning -- that he wished to forgo jury participation, which was before the photograph was shown to the veniremembers and before the statements were made by the potential jurors. Further, as stated earlier, Osgood repeatedly asserted his right to waive his right to the jury's participation in the new penalty-phase hearing. Therefore, considering the totality of the circumstances in this case, we cannot say that the court's decision to allow the State to show the jury venire the crime-scene photograph rendered Osgood's waiver of the jury's participation involuntary. See Turner, 924 So. 2d at 782.

C.

Osgood further claims that his decision to waive jury participation in his new penalty-phase hearing was involuntary because the circuit court denied his motion to continue, which, he says, he made to allow his defense counsel adequate time to prepare for the penalty-phase hearing.

In order to determine whether the circuit court's denial of his motion to continue affected the voluntariness of Osgood's waiver of jury participation in his new penalty-phase hearing, we must first consider whether the circuit court's denial of his motion to continue was proper.

On October 21, 2016, this Court initially remanded this case to the circuit court for a new penalty-phase hearing. On June 21, 2017, the circuit court appointed Robert Bowers, Jr., as counsel to represent Osgood in his new penalty-phase hearing, and the court set the new sentencing hearing for November 13, 2017. On September 8, 2017, the circuit court ordered the new sentencing date to be continued and ordered the parties to "collectively review for re-sentencing dates after February 1, 2018." (RTR C., 98.) In its September 8, 2017, order, the circuit court also appointed additional counsel, Ali Garrett, to represent Osgood. On November 30, 2017, the circuit court entered an order setting Osgood's new penalty-phase hearing for April 9, 2018.

On March 23, 2018, Osgood's counsel filed a motion for a continuance, stating:

> "1. Appointed counsel Robert Bowers, Jr., did not receive notice of the April 9, 2018 trial date.

> "2. Neither of the defendant's appointed attorneys has had an opportunity to review the entire trial transcript.
>
> "3. The defendant's attorneys need more time to locate the expert previously used at trial, and have been unable to contact him at this point.
>
> "4. Robert Bowers, Jr. has back to back criminal jury weeks the weeks of March 26 and April 2, and needs more time to adequately prepare for this matter before April 9, 2018."

(RTR C., 103.)

On April 5, 2018, the circuit court entered a written order denying Osgood's motion to continue.

> "'It is well settled that a motion for continuance is addressed to the sound discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal without proof that it was clearly abused. E.g., Arthur v. State, [711 So. 2d 1031] (Ala. Crim. App. 1996); Smith v. State, 698 So. 2d 189 (Ala. Crim. App. 1996); Long v. State, 611 So. 2d 443 (Ala. Crim. App. 1992). Review of a denial of a motion for continuance requires a review of the circumstances of the case, including the reasons the defendant gave to the trial judge in support of the motion, in order to determine whether there was a clear abuse of discretion. Arthur, supra.'"

Knox v. State, 834 So. 2d 126, 133-34 (Ala. Crim. App. 2002)(quoting R.D. v. State, 706 So. 2d 770, 783 (Ala. Crim. App. 1997)). Further, this Court has stated:

> "'"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to

> violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964).' Glass v. State, 557 So. 2d 845, 848 (Ala. Cr. App. 1990).
>
> "'The reversal of a conviction because of the refusal of the trial judge to grant a continuance requires "a positive demonstration of abuse of judicial discretion." Clayton v. State, 45 Ala. App. 127, 129, 226 So. 2d 671, 672 (1969).' Beauregard v. State, 372 So. 2d 37, 43 (Ala. Cr. App.), cert. denied, 372 So. 2d 44 (Ala. 1979)."

McGlown v. State, 598 So. 2d 1027, 1029 (Ala. Crim. App. 1992).

In the motion to continue filed by Osgood's counsel, counsel requested a continuance in part because: 1) Bowers had not received notice of the hearing date; 2) neither of Osgood's attorneys had had an opportunity to review the entire trial transcript; and 3) Bowers had criminal-jury weeks in the weeks leading up to Osgood's new penalty-phase hearing. First, although Osgood claims that Bowers was not given notice of the hearing date, he fails to offer any explanation in the motion to continue or in the record that suggests why Bowers was not aware of the new penalty-phase hearing date or that Bowers's not being aware of the date was through no fault of his own.

There was also no allegation that Garrett, Bowers's cocounsel, was also unaware of the new trial date, nor is there any indication regarding why Garrett had not been in contact with Bowers to discuss the new trial date or trial preparation. Additionally, we note that Bowers represented Osgood during the guilt-phase portion of his trial and the first penalty-phase hearing. Bowers was then appointed to represent Osgood in the new penalty-phase proceedings on June 21, 2017, and Garrett was appointed as cocounsel on September 8, 2017, which should have been more than sufficient time to allow both counsel to obtain and review the trial transcript. Nothing in the record or in Osgood's motion for a continuance suggests that counsel had not been able to obtain a copy of the trial transcript; instead, the motion merely stated that counsel had not yet reviewed the trial transcript. Further, Bowers suggested that he had inadequate time to prepare for Osgood's penalty-phase hearing because he had a busy schedule in the two weeks leading up to the hearing date; however, Bowers was appointed as counsel almost one year before the new penalty-phase hearing in June 2017, and the new penalty-phase hearing date was set on November 30, 2017, which was over four months

before the new sentencing-hearing date and should have been sufficient time for preparations for a new sentencing hearing. Also, in its September 8, 2017 order, the court ordered both parties to "collectively review" possible dates for the new sentencing hearing. Nothing in the record suggests that the parties did not, in fact, follow the orders of the circuit court.

Osgood's counsel also argued in his motion to continue that they needed more time to locate "the expert" who testified during Osgood's first trial and that counsel had been unable to locate him. (RTR, C. 103.) Osgood identifies the expert by name in his brief on return to remand as Teal Dick, Osgood's mitigation expert from his first penalty-phase hearing. In Ex parte Saranthus, 501 So. 2d 1256, 1257 (Ala. 1986), the Alabama Supreme Court stated:

> "A motion for a continuance is addressed to the discretion of the court and the court's ruling on it will not be disturbed unless there is an abuse of discretion. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973). If the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence.

> Knowles v. Blue, 209 Ala. 27, 32, 95 So. 481, 485-86 (1923)."

501 So. 2d at 1257. Here, even assuming that Dick's testimony was material and competent, we cannot say that the remaining parts of the Saranthus test were met in this case. There is no indication in the motion that there was a probability of procuring Dick's testimony within a reasonable time if a continuance was granted, because counsel's statement in the motion to continue indicated that counsel had been unable to locate or contact Dick. See Reese v. State, 501 So. 2d 148, 151 (Ala. Crim. App. 1989)(upholding the denial of a motion to continue after finding that there was no probability that the evidence would be forthcoming where the record indicated that absent witnesses could not be located and that previous efforts by the State and the defense to locate the witnesses had been futile)(rev'd on other grounds by Huntley v. State, 627 So. 2d 1013 (Ala. 1992)). Additionally, the motion to continue in the present case was vague concerning counsel's efforts to contact Dick or concerning the due diligence counsel had performed in an effort to locate Dick. Thus, based on the facts before the circuit court at the time the court denied the motion, we cannot say that the circuit court abused

its discretion in denying the motion to continue on the ground that a witness was absent. See McGlown, 598 So. 2d at 1029.

Moreover, after reviewing the entire record, this Court has been unable to find any indication that Osgood suffered any prejudice as a result of the circuit court's denial of his motion for a continuance. See Wimberly v. State, 934 So. 2d 411, 425 (holding that the appellant had not established that the denial of his motion to continue was prejudicial). As the State noted in its brief on return to remand, the circuit court also appears to indicate that Dick may have actually been located and available for the new penalty-phase hearing because the court asked a veniremember during voir dire whether "the fact that Teal Dick might testify in this case and you are here as a jury veniremember, would that affect your ability to be a fair and impartial juror?" (Supp. R. on RTR, 15.) Considering Osgood's statements during the penalty phase and his adamancy that he wanted to waive the jury's participation in the new penalty-phase hearing, this Court "find[s] it extremely improbable that the additional time for preparation requested by [Osgood] would have changed the result of the trial." Price v. State, 725 So. 2d 1003, 1061

(Ala. Crim. App. 1997)(citing Fortenberry v. State, 545 So. 2d 129, 139 (Ala. Crim. App. 1988)). See also Beauregard v. State, 372 So. 2d 37, 43 (Ala. Crim. App. 1979) (citing Clayton v. State, 226 So.2d 671, 672 (1969)("The reversal of a conviction because of the refusal of the trial judge to grant a continuance requires 'a positive demonstration of abuse of judicial discretion.'")).

Therefore, turning to whether the circuit court's denial of his motion to continue affected the voluntariness of Osgood's waiver of jury participation, after considering the totality of the circumstances in this case and the record as a whole, we cannot say that the court's decision to deny his motion to continue rendered Osgood's waiver of the jury's participation involuntary. See Turner, 924 So. 2d at 782.

D.

Osgood also claims that his waiver of jury participation was involuntary because, he says, the circuit court improperly denied his motion for a mistrial after the district attorney commented on Osgood's previous trial and sentencing. During voir dire in the instant case, the district attorney stated:

> "James Osgood has already been found guilty of capital murder by a Chilton County jury composed of

> twelve citizens who were seated right over there in that box. We're here today to reconduct or to conduct the sentencing hearing or the sentencing phase as I told you. The options will be, your only options will be life without parole or death."

(Supp. R. on RTR, 50.) Defense counsel immediately objected and requested a mistrial based on the district attorney's reference to the new penalty-phase hearing as a "redo or resentencing," which counsel claimed prejudiced the entire jury venire. Id. The circuit court denied Osgood's motion for a mistrial.

Contrary to Osgood's contention, the circuit court's denial of his motion for a mistrial was proper.

> "'A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice.' Hammonds v. State, 777 So. 2d 750, 767 (Ala. Crim. App. 1999)(citing Ex parte Thomas, 625 So. 2d 1156 (Ala. 1993)), aff'd, 777 So. 2d 777 (Ala. 2000). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So. 2d 130, 135 (Ala. Crim. App. 1991). 'The decision whether to grant a mistrial rests within the sound discretion of the trial court and the court's ruling on a motion for a mistrial will not be overturned absent a manifest abuse of that discretion.' Peoples v. State, 951 So. 2d 755, 762 (Ala. Crim. App. 2006)."

Peak v. State, 106 So. 3d 906, 915 (Ala. Crim. App. 2012).

In Sneed v. State, 1 So. 3d 104 (Ala. Crim. App. 2007), this Court stated:

"In Frazier v. State, 632 So. 2d 1002, 1007 (Ala. Crim. App. 1993), we held that it was plain error for the prosecutor to comment that Frazier had previously been convicted of the same offense, stating:

> "'In Lloyd v. State, 53 Ala. App. 730, 733, 304 So. 2d 232, cert. denied, 293 Ala. 410, 304 So. 2d 235 (1974), this court held that it is reversible error for the prosecution to comment on the result of a defendant's previous trial at a subsequent trial for the same offense. See also Wyatt v. State, 419 So. 2d 277, 282 (Ala. Crim. App. 1982). As the Fifth Circuit Court of Appeals stated in United States v. Attell, 655 F.2d 703, 705 (5th Cir. 1981), "[W]e are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged."'

"Likewise, in Hammond v. State, 776 So. 2d 884, 892 (Ala. Crim. App. 1998), we held that, 'at the sentencing phase of a second or subsequent capital murder trial, it is reversible error for the prosecution to comment on the result of a defendant's previous trial for the same offense.' We noted that this is especially true when a prosecutor tells a penalty phase jury that a previous jury recommended that a defendant be sentenced to death. However, we have never held that it is error, much less plain error, for a witness to merely comment about a 'first trial' or a prior proceeding. Cf. Hood v. State, 245 Ga. App. 391, 392, 537 S.E.2d 788, 790 (2000)(footnote omitted) (noting that, '[w]here there is no mention of the result of a prior judicial proceeding, the bare reference to an earlier trial does not necessarily imply a conviction and reversal on appeal. The equally rational inference is a mistrial due to the inability to achieve a unanimous verdict'); State v.

> Lawrence, 123 Ariz. 301, 305, 599 P.2d 754, 758 (1979) (noting that '[w]e are aware of no authority in this jurisdiction supportive of the contention that mere mention of a previous trial mandates reversal on appeal')."

1 So. 3d at 114.

We note that in Hammond, in which this Court held that the prosecutor's comments to the jury constituted plain error, this Court explained:

> "In determining whether Hammond should receive the death penalty or life imprisonment without parole, this jury was aware of how another jury had resolved this very issue--adversely to the defendant. If a juror was uncertain as to whether aggravating circumstances existed, or, if found to exist, whether they outweighed the mitigating circumstances, the knowledge that 12 other people had determined that it did could have swayed the juror's verdict in favor of death. Further, the jury's awareness of Hammond's previous death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. People v. Hope, 116 Ill.2d 265, 274, 508 N.E.2d 202, 205, 108 Ill.Dec. 41, 45 (Ill.1986)."

776 So. 2d at 892.

The prosecutor's statement in this case, unlike the prosecutor's statements in Hammond, was merely a reference to the first sentencing hearing and did not inform the jury of the result of that proceeding. Thus, the circuit court did not

abuse its discretion in denying Osgood's motion for a mistrial.

As previously discussed in this opinion, Osgood repeatedly and clearly asserted his desire to waive the jury's participation in the new penalty-phase proceeding after the court thoroughly explained to Osgood his right to have a jury determine his sentence and explained the consequences of waiving such a right. We again note that, according to Osgood's counsel, Osgood first inquired about his right to waive jury participation on Monday morning, prior to the new penalty-phase hearing, including the prosecutors statement to the jury and the court's denial of Osgood's motion for a mistrial. We have reviewed the entire record in this case and have found nothing in the record to suggest that the court's denial of Osgood's motion for a mistrial had any effect on Osgood's decision to waive jury participation at his new penalty-phase hearing. Based on the record as a whole and the totality of the circumstances presented here, we conclude that the record affirmatively establishes that Osgood was fully informed of his right to jury participation in the sentencing

proceedings and that he subsequently freely waived his right to participation of the jury. See Turner, 924 So. 2d at 782.

II.

Osgood separately claims that the circuit court erred by allowing the State to present an "extremely prejudicial crime scene photograph of the victim" to the jury venire during voir dire, which he claims prevented him from selecting an impartial jury. (Osgood's Supp. brief, 11.)

To the extent that Osgood claims that the court's decision to allow the State to introduce the crime-scene photograph during voir dire rendered his waiver of jury participation in the new penalty-phase hearing involuntary, this issue was also raised as part of his claim challenging the voluntariness of his waiver of jury participation. This claim was previously addressed in Part I.B, of this opinion, and Osgood's waiver of jury participation was determined to be valid.

To the extent that Osgood maintains that he was unable to select an impartial jury because the court improperly allowed the State to present the crime-scene photograph of the victim to the jury venire during voir dire, Osgood is not entitled to

relief on this claim. We note that Osgood did object to the introduction of the photograph in the circuit court. In his brief on return to remand, Osgood contends that allowing the State to show the venire a photograph of the victim taken from the crime scene was prejudicial and allowed the State to obtain a preview of the veniremembers' opinions on that evidence. Osgood maintains that that error in allowing the State to present the photograph "violated [his] rights to due process, an impartial jury, and a reliable sentencing guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Alabama Constitution, and Alabama law." (Osgood's Supp. brief, 17.)

In support of his argument on return to remand, Osgood acknowledges that this specific issue -- i.e., whether parties may show evidence during voir dire -- "is an issue of first impression for Alabama courts." (Osgood's Supp. brief, 11.) Osgood cites several cases from other jurisdictions that have addressed this issue. However, in this particular case, it is unnecessary for this Court to determine whether the court's ruling on this matter was proper. Even assuming -- without deciding -- that the court improperly allowed the prosecutor

to show the photographic evidence, any such error in the circuit court's decision was harmless in this particular case. See Rule 45, Ala. R. App. P. Here, even if the circuit court improperly allowed the prosecutor to show the jury the photographic evidence, Osgood's substantial rights were not affected because he ultimately waived the jury's participation, which was previously determined in this opinion to be a valid waiver, and the sentencing determination was made by the circuit judge alone. Thus, any error in the court's decision did not affect Osgood's sentencing in any way.

III.

Osgood also argues that the circuit court improperly denied his motion to continue. Although Osgood raised this claim as part of his challenge to the voluntariness of his waiver of jury participation, he also raises this claim separately and contends that the court's denial of his motion to continue violated his "rights to counsel, due process, and a reliable sentencing as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Alabama Constitution, and Alabama law."

(Osgood's Supp. brief, 29.) However, as previously determined in Part I.C of this opinion, discussing whether the court's denial of Osgood's motion to continue affected the voluntariness of his waiver of jury participation in the instant proceedings, we cannot say that the circuit court abused its discretion in denying Osgood's motion to continue. Therefore, Osgood is not entitled to relief on this claim.

IV.

Osgood also contends that the district attorney's comment on his prior sentencing proceedings prejudicially tainted the jury, necessitating a mistrial. Again, although Osgood raised this claim as part of his challenge to the voluntariness of his waiver of jury participation, he raises this claim separately and alleges that the court's ruling "violated his rights to due process, an impartial jury, and a reliable sentencing." (Osgood's Supp. brief, 32.) As previously determined in Part I.D of this opinion, we cannot say that the circuit court abused its discretion in denying Osgood's motion for a mistrial. Thus, Osgood is not entitled to relief on this claim.

V.

Next, Osgood claims that the circuit court erred in admitting and considering testimony that exceeded the scope of permissible victim-impact testimony. Specifically, Osgood alleges that the court improperly allowed the victim's sister to give testimony characterizing the crime and Osgood, and requesting that Osgood be sentenced to death. Osgood did not present this issue to the circuit court; therefore, we review this issue under the plain-error standard.

During the new penalty-phase hearing, the prosecutor informed the court that two representatives of the victim's family had asked to address the court. The victim's sister, Trish Jackson, addressed the court and stated:

> "[JACKSON:] Your Honor, I ask today that we be heard, the family of Tracy, that our voice today is replayed and everyone here today in your minds just again and again and again. Okay. This coming back here has been such a disservice to our ongoing fight for Tracy. It has been a disservice for proper closure and what we have been through to have to come back today. The focus should never, never be on minimizing the actions and the crime that that man did. He took the life of Tracy. He isn't embracing accountability. That I know. This isn't about him being accountable. He is looking to escape his punishment. That is my opinion. He's a monster and his plans for killing Tracy were horrendous and tortuous. For his actions, in my opinion, he deserves the death penalty. No mercy. I feel this is just punishment. Your Honor. And I am grateful to hear that could be his punishment."

(Supp. R. on RTR, 207.)

In Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993), the Alabama Supreme Court held that a circuit court errs if it "consider[s] the portions of the victim impact statements wherein a victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment." 640 So. 2d at 1017. See also Gissendanner v. State, 949 So.2d 956, 962 (Ala. Crim. App. 2006)("[V]ictim impact evidence may be presented during the penalty phase of a capital-murder trial so long as the witness does not recommend an appropriate punishment or characterize the crime or the defendant."). Here, as Osgood suggests, the statements made by Jackson during the new penalty-phase hearing characterized the crime and the defendant, as well as recommended an appropriate sentence. However, the presentation of the statements does not automatically rise to the level of plain error. See Ex parte Land, 678 So. 2d 224 (Ala. 1996); Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013).

In Ex parte Land, letters were presented to the trial court by the victim's family and friends that Land claimed expressed the writers' opinions regarding Land, the crime, and

appropriate punishment. 678 So. 2d at 236. During the sentencing hearing, the judge stated that he had "thought very carefully" about everything that had been written in the letters. Id. The judge also stated that he was "to determine sentence based squarely on whether or not prevailing [sic] circumstances found to exist outweigh mitigating circumstances found to exist." Id. at 236-37. As this Court explained in Lockhart:

> "[I]n Ex parte Land ... the Alabama Supreme Court found that it was not plain error for the trial court when considering sentencing, to read letters from members of the victim's family and from members of the defendant's family, some of which expressed opinions as to the appropriate punishment, because those letters were read only by the trial judge and only 'out of a respect for the families and for the limited purpose of possibly establishing a mitigating factor....'"

163 So. 3d at 1138-39 (quoting Land, 678 So. 2d at 237).

In Lockhart, after the jury had returned a sentencing recommendation, the trial court held a hearing in which it allowed some of the victim's relatives to give statements, including statements asking the court to sentence Lockhart to death and stating that they opposed leniency. Id. at 1138. Before the statements were given, both parties and the trial court agreed that the court "could not consider the statements

as victim-impact evidence but that the court could consider the statements for the limited purpose of determining whether the victim's family was recommending leniency," which was also reflected in the circuit court's sentencing order. Id. This Court found that, because "the statements of the victim's relatives were not presented to the jury, and the trial court explicitly stated that it considered the statements only for the purpose of determining whether the victim's family opposed leniency," Lockhart's substantial rights were not adversely affected and, thus, the trial court did not commit plain error. Id. at 1139.

We recognize that there are certain situations in which the acceptance or presentation of such victim-impact statements may, in fact, rise to the level of plain error. In Gaston v. State, 265 So. 3d 387 (Ala. Crim. App. 2018), this Court held that it was plain error for the trial court to allow testimony from the victim's family members as to their desire for the jury to recommend the death penalty where the statements were presented to jury without an instruction from the circuit court on how the jury was to consider the victim-impact testimony and, thus, it was unclear that the improper

testimony had no influence on the jury's recommendation. In Ex parte Washington, 106 So. 3d 441 (Ala. 2011), this Court held that it was plain error for the trial court to allow the admission of victim-impact testimony from the victim's parents characterizing the crime and recommending the appropriate punishment. In Washington, the statements were presented to the jury without a limiting instruction on how the jury could consider the information. Additionally, the trial judge stated at the hearing that he had reviewed the testimony and that he would consider the testimony as part of the presentence report.

Under the particular circumstances presented in this case, we conclude that the admission of the victim-impact testimony did not rise to the level of plain error. In this case, the victim-impact statements, unlike the statements made in Gaston and Washington, were not made to a jury and were made only to the judge at the conclusion of the new penalty-phase hearing after the State informed the court that the victim's family wanted to address the court. Also, unlike the court in Washington, the circuit court in this case made no statement indicating that it would consider the victim-impact

statements when making his sentencing determination. Thus, in this particular case, although the court did not explicitly so state, it is clear that the circuit court allowed the family members to speak solely out of respect for the family. The record indicates that the court's sentencing determination was based solely on its consideration of the aggravating circumstances and the mitigating circumstances presented. Almost immediately following the victim-impact statements, the court stated:

> "THE COURT: Mr. Osgood, this Court has sworn and taken an oath to uphold the law of the State. This is a duty that is not taken lightly. I will continue to do the best of my ability to follow the law of this state and of our country. The law as it applies in this case requires the Court to weigh the aggravating factors as against the mitigating factors. I have fulfilled that duty and considered each of your mitigating factors and all the evidence presented by you at the previous sentencing phase of this trial. After taking all the factors into consideration, I cannot find that the mitigating factors outweigh the proven aggravating factors of the intentional killing of an innocent victim while in the course of a rape of that victim. I, in fact, find that the aggravating factors or aggravating factor outweighs all of the presented mitigating factors. Accordingly, this Court finds that the sentence in this case should be death."

(Supp. R. on RTR, 209-10.) The court's written sentencing order also indicates that the court's sentencing decision was

based solely on the weighing of the aggravating and mitigating circumstances. There is nothing in the record or in the circuit court's sentencing order that indicates that the court considered the testimony of the victim's family in sentencing Osgood 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. Crim. 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). Accordingly, based on the record before this Court, we cannot say that Osgood's substantial rights were adversely affected and, thus, the circuit court did not commit plain error.

VI.

Next, Osgood claims that the circuit court erred in sentencing Osgood to death on the basis of an "out-of-date and inadequate presentence investigation report" because it relied on the same presentence investigation report that had been completed in 2014 and used during Osgood's first penalty-phase hearing. (Osgood's Supp. brief, 35.) Specifically, Osgood

claims in his brief on return to remand that certain information found in the presentence investigation report that is required by Rule 26.3(6) and (7), Ala. R. Crim. P., such as "'statement[s] about the defendant's social history, including family relationships, marital status, interests, and activities" and "'statement[s] of the defendant's medical and psychological history,'" would likely be different in 2018 than it was in 2014, regardless of whether he had been incarcerated during that entire time. He also claims that an updated report "could have provided information regarding [his] good behavior in prison." (Osgood's Supp. brief, 36.) Osgood did not raise this claim in the circuit court; thus, we will review this claim to determine whether there is plain error. Rule 45A, Ala. R. App. P.

In the present case, at the new penalty-phase hearing, the following occurred:

> "THE COURT: We had a presentence investigation. It is my understanding that the defendant since the last sentencing hearing, he has been in custody with the Department of Corrections or with Chilton County since then.
>
> "MR. BOWERS: He has, Your Honor.

> "THE COURT: Is there anything in addition to the previous presentencing order that you would like to add to that report?
>
> "MR. BOWERS: No, sir."

(Supp. R. on RTR, 208-09.)

> "'A party cannot assume inconsistent positions at trial and on appeal, and a party cannot allege as error proceedings in the trial court that were invited by him or were a natural consequence of his own actions.' Fountain v. State, 586 So. 2d 277, 282 (Ala. Crim. App. 1991). 'The invited error rule has been applied equally in both capital cases and noncapital cases.' Rogers v. State, 630 So. 2d 78 (Ala. Crim. App. 1991), rev'd on other grounds, 630 So. 2d 88 (Ala. 1992). 'An invited error is waived, unless it rises to the level of plain error.' Ex parte Bankhead, 585 So. 2d 112, 126 (Ala. 1991)."

Williams v. State, 710 So. 2d 1276, 1316 (Ala. Crim. 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). See also Melson v. State, 775 So. 2d 857, 874 (Ala. Crim. App. 1999)("'It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice.' Murrell v. State, 377 So. 2d 1102, 1105, cert. denied, 377 So. 2d 1108 (Ala. 1979), quoting Aldridge v. State, 278 Ala. 470, 474, 179 So. 2d 51, 54 (1965)."). Thus, if there was any error in the circuit court's reliance on the

2014 presentence investigation report, it was clearly invited by Osgood.

Moreover, even assuming that the court's use of the previous presentence investigation was not invited error, any potential error was harmless beyond a reasonable doubt. We note that Osgood's assertions on appeal to support this claim were merely speculative, stating that certain information "would likely be different in 2018 than it was in 2014" and that an updated presentence investigation report "could have provided information regarding [his] good behavior in prison." (Osgood's Supp. brief, 36.)(Emphasis added.) Osgood has failed to provide this Court with any information that he believes should have been included in an updated presentence investigation report.

Additionally, this Court addressed a similar situation in Riley v. State, 166 So. 3d 705 (Ala. Crim. App. 2013), in which the court sentenced Riley to death using the same presentencing report that had been used in Riley's first trial. In Riley, this Court noted that the circuit court not only had considered the previous presentence report from Riley's previous trial, which detailed the facts and

circumstances of Riley's offense as well as his background and circumstances, but also had considered evidence of Riley's "difficult upbringing, his troubled childhood, the death of his sibling, his estranged relationship with his mother, his substance-abuse problems, his age at the time of the offense, any alleged mental-health issues, evidence of three separate head traumas, and the well-being of his young daughter." Id. at 718. In Riley, this Court held that where the record indicated that "the circuit court carefully considered 'the full mosaic of [Riley's] background and circumstances before determining the proper sentence,'" and "[b]ased on the vast array of mitigation evidence presented during the penalty phase coupled with the court's access to reports and other information not contained in the presentence report, any inadequacies in the presentence report did not constitute plain error." Id., citing Guthrie v. State, 689 So. 2d 935, 937 (Ala. Crim. App. 1996).

Here, the circuit judge was the same judge who was present and heard all the mitigation evidence that had been presented at Osgood's first sentencing hearing. The circuit court's sentencing order indicated that it had considered

Osgood's childhood, including Osgood being passed around from home to home, his parents leaving him and his siblings, sexual abuse, substance abuse, and the fact that Osgood's brain development was potentially hindered due to malnutrition Osgood suffered as an infant. See RTR C., 120. The circuit court's sentencing order indicates that it also considered the mitigation expert's testimony and evidence of Osgood's character. Much like in Riley, the record in the present case indicates that the circuit court carefully considered "the full mosaic of [Osgood's] background and circumstances before determining the proper sentence," Guthrie, 689 So. 2d at 93; thus, we conclude that any inadequacies in the presentence report did not constitute plain error. Rule 45A, Ala. R. App. P.

VII.

Osgood also argues that the circuit court and the State misled potential jurors about the importance of the jury's role in sentencing by referring to the jury's role as a recommendation before the venire. Osgood insists that the circuit court and the prosecution's references "unconstitutionally undermined potential juror's sense of

responsibility." (Osgood's Supp. brief, 38.) Osgood cites Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986), Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985), and Ex parte McGriff, 908 So. 2d 1024, 1038 (Ala. 2004), in support of his contention. As previously discussed Part I.A of this opinion, the court and the prosecution's reference to the jury's role as a recommendation was not error. Further, as to this particular claim, any potential error was harmless beyond a reasonable doubt in this case. As previously determined in this opinion, Osgood voluntarily waived his right to jury participation in his new penalty-phase trial, leaving the sentencing determination solely with the circuit court. Therefore, this reference had no effect on Osgood's sentencing and did not affect his substantial rights; thus, Osgood is not entitled to relief on this claim.

VIII.

Osgood alleges that his death sentence must be vacated in light of the United States Supreme Court's decisions in Hurst v. Florida, 577 U.S. ____, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Specifically, he claims that Ring and

Hurst render Alabama's death-penalty sentencing law unconstitutional. He also claims that, under Hurst, a death sentence may be imposed only after a jury has unanimously found beyond a reasonable doubt 1) the existence of all the statutory aggravating circumstances on which the death sentence is premised, and 2) that those aggravating circumstances outweigh the mitigating circumstances. Thus, he contends, in the present case, because the circuit court, not the jury, found the existence of an aggravating circumstance and found that the aggravating circumstance outweighed the mitigating circumstances, his death sentence is due to be reversed. We disagree.

The Alabama Supreme Court in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), explained:

> "In 2000, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a 'jury determination of any fact on which the legislature conditions an increase in their maximum punishment.' 536 U.S. at 589. Specifically, the Court held that

> the right to a jury trial guaranteed by the Sixth Amendment required that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence."

Bohannon, 222 So. 3d at 528. The Court in Bohannon also explained that the Alabama Supreme Court had considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), and Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), stating the following in regard to its findings:

> "[The Alabama Supreme Court] concluded that 'all [that] Ring and Apprendi require' is that 'the jury ... determine[] the existence of the "aggravating circumstance necessary for imposition of the death penalty."' 859 So. 2d at 1188 (quoting Ring, 536 U.S. at 609), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.
>
> "In Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at

> least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment."

222 So. 3d 525. Additionally, the Alabama Supreme Court in Bohannon recognized the following:

> "The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the 'findings necessary to impose the death penalty.' 577 U.S. ----, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible."

222 So. 3d at 531.

Finally, in Bohannon, the Alabama Supreme Court addressed the specific issue that Osgood now raises, stating:

> "Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make 'the critical findings necessary to impose the death penalty.' 577 U.S. ----, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's

fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

"Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty--the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

"Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a

theoretically limitless set of facts.' 859 So.2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481. Hurst does not disturb this holding.

"Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: 'The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. ----, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

> "Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because 'two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct,' see § 13A-5-40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A-5-49(9), Ala. Code 1975, that '[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct,' which made Bohannon eligible for a sentence of death. See also § 13A-5-45(e), Ala. Code 1975 ('[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.'). Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme or course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated."

222 So. 3d at 532-33.

In the present case, a jury convicted Osgood of two counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. Thus, by its verdict finding Osgood guilty of murder made capital because it was committed during the course of a rape, the jury also found the existence of the aggravating

circumstance provided in § 13A-5-49(4), Ala. Code 1975, that "the capital offense was committed while the defendant was engaged or was an accomplice in the commission of ... [a] rape," which made Osgood eligible for a sentence of death. See also § 13A-5-45(e), Ala. Code 1975 ('[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.'). Therefore, "[b]ecause the jury, not the judge, unanimously found the existence of an aggravating factor" -- that the capital offense was committed while Osgood was engaged in the commission of a rape -- "making [Osgood] death-eligible, [Osgood]'s Sixth Amendment rights were not violated." See Bohannon, 222 So. 3d at 533.[4]

[4]We recognize that there are situations that may arise in which a defendant voluntarily waives jury participation in the penalty-phase of his trial after a jury finds him guilty of capital murder, but where the determination of the existence of an aggravating circumstance necessary to render him eligible for the death penalty is not encompassed in the jury's guilty verdict. In such cases, Hurst, Ring, and Apprendi, would likely not apply because the judge, as the fact-finder, would be required to determine whether aggravating factors exist to make the defendant eligible for the death penalty. However, in this particular case, because the jury unanimously found the existence of the aggravating circumstance beyond a reasonable doubt when it rendered its

IX.

To the extent that Osgood contends that the circuit court erred in "double-counting rape as an aggravating circumstance in the penalty phase" of his trial, Osgood is not entitled to relief on this claim.[5] (Osgood's brief on appeal, 97.) Specifically, Osgood claims that "the use of the charge of intentional murder during the course of a rape ... both as an aggravator in the guilt/innocense phase and as an aggravator in the penalty phase failed to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty ... and subjected [him] to two punishments as a result of being convicted of a single criminal charge." (Osgood's brief on appeal, 97-98.) These same assertions have been previously considered and rejected by this Court. See Reynolds v. State, 114 So. 3d 61 (Ala.

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verdict in the guilt-phase of Osgood's trial, such a determination regarding the application of Hurst, Ring, and Apprendi when the jury had yet to make such finding of the existence of aggravating factors is unnecessary.

[5]Although this specific issue is not included in his supplemental brief on return to remand, Osgood raised this issue in his principal brief on appeal. In his supplemental brief on return to remand, Osgood incorporated by reference the issues raised in his principal brief before this Court pursuant to Rule 28A(a), Ala. R. App. P.

Crim. App. 2010); Morris v. State, 60 So. 3d 326 (Ala. Crim. App. 2010). Osgood did not object on this basis at trial, and we find no plain error. Rule 45A, Ala. R. App. P.

X.

Additionally, in a claim that Osgood incorporated from his principal brief on appeal, Osgood contends that the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment. However, contrary to Osgood's assertion, "'[t]here is an abundance of caselaw ... that holds that the death penalty is not per se cruel and unusual punishment.'" Mashburn v. State, 7 So. 3d 453, 465 (Ala. Crim. App. 2007)(quoting Stewart v. State, 730 So. 2d 1203, 1242 (Ala. Crim. App. 1997)(opinion on third return to remand), aff'd 730 So. 2d 1246 (Ala. 1999)). See also Knight v. State, 907 So. 2d 470 (Ala. Crim. App. 2004); Hocker v. State, 840 So. 2d 197 (Ala. Crim. App. 2002). Accordingly, Osgood is not entitled to relief on this claim.

XI.

Finally, we must address the propriety of the decision of the circuit court to sentence Osgood to death, as required by § 13A-5-53, Ala. Code 1975. Osgood was convicted of two

counts of murder made capital because it was committed during the course of a first-degree rape and during the course of a first-degree sodomy. See § 13A-5-40(a)(3), Ala. Code 1975. The record shows that Osgood'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.

As previously discussed, the circuit court found as aggravating circumstances that Osgood intentionally killed the victim while in the course of raping her. See § 13A-5-49(4). The circuit court stated the following concerning the mitigating circumstances in its written sentencing order:

> "This Court finds, from preponderance of the evidence that one statutory mitigator and nine non-statutory mitigator exist. Those would be under Section 13A-5-51(1), that [Osgood] had no significant history of prior criminal activity, and under Section 13A-5-52, that [Osgood's] childhood was unsettled at best, with him being passed around from home to home, parent to parent and some parents leaving him and his siblings after establishing a family together, substance abuse, sexual abuse by a man in a bar when he was a child, that [Osgood] fathered a child with a 24 year old woman when he was 14, that he had sexual encounters with other children when he was 9 years old, that his brain development was potentially hindered due to malnutrition he suffered as an infant, that he was admitted to a [psychiatric] hospital as a teenager, that he reported a suicide attempt and that Dr. Mulbry diagnosed him as having an antisocial personality disorder."

(Record on Return to Remand, 120.) The court also stated the following in discussing the nonstatutory mitigating factors:

> "[Osgood] presented evidence of [his] character and the reasons for his actions throughout his life, included in the same are factors concerning his adoptions, the family leaving he and his siblings, the several Pension and Security contracts and the facts that he moved in with a prior family member to keep them while they were sick and needed nursing.
>
> "The defense presented testimony from Teal Dick, a recognized mitigation expert who is a licensed professional counselor, who testified that he had counseled and review[ed] [Osgood's] history on five occasions and from those sessions, he determined that [Osgood] has a sexual addiction and an attachment disorder, which was confirmed by the evidence presented by Dr. Leonard William Mulbry.
>
> "In reviewing and considering the nonstatutory mitigating circumstances, this Court notes that his upbringing was non-conventional, and testimony of his parents failure to cuddle him caused certain character flaws."

(Record on Return to Remand, 121-22.)

After reviewing the record, we agree with the circuit court's findings. As required by § 13A-5-53(b)(2), Ala. Code 1975, we have independently weighed the aggravating and mitigating circumstances to determine the propriety of Osgood's sentence of death, and we are convinced that death was the proper sentence for Osgood. Osgood's sentence was not excessive or disproportionate to the penalty imposed in

similar cases. See, e.g., Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013)(rape/murder); Hammonds v. State, 777 So. 2d 750 (Ala. Crim. App. 1999) (rape/murder); Freeman v. State, 555 So. 2d 196 (Ala. Crim. App. 1988) (rape/murder).

Further, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that has or probably has adversely affected Osgood's substantial rights and have found no plain error or defect in the proceeding under review.

Conclusion

Based on the foregoing reasons, Osgood's sentence of death is affirmed.

AFFIRMED.

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