REL: January 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-17-0963

Peter Capote

v.

State of Alabama

Appeal from Colbert Circuit Court
(CC-16-340)

WINDOM, Presiding Judge.

Peter Capote appeals his convictions for one count of capital murder and one count of first-degree assault.[1] Capote was convicted of one count of murder made capital for taking the life of Ki-Jana Freeman through the use of a deadly weapon while Freeman was in a vehicle, see § 13A-5-40(a)(17), Ala. Code 1975, and one count of first-degree assault for causing serious physical injury to Tyler Blythe, see § 13A-6-20, Ala. Code 1975. The jury recommended, by a vote of 10-2, that Capote be sentenced to death for his capital-murder conviction. The circuit court accepted the jury's recommendation and sentenced Capote to death. Capote was sentenced to 20 years in prison for his assault conviction.

In early 2016 Thomas Hubbard was the leader of the gang Almighty Imperial Gangsters. That gang consisted of Hubbard, Capote, Benjamin Young, De'Vontae Bates, Austin Hammonds, Michael Blackburn, and Trey Hamm. On February 28, 2016, Hubbard's residence was burglarized. Several items were taken during the burglary, including Hamm's Xbox video-game console.

[1]Capote was also charged with, and found guilty of, discharging a firearm into an occupied vehicle; however, following the return of the jury's verdict, the State moved to set aside the verdict. The circuit court granted the motion on that count.

Hubbard informed the gang that he was going to find out who had burglarized his house and kill him or her.

Hammonds and Bates learned that Ki-Jana Freeman was selling an Xbox in an online marketplace. They suggested to Hubbard that Freeman might have been the person that had stolen Hamm's Xbox. The gang held a meeting and decided to kill Freeman if he was responsible for the burglary. The gang formulated a plan in which Hammonds would meet with Freeman to determine if the Xbox Freeman was selling was the one that had been stolen during the burglary. Hammonds contacted Freeman via an instant message on the social-media Web site Facebook, asking if Freeman had a green, Halo Edition Xbox for sale. Freeman and Hammonds exchanged several messages about the Xbox, but they never met to conduct a transaction. Hammonds, though, represented to Hubbard that he had met with Freeman, telling Hubbard that he thought the Xbox Freeman was selling was the one stolen during the burglary.[2]

On March 1, 2016, Bates contacted Freeman, purportedly seeking to purchase acid, a hallucinogenic drug. Bates and

[2]Hammonds alleged at trial that he later told Hubbard that Freeman did not have the stolen Xbox but that Hubbard continued with the plan to kill Freeman.

Freeman agreed to meet at 10:00 p.m. at the Spring Creek Apartments. Bates did not go to the apartment complex; instead, Capote, Young, Hubbard, and Hamm went to the complex in a white truck and waited for Freeman to arrive. Bates sent a text message to Freeman asking him for his location and what kind of vehicle he was driving. Freeman responded that he was about to arrive at the apartment complex and that he was driving a blue Ford Mustang automobile. Bates relayed Freeman's response to his fellow gang members in the truck. When he arrived at the apartment complex, Freeman parked his Mustang in the back parking lot near a dumpster. The white truck pulled behind Freeman. Young and Capote got out of the truck and began firing their weapons at the Mustang. After firing multiple rounds, Young and Capote got back in the truck and left. Freeman was shot multiple times and was pronounced dead shortly after arriving at the hospital. Tyler Blythe, Freeman's friend who had ridden with Freeman to the apartment complex, was shot 13 times but survived his injuries.

During the investigation, law-enforcement officers obtained a video from surveillance cameras at the apartment complex that had recorded the shooting. Hammonds and Bates

identified Capote as one of the shooters in the video. Shawn Settles, Hubbard's cellmate at the county jail, gained Hubbard's trust and learned the location of an assault rifle used in the shooting. Settles told law-enforcement officers where they could find the rifle, which led to its recovery. Testing of the rifle and the bullets established that the rifle had been used in the shooting.

Standard of Review

This Court has explained:

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

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

applies the law to the facts, no presumption of correctness exists as to the court's judgment."'" Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004) (quoting State v. Hill, 690 So. 2d 1202, 1203 (Ala. 1996), quoting in turn Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995)).

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

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

(Emphasis added.)

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

> "'"To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations."' Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 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 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S., at 163, n. 14.'
>
> "See also Ex parte Hodges, 856 So. 2d 936, 947-48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

11 So. 3d at 938. "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Although Capote'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).

I.

Capote argues that the circuit court improperly admitted lay-opinion testimony from Capote's codefendants on the ultimate issue in the case -- the identity of the shooter. Bates and Hammonds identified Capote as the shooter when they watched the surveillance video from the apartment complex, and they both testified at trial that Capote was the shooter in the video. Capote claims that neither codefendant was present at the apartment complex during the shooting and that they lacked personal knowledge of the shooting as required under Rule 701, Ala. R. Evid. Capote also contends that this evidence was improperly admitted through the hearsay testimony of Investigator Wes Holland. Capote did not raise these claims below. Consequently, they will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

Rule 704, Ala. R. Evid., states that "[t]estimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." "An ultimate issue has been defined as the last question that must be determined by the jury. See Black's Law Dictionary (5th ed. 1991)." Tims v. State, 711

So. 2d 1118, 1125 (Ala. Crim. App. 1997). Rule 701, Ala. R. Evid., states that "[i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

This Court was confronted with a similar situation in Hardy v. State, 804 So. 2d 247 (Ala. Crim. App. 1999), wherein this Court addressed the admissibility of testimony from several witnesses who identified the defendant as the gunman shown in the store's surveillance videotape. This Court in Hardy stated the following:

> "In Ex parte Rieber, 663 So. 2d 999 (Ala.), cert. denied, 516 U.S. 995, 116 S. Ct. 531, 133 L. Ed. 2d 437 (1995), the Alabama Supreme Court addressed the question whether the identification by witness Wayne Gentle of Rieber as the gunman in the surveillance videotape showing the capital murder of a convenience store clerk was reversible error. The court disposed of this issue, as follows:
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> > "'[W]e note that we are aware of no rule (and Rieber does not cite us to one) preventing a lay witness from testifying to facts that are within his personal knowledge. See J. Colquitt, Alabama Law of Evidence, §§ 7.0, 7.1 (1990), and the cases cited therein; C. Gamble, McElroy's Alabama

> Evidence, § 127.01 (4th ed. 1991), and the cases cited therein. Gentle testified that he had been a high school classmate of Rieber; that he knew Rieber when he saw him; and that he had seen and spoken to Rieber at the store at approximately 5:00 p.m. on the day of the murder. The record indicates that Gentle's identification of Rieber as the gunman shown on the videotape was based on his personal knowledge of Rieber's physical characteristics and on his appearance on the day of the murder.
>
> "'We also note Rieber's contention[] that Gentle's identification testimony ... constituted a nonexpert opinion that usurped the function of the jury in evaluating the videotape .... [E]ven if we were to agree with Rieber's characterization of Gentle's testimony as an opinion, and we do not, our conclusion as to the admissibility of Gentle's testimony would not be different. Gentle personally observed Rieber on the day of the murder. At that time, according to Gentle, Rieber was wearing a light colored T-shirt and a ball cap, and he had darker hair than he had at the trial. The record indicates that Rieber had cut his hair before the trial commenced; he wore a gray suit in court. It is well settled that if a lay witness is better qualified or in a better position than the jury to draw inferences from the facts, then it is permissible for that witness to express an opinion or to draw a conclusion from those facts personally observed by or known to the witness. Colquitt, Alabama Law of Evidence, supra; McElroy's, supra; Wright v. Rowland, 406 So. 2d 830 (Ala. 1981).'

"663 So. 2d at 1011-12.

"... [W]e have also considered the pertinent discussion by the United States Court of Appeals for the Eleventh Circuit in United States v. Pierce, 136 F.3d 770 (11th Cir.), cert. denied, 525 U.S. 974, 119 S. Ct. 430, 142 L. Ed. 2d 350 (1998). In that case, the court addressed the propriety, under Fed. R. Evid. 701, of the admission of lay opinion testimony from [Pierce]'s probation officer and his employer, identifying him as the individual depicted in a still photograph taken from a surveillance videotape of a bank robbery. We recognize that Alabama's counterpart to Fed. R. Evid. 701 -- Ala. R. Evid. 701, which is identical to the federal rule -- was not in effect at the time of Hardy's trial and, on its face, is different from the preexisting Alabama practice. However, we nevertheless find the analysis in United States v. Pierce pertinent, for it also uses the inquiry used in Ex parte Rieber. (Ex parte Rieber casts the pertinent determination as whether the lay witness is better qualified or in a better position than the jury to draw the conclusion of identity from those facts personally observed by or known to him. In its discussion in United States v. Pierce, the court replaces the pertinent inquiry of whether there is some basis for concluding that the witness is more likely to correctly identify the defendant from the surveillance photograph than is the jury with the focus of whether a witness is better able than the jury to make a correct determination.) The court in United States v. Pierce stated:

> "'Although this court has not previously addressed whether lay opinion testimony identifying a defendant in surveillance photographs is admissible under Rule 701, several other circuits have held such testimony admissible in some circumstances. Because we find, as have most of those circuits, that lay opinion identification testimony may be helpful to the jury where, as here, "there is some

basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury," we hold that the district court acted within its discretion in admitting identification testimony from Hammond and Hammonds. United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984); see also United States v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995) (holding lay opinion identification testimony admissible "at least when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification"); United States v. Robinson, 804 F.2d 280, 282 (4th Cir. 1986) ("A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."); United States v. Towns, 913 F.2d 434, 445 (7th Cir. 1990) (same); United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993) (holding lay opinion identification testimony admissible where "there is reason to believe that the witness is more likely to identify correctly the person than is the jury"); United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir. 1980) (upholding the admission of lay opinion testimony regarding defendant's resemblance to the subject of a bank surveillance photograph where the witness "was in a much better position than the jury to give an opinion as to the resemblance between [defendant]

at the approximate date of the robbery and the man in the surveillance photograph").

"'We agree with our sister courts that whether a particular witness is better suited than the jury correctly to identify a defendant as the individual depicted in surveillance photographs turns on a number of factors. Perhaps most critical to this determination is the witness's level of familiarity with the defendant's appearance. As the Fourth Circuit observed in United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986), vacated on other grounds, 479 U.S. 1077, 107 S.Ct. 1271, 94 L. Ed.2d 132 (1987):

> "'"[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting."

"'Accordingly, while familiarity derived from a witness's close relationship to, or substantial and sustained contact with, the defendant weighs heavily in favor of admitting the witness's identification

testimony, knowledge of the defendant's appearance based entirely on the witness's "review of photographs of [the defendant] and witnesses' descriptions of him" does not, as it is not based on anything more than the evidence the jury would have before it at trial. See LaPierre, 998 F.2d at 1465.

"'Similarly, factors such as the witness's familiarity with the defendant's appearance at the time the surveillance photographs were taken or dressed in a manner similar to the individual depicted in the photographs, and whether the defendant had either disguised his appearance at the time of the offense or altered his appearance prior to trial, would also have some bearing on whether the witness is better able than the jury to make a correct identification. See United States v. Ellis, 121 F.3d 908, 926 (4th Cir. 1997), cert. denied, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 674 (1998) (upholding the admission of lay opinion identification testimony by a witness who had known defendant for approximately five years, where defendant had disguised himself with a mask and a hooded sweatshirt at the time of the offense); Towns, 913 F.2d at 445 (upholding identification testimony from defendant's former girlfriend, who had observed defendant's appearance on the day of the bank robbery, where the surveillance photograph depicted the robber "wearing a stocking cap, sunglasses, and a sweatsuit that potentially made him appear heavier than he really was" and where defendant had shaved his moustache off prior to trial); Borrelli, 621 F.2d at 1095 (finding lay opinion identification testimony helpful

> where witness, defendant's stepfather, "had independent knowledge of [defendant's] appearance both before and at the time of the robbery" and defendant "had significantly altered his appearance by changing his hairstyle and growing a moustache")."

"136 F.3d at 774-75. See also People v. Morgan, 214 A.D.2d 809, 625 N.Y.S.2d 673, 674 (1995) ('It is now accepted that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'), appeal denied, 86 N.Y.2d 783, 655 N.E.2d 726, 631 N.Y.S.2d 629 (1995).

"In considering the above principles, we note that [Sergeant Dwight] Hale's identification rests upon the weakest foundation of the identifications introduced (the others being the identifications by Partridge, Townsend, and Hines). Hale, the chief investigator for this case, testified that he spent a total of about 15 hours around Hardy after Hardy's apprehension, which included interviewing Hardy in Louisville and transporting him to Alabama. [Officer Eric] Partridge testified that he has known Hardy for 15 years; that they had gone to school together; that they rode the same school bus daily for five or six years; that he has also 'known him through the police department' (R. 3134), and that, while he was a police officer, he saw Hardy two to three times a week; and that the last time he had seen him before the commission of the September 7, 1993, robbery-murder was around August 20, 1993. [Investigator Thomas] Townsend testified that he has known Hardy all of Hardy's life; that he knows Hardy's family; that they live in the same community; and that, during the year preceding the capital offense, he saw Hardy an average of three times a week. [Christopher] Hines testified that,

when he viewed the videotape several days after the offense, he identified the gunman in the videotape as Hardy. He further testified that he had been with Hardy on several occasions during the days preceding the crime and that he was with Hardy during the hours around the crime except between approximately 10:30 p.m., when he gave Hardy the keys to his automobile, and around 3:00 or 4:00 a.m. the following morning, when Hardy returned; and that after Hardy returned, they were going to go get breakfast, but instead Hardy took him to where the cash register was.

"The above qualifications of each of these latter three witnesses constitute a clearly sufficient basis for concluding that each was better qualified or in a better position than the jury to correctly identify Hardy. Weighing heavily in favor of admitting their identifications is their 'familiarity derived from a ... close relationship to, or substantial and sustained contact with' Hardy. United States v. Pierce, 136 F.3d at 774. For example, they had far more opportunity than the jurors to see Hardy from a variety of angles and distances and under different lighting conditions. In addition, they were more familiar with Hardy's carriage and posture. Because the depiction of the gunman was in fact a moving picture, the three, having seen Hardy in motion and being familiar with his mannerisms and body movements, were certainly in a better position to identify him than the jury, who had primarily seen Hardy motionless in a sterile courtroom. See State v. Hardy, 76 Wash. App. 188, 884 P. 2d 8, 10 (1994). Moreover, all three witnesses were familiar with Hardy's appearance at the time the surveillance videotape was made -- Hines more than the two law enforcement officers because he had seen Hardy hours before and hours after the capital offense. We have also taken into consideration the fact that Hardy obscured his face from view at the time of the offense, thus altering his appearance in an attempt to avoid being

identified. See United States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991) ('Because the police officers who identified Stormer had worked with him for several years and were familiar with his appearance, they were in a better position to properly identify Stormer as the robber [depicted in the surveillance photographs] than the jury, especially in light of the fact that poor picture quality of the surveillance photographs in conjunction with Stormer's efforts to alter his appearance served to hinder the jury in making the crucial decision of whether Stormer was the man depicted in the surveillance photographs.'). See also People v. Robinson, 908 P.2d 1152, 1155 (Colo. App. 1995) (in rejecting the contention that the jury would not be less able to make a comparison than would the police detective, the court noted that the surveillance videotape is 'less than clear'; that it shows, 'for the most part, only a profile view of the robber'; that it distorts 'to some extent the viewer's perspective concerning the robber's height'; and that it is 'quite brief, and the opportunity to make a comparison is therefore limited'), aff'd, 927 P.2d 381 (Colo. 1996). Particularly in regard to Hines's identification of Hardy as the gunman in the videotape, see Ex parte Rieber, 663 So. 2d at 1011 (after observing that '[t]he record indicates that [the witness's] identification of Rieber as the gunman shown on the videotape was based on his personal knowledge of Rieber's physical characteristics and on his appearance on the day of the murder,' the Court stated that 'even if we were to agree with Rieber's characterization of [the witness's] testimony as an opinion, and we do not, our conclusion as to the admissibility of [the witness's] testimony would not be different'); State v. Winston, 959 S.W.2d 874, 878 (Mo. Ct. App. 1997) (where the defendant's girlfriend's sister 'had spent time with defendant in the time immediately surrounding the burglaries and was familiar with his features,' and where 'the person in the printout of the video tape was moving

quickly and is somewhat difficult to see,' there was a basis for concluding that the sister was more likely to correctly identify the defendant than was the jury in a print generated from a videotape of the surveillance camera, i.e., she was in possession of knowledge that the jury did not have and thus was helpful to the jury). We conclude that the trial court's admission of the identifications of Hardy by Partridge, Townsend, and Hines was within its sound discretion. See United States v. Pierce, 136 F.3d at 773 ('"The ultimate decision as to the admissibility of lay opinion testimony is committed to the sound discretion of the district court and will not be overturned on appeal unless there is a clear abuse of discretion." United States v. Myers, 972 F.2d 1566, 1576-77 (11th Cir. 1992).').

"....

"In finding that the admission of the identification testimony presents no reversible error, we have rejected Hardy's specific contention that the identifications of Hardy constituted incompetent opinion evidence from lay witnesses because, he argues, the witnesses were not actually at the store at the time of the robbery-murder and thus they did not actually observe the facts as to which they testified. Contrary to Hardy's assertion, it was not outside the knowledge of these witnesses to address in their testimony the question whether Hardy, whom they had sufficient basis to recognize, was the gunman in the videotape. Because they knew Hardy at the time of the crime, their conclusions that the person depicted in the videotape was Hardy were based on their perceptions. See Ex parte Rieber (even though the witness did not witness the crime, his identification was properly admitted because it was based, in part, on the witness's personal knowledge of Rieber's physical characteristics). We also reject Hardy's contention that, by testifying that they recognized Hardy as the gunman in the videotape, all identification

> witnesses gave impermissible opinions as to the ultimate fact in issue. 'Although identification testimony embraces an issue of fact -- the identity of the perpetrator, and perhaps evidence of guilt -- the persons providing the identifications are not providing opinions of defendant's guilt or innocence or telling the jury how it should decide the case.' State v. King, 180 Ariz. 268, 883 P.2d 1024, 1036 (1994), cert. denied, 516 U.S. 880, 116 S. Ct. 215, 133 L. Ed. 2d 146 (1995)."

804 So. 2d at 269-274 (footnotes omitted).

In the present case, both Hammonds and Bates were members of the same gang as Capote and were familiar with his appearance at the time of the shooting. In fact, Bates saw Capote leave in the white truck shortly before the shooting. Hammonds's and Bates's familiarity with Capote derived from a "substantial or sustained contact with" Capote; therefore, they were in a better position to identify him than the jury, especially given the poor quality of the surveillance video. See Hardy, 804 So. 2d at 272; United States v. Pierce, 136 F.3d 770, 774 (11th Cir. 1998); United States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991). Further, as this Court held in Hardy, "'[a]lthough identification testimony embraces an issue of fact -- the identity of the perpetrator, and perhaps evidence of guilt -- the persons providing the identifications are not providing opinions of defendant's guilt or innocence

or telling the jury how it should decide the case.'" Hardy, 804 So. 2d at 274 (quoting State v. King, 883 P. 2d at 1036)). Thus, this Court rejects Capote's contention that Hammonds's and Bates's identification testimony amounted to impermissible opinions as to the ultimate fact in issue. See Hardy, 804 So. 2d at 274. This Court finds no abuse of discretion in the circuit's admitting the testimony. Thus, this issue does not entitle Capote to any relief.

Capote also argues that error occurred when Inv. Holland testified that Hammonds and Bates had identified Capote as the passenger in the white truck. Capote contends that this testimony was inadmissible hearsay. In Smith v. State, 246 So. 3d 1086 (Ala. Crim. App. 2017), the investigator testified that the nontestifying codefendants had given several names of others who might have been involved in the crime, including Smith's. This Court held that the investigator's testimony was not hearsay because it was not offered for the truth of the matter asserted but was offered to explain the course of the investigation. Likewise, Inv. Holland's references to the information he received from Bates and Hammonds were not hearsay because they were not offered to prove the identity of

the shooters, because Bates and Hammonds had already testified about the identity of the shooters in the video; rather, the information was offered through the investigator to explain the course of the investigation and its focus on Capote as one of the participants in the shooting.

Moreover, even if Inv. Holland's testimony is considered as hearsay, Capote is due no relief on this claim. "[Evidence] that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred." White v. State, 650 So. 2d 538, 541 (Ala. Crim. App. 1994), overruled on other grounds, Ex parte Rivers, 669 So. 2d 239 (Ala. Crim. App. 1995). Inv. Holland's testimony about the identifications was cumulative to the testimony of Hammonds and Bates; therefore, any error in the admission of Inv. Holland's testimony was harmless. Accordingly, Capote is not entitled to any relief on this claim.

II.

Capote argues that the circuit court erred when, over his objection, it allowed the State to admit into evidence letters he allegedly wrote and passed to Hubbard in jail. Capote

contends that the letters were not properly authenticated. Specifically, Capote argues that, because no one testified that they had seen Capote's handwriting, other than in the letters in question, or actually witnessed Capote writing the letters, the letters were not shown to have been written by him.

Following their arrest, Hubbard and Capote were placed in the county jail. Hubbard was placed in a cell with Shawn Settles. While in jail, Hubbard and Capote conversed aloud back and forth between the cells about the case. Settles recommended that they refrain from discussing their case aloud but should, instead, write notes to one another. Settles taught Hubbard and Capote how to send written notes between their cells. Settles testified that, when an inmate wanted to send another inmate a note, the sender announced it to the hallway and sent the note down the hall and the recipient acknowledged receipt of the note. Settles testified that Hubbard and Capote used this method several times. Settles testified that State's Exhibit 88 was sent by Capote and that he saw Capote writing on paper shortly before he sent the note to Hubbard. The note stated, in pertinent part:

> "Listen gee I killed that nigga But Fuck Ben I'll ask ta talk to Detective and ask For Immunity If I tell him who killed KJ and Tell him Ben did It Bookies uncle said his cousin Life at the Building where It happed and can point Ben out that he seen him Do It and will tell the Detectives That Ben killed him and help us cuz he Did see Ben for real But not the others But he'll say he seen Ben kill KJ and two black guys wit him ...."

(C. 443; R. 1219.) Settles also testified that he heard and saw Capote send additional letters, admitted as State's Exhibits 89, 90, and 92. Settles stated that he had pretended to flush the letters down the toilet in front of Hubbard but, instead, had kept them and turned them over to law-enforcement officers.

> "'"The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001). "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000). In addition, "[t]rial courts are vested with considerable discretion in determining whether evidence is relevant, and such a determination will not be reversed absent plain error or an abuse of discretion." Hayes v. State, 717 So. 2d 30, 36 (Ala. Crim. App. 1997).'

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

Woods v. State, 13 So. 3d 1, 23 (Ala. Crim. App. 2007).

Rule 901(a), Ala. R. Evid., provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "A writing may be authenticated by evidence of the contents or substance of the writing when taken in conjunction with the circumstances out of which it was written." Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence § 111.01(1) (6th ed. 2009). See also Rule 901(b)(4), Ala. R. Evid. (providing that a piece of evidence may be properly authenticated by its "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances").

In Washington v. State, 539 So. 2d 1089 (Ala. Crim. App. 1988), this Court held:

> "'Before a letter is received in evidence, it is necessary to lay a foundation establishing its identity and authenticity, as by introducing proof as to the source of the letter or proof of the handwriting or signature of the sender.' Howard v. State, 347 So. 2d 574, 575 (Ala. Crim. App. 1977). Here, there was no proof regarding the defendant's

handwriting and the letters bore no signature. Nevertheless, even 'unsigned letters may be received in evidence if properly connected with a person as being his actual letter, by the introduction of competent evidence showing it to be so.' Silva v. Exchange Nat'l Bank, 56 So. 2d 332, 335-36 (Fla. 1951).

"The question before us is whether the letters were 'properly connected' with the defendant even though no witness saw him write the letters or place them in his truck for delivery. 'The authenticity of a letter may be established in more than one way. It may be established directly by proof of handwriting or by indirect or circumstantial evidence.' Casto v. Martin, 159 W.Va. 761, 230 S.E.2d 722, 727 (1976); Maynard v. Bailey, 85 W.Va. 679, 102 S.E. 480 (1920); Deaderick v. Deaderick, 182 Ga. 96, 185 S.E. 89 (1936).

"....

"Finally, although 'the mere contents of a written communication ... are of themselves usually not sufficient evidence of genuineness,' 7 Wigmore, Evidence § 2148 at 746, '[t]he contents of a writing may be critical in establishing admissibility. When the contents of a letter are of such nature that the letter could not have passed between any parties except the purported writer and the person to whom it was delivered, the letter is admissible.' Casto v. Martin, 230 S.E.2d at 727 (footnotes omitted). See also People v. Adams, 162 Mich. 371, 127 N.W. 354, 360 (1910) (letters purporting to come from defendant to witness, referring to a subject previously discussed by them, were admissible although it was not shown that he signed or sent them).

"....

> "The sufficiency of the predicate required for the authentication of letters is largely within the discretion of the trial judge, and will be reviewed only for an abuse of discretion. Casto v. Martin, 230 S.E.2d at 727; State v. Huffman, [141 W.Va. 55,] 87 S.E.2d [541] at 554 [(1955)]. We find no abuse of discretion here. The letters were properly admitted for the jury to determine their actual authorship. Maynard v. Bailey, 102 S.E. at 482."

539 So. 2d at 1097-99.

Here, Settles testified that he heard Hubbard and Capote talking about the case while in jail. Settles advised the men that they should write to one another instead of talking aloud for others to hear. Settles testified that the inmates had a method for sending notes to one another in jail and that he instructed Hubbard and Capote on how to send notes. Utilizing the method described by Settles, Capote called out to Hubbard before sending him a note; Settles was familiar with Capote's voice and oftentimes saw Capote appear in the window of his cell's door before sending a note. Before Capote's sending the first note, which was State's Exhibit 88, Settles saw Capote writing on a piece of paper. Capote sent the notes down the catwalk of the jail, and Hubbard indicated that he had received them. Hubbard also sent notes to Capote using the same system. Further, the contents of some of the notes

contained information only Capote would know. For instance, as a tactic to get Capote to confess to the crime, law-enforcement officers had told Capote that they had found some of his girlfriend's hair in the white truck. Capote then admitted to stealing the truck but did not confess to the murder. Capote referenced what the law-enforcement officers had told him in the letter. Capote also talked about the other codefendants in the letter.

The State presented sufficient evidence tending to connect the letters to Capote. Actual authorship of the letters was for the jury to decide. Washington, supra. Therefore, this Court finds no abuse of the circuit court's discretion in admitting the letters. Accordingly, Capote is not entitled to any relief on this claim.

III.

Capote claims that the circuit court violated the Confrontation Clause of the Sixth Amendment to the United States Constitution and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), when it allowed the State to introduce statements from his nontestifying codefendants, Hubbard and Young.

A.

Capote argues that the circuit court erred when it admitted into evidence State's Exhibit 92, a letter that Capote wrote in response to a letter that Hubbard had written, in which Hubbard had presented several numbered questions for Capote to answer. Initially, the circuit court ruled that State's Exhibit 91 -- the numbered questions -- was admissible, and the State asked Settles to read the questions at trial. The circuit court, however, immediately changed its ruling and did not allow Hubbard's questions to be admitted into evidence but did, over Capote's objection, allow Capote's answers to be admitted. Capote contends that, because Hubbard's questions were properly excluded, the numbered answers written in response should have also been excluded. According to Capote, the answers without reference to the related questions were not relevant, were more prejudicial than probative, and "forced [the jury] to speculate as to what the list of questions in State's Exhibit 91, that the State had discussed in front of them and began to have read, were, in order to make any sense of State's Exhibit 92." (Capote's

brief, at 33.) Capote further contends that the admission of State's Exhibit 92 was unconstitutional under Bruton.

In Bruton, the Supreme Court of the United States held that the receipt into evidence of a nontestifying codefendant's confession that implicates the accused violates the accused's right of cross-examination guaranteed by the Confrontation Clause. 391 U.S. at 132, 88 S.Ct. At 1625-26. In this case, the record reveals no such violation. Settles never testified to the contents of the questions written by Hubbard. Thus, there was no inadmissible statement by a nontestifying codefendant admitted into evidence. Further, State's Exhibit 92, the numbered response by Capote, did not constitute inadmissible hearsay.

Under the Alabama Rules of Evidence, hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. Hearsay is generally inadmissible. See Rule 802, Ala. R. Evid. Yet, not all out-of-court statements offered for the truth of the matter asserted constitute hearsay. A party-opponent admission, for example, includes, but is not

limited to, a statement that is offered against a party that is "the party's own statement in either an individual or a representative capacity." Rule 801(d)(2), Ala. R. Evid. When a statement is offered against a defendant in this manner, it is not hearsay and is, therefore, not excluded under Rule 802, Ala. R. Evid. See Rule 801(d)(2), Ala. R. Evid.

Here, the statements contained in State's Exhibit 92 were statements by Capote and were properly admitted as an admission by a party opponent. Contrary to Capote's arguments, the statements were relevant to show Capote's knowledge of and involvement in the murder. Further, the statements by Capote corroborated trial testimony, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See Rule 403, Ala. R. Evid.

Finally, Capote argues that the State admitted improper hearsay statements from Hubbard through Settles's testimony. The citations to the record in Capote's brief, however, do not support Capote's contention. The cited pages do not contain any testimony regarding statements made by Hubbard.

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

B.

Capote argues that the State improperly admitted statements by codefendant Young. Capote claims that Hammonds was allowed to testify to statements Young had made to him following the murder.

During trial, Hammonds testified that he met with Hubbard, Capote, and Young the day after the murder. When asked if the men had had a discussion regarding the shooting, Hammonds testified that they had told him to lay low and to keep quiet. The prosecutor then asked Hammonds if they had ever told him how many shots were fired. Hammonds testified: "15 or 17, something like that." (R. 931.) Defense counsel objected, and the circuit court sustained the objection, instructing Hammonds not to testify to what he was told. Because the circuit court immediately sustained the objection and indicated that the witness could not testify to what he was told, there is no adverse ruling from which to appeal. After the circuit court sustained the objection, Capote did not raise any further objections, request any curative

instructions, or move for a mistrial. See Taylor v. State, 808 So. 2d 1148, 1188 (Ala. Crim. App. 2000) ("The trial court's sustaining of Taylor's objection was sufficient to eradicate any possible prejudice to Taylor."). Therefore, this issue will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

This Court notes that the statements were attributed to the group rather than a specific person. This is significant because the analysis would vary depending on the attribution. If the statements were made by Capote himself, no Bruton violation occurred. On the other hand, if the statements were made by Young or Hubbard, the statements did not directly implicate Capote. Further, if Young or Hubbard did make the statements as related by Hammonds, they were plainly nontestimonial, see United States v. Williams, 506 F.3d 151, 156 (2d Cir. 2007) (statements to associates about crimes in which the declarant participated are not testimonial), and the Confrontation Clause does not apply to nontestimonial statements. United States v. Hano, 922 F. 3d 1272 (11th. Cir. 2019). Thus, if the statements were made by Young or Hubbard, no Bruton violation occurred.

Moreover, even if this Court were to find that a Bruton violation occurred, this Court has held that such a violation may be harmless. See Collins v. State, [Ms. CR-14-0753, Oct. 13, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017). "[V]iolations of the Confrontation Clause are subject to harmless-error analysis." Smith v. State, 898 So. 2d 907, 917 (Ala. Crim. App. 2004).

> "'A denial of the right of confrontation may, in some circumstances, result in harmless error.' James v. State, 723 So. 2d 776, 781 (Ala. Crim. App. 1998). '[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' Ex parte Baker, 906 So. 2d 277, 287 (Ala. 2004) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). '"'The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction.'"' James, 723 So. 2d at 781 (quoting Chapman, 386 at 23, quoting in turn Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). In determining whether such an error is harmless, this Court must look at 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)."

Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017).

The statements at issue were by no means critical and were cumulative to, and corroborated by, other evidence. After thoroughly reviewing the record, this Court concludes that any error in the admission of the statements was harmless beyond a reasonable doubt. Accordingly, Capote is not entitled to any relief on this claim.

IV.

Capote argues that the circuit court erred in allowing the State to introduce gruesome autopsy photographs. Specifically, Capote contends that the autopsy photographs, including photographs of Freeman's lungs removed from his body and of Freeman's rib cage with the organs removed, were particularly gruesome, irrelevant, and inflammatory.

The record reflects that, before trial, Capote filed a motion in limine to prohibit the State from introducing inflammatory and prejudicial autopsy photographs. The circuit court ruled that the photographs that had been admitted in codefendant's Young's trial would be admitted in Capote's trial. The circuit court's ruling was not absolute. At trial, Capote did not object to the admission of the autopsy photographs; therefore, this Court reviews Capote's challenge

to the admission of the autopsy photographs for plain error only. See Ex parte Martin, 931 So. 2d 759 (Ala 2004) (holding that, unless the trial court's ruling on a motion in limine is absolute or unconditional, proper objections at trial are necessary to preserve the issue); Rule 45, Ala. R. App. P.

> "'Generally, photographs are admissible into evidence in a criminal prosecution "if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge."' Bankhead v. State, 585 So. 2d 97, 109 (Ala. Crim. App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd, 625 So. 2d 1146 (Ala. 1993), quoting Maqwood v. State, 494 So. 2d 124, 141 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 154 (Ala. 1986). 'Photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome.' Williams v. State, 506 So. 2d 368, 371 (Ala. Crim. App. 1986) (citations omitted). In addition, 'photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.' Ex parte Siebert, 555 So. 2d 780, 784 (Ala. 1989). 'This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries.' Ferguson v. State, 814 So. 2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001). '"[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter."' Jackson v. State, 791 So. 2d 979, 1016 (Ala. Crim. App. 2000), quoting Perkins v. State, 808 So. 2d

> 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953 (2002), on remand to, 851 So. 2d 453 (Ala. 2002). 'The same rule applies for videotapes as for photographs: "The fact that a photograph is gruesome and ghastly is no reason for excluding it, if relevant, even if the photograph may tend to inflame the jury."' Siebert v. State, 562 So. 2d 586, 599 (Ala. Crim. App. 1989), aff'd, 562 So. 2d 600 (Ala. 1990), quoting Walker v. State, 416 So. 2d 1083, 1090 (Ala. Crim. App. 1982). See also Ward v. State, 814 So. 2d 899 (Ala. Crim. App. 2000). Generally, '[a] properly authenticated video tape recording of the scene of the crime constitutes competent evidence' and 'is admissible over the defendant's objections that the tape was inflammatory, prejudicial, and cumulative.' Kuenzel v. State, 577 So. 2d 474, 512-13 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala. 1991). 'Provided that a proper foundation is laid, the admissibility of videotape evidence in a criminal trial is a matter within the sound discretion of the trial judge.' Donahoo v. State, 505 So. 2d 1067, 1071 (Ala. Crim. App. 1986)."

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

This Court has thoroughly reviewed all the autopsy photographs. As Capote contends, photographs that depict distortions of the subject matter, such as massive mutilation or extreme magnification, are objectionable. See Malone v. State, 536 So. 2d 123 (Ala. Crim. App. 1988). Nonetheless, photographs that accurately depict the nature of a victim's wounds are admissible even if they are gruesome or cumulative. Ackling v. State, 790 So. 2d 975 (Ala. Crim. App. 2000). The

autopsy photographs were relevant and admissible to show the extent of the wounds to Freeman's body. Each photograph was identified and explained to the jury. Although they are certainly unpleasant to view, they are not unduly gruesome, and this Court concludes that their prejudicial effect did not substantially outweigh their probative value. Therefore, this Court finds no error, much less plain error, in the admission of the autopsy photographs. Accordingly, Capote is not entitled to any relief on this claim.

V.

Capote argues that "the State repeatedly introduced inadmissible hearsay evidence through its witnesses and its exhibits at trial." (Capote's brief, at 41.) Capote points to numerous claims of error, including the alleged hearsay statements already addressed above. This Court will not readdress those claims here. In addition to those claims of error, Capote contends that the conversations through the Facebook social-media Web site between Freeman and his girlfriend, and between Freeman and Hammonds and Bates, were inadmissible hearsay. Capote also cites other alleged hearsay statements, including Hammonds's testimony that he told

Hubbard that Freeman did not have the Xbox and the lead investigator's testimony that Settles gave them the location of the rifle used in the shooting.[3]

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. However, "'[a] statement offered for

[3]Specifically, the claims of error relate to the following testimony: 1) Blythe's testimony that Freeman had told Blythe that he was meeting Bates at the apartment complex (R. 528); 2) Freeman's girlfriend's testimony regarding messages that she and Freeman had exchanged the day of the shooting, which included Freeman's texting her that he was with Blythe and was waiting to meet with "Dewayne" to sell an Xbox, that he eventually gave up on meeting with Dewayne, and that he was meeting with "a guy named Vontae" to get money Vontae owed him (R. 623-36); 3) Bates's testimony about messages he had exchanged with Freeman arranging a meeting to purchase drugs (R. 832-41); 4) Hammonds's and Freeman's Facebook messages regarding the Xbox and attempts to arrange a meeting (R. 914-20); 5) Hammonds's testimony that he had told Hubbard that the Xbox for sale was not the one that had been stolen from his residence (R. 922-23); 5) testimony that Hubbard had said that he would kill the person that had committed the burglary (R. 999, 1022); 6) testimony about directions Settles gave law-enforcement officers to find the rifle (R. 1071); and 7) Settles's own statement to Hubbard and Capote in jail that they should not discuss their case aloud and, that he had told Hubbard he had flushed the notes down the toilet, and his testimony that Hubbard had told Capote to answer the numbered questions (R. 1190, 1194-98, 1208, 1226-30). Any other citations to alleged hearsay in the record not previously addressed or set forth herein either arose in closing arguments or did not contain out-of-court statements.

some other purpose other than to prove the truth of its factual assertion is not hearsay.'" Montgomery v. State, 781 So. 2d 1007, 1019 (Ala. Crim. App. 2000) (quoting Thomas v. State, 408 So. 2d 562, 564 (Ala. Crim. App. 1981)).

Here, the claims of error cited by Capote primarily involve statements that were not offered for the truth of the matter asserted. Instead, the statements explained the actions of the participants leading up to the shooting. Furthermore, the statements through Facebook between Freeman and Hammonds and between Freeman and Bates were cumulative to Hammonds's and Bates's testimony regarding their involvement in the plan to lure Freeman to a meeting. The statements that Settles told Capote and Hubbard not to discuss the case aloud in the jail and that Settles told Hubbard he was flushing the letters in the toilet were not statements offered to prove the truth of the matter asserted. Likewise, the specific directions given by Settles to locate the rifle were not offered to prove the truth of the matter asserted but to demonstrate how law-enforcement officers arrived at the location of the rifle. See, e.g., Smith v. State, 795 So. 2d 788 (Ala. Crim. App. 2000); Miller v. State, 687 So. 2d 1281

(Ala. Crim. App. 1996); D.R.H. v. State, 615 So. 2d 1327 (Ala. Crim. App. 1993); Sawyer v. State, 598 So. 2d 1035 (Ala. Crim. App. 1992); and Thomas v. State, 520 So. 2d 223 (Ala. Crim. App. 1987) (all recognizing that a statement is admissible when it is not offered to prove the truth of its content but to establish the reason for action or conduct by the witness). See also Stallworth v. State, 868 So. 2d 1128, 1153 (Ala. Crim. App. 2001) (quoting Ashford v. State, 472 So. 2d 717, 719 (Ala. Crim. App. 1985), quoting in turn 22A C.J.S. Criminal Law § 718 (1961)) ("'"[The hearsay rule] does not exclude extrajudicial utterances offered merely to prove the fact of the making or delivery thereof, or to explain subsequent conduct of a hearer."'"), and Grayson v. State, 824 So. 2d 804, 813 (Ala. Crim. App. 1999), aff'd, 824 So. 2d 844 (Ala. 2001) (quoting Tucker v. State, 474 So. 2d 131, 132 (Ala. Crim. App. 1984), rev'd on other grounds, 474 So. 2d 134 (Ala. 1985)) ("'[A] statement may be admissible where it is not offered to prove the truth of whatever facts might be stated, "but rather to establish the reason for action or conduct by the witness."'"). Because the statements were not offered to prove the truth of the matter asserted, they were,

by definition, not hearsay, and there was no error in their admission. Accordingly, Capote is not entitled to any relief on this claim.

VI.

Capote argues that the State erred when it referred to and relied upon evidence that was never formally admitted at trial, specifically, the five projectiles that were removed from Freeman's body. Three witnesses testified at trial identifying the exhibits, establishing a chain of custody, and linking three of the projectiles to the recovered rifle. Capote did not object during the witnesses' testimony or at any point during the trial; therefore, this claim is reviewed for plain error only.

> "'"Demonstrative or real evidence, or evidence by inspection, is such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses, as where various things are exhibited in open court." Kabase v. State, 31 Ala. App. 77, 83, 12 So. 2d 758, 764 (1943) and authority cited therein. Where the jury has had an adequate view of real evidence it is not strictly needful to make a formal introduction of it in evidence. Smith v. State, 344 So. 2d 1239, 1241 (Ala. Cr. App.), cert. denied, 344 So. 2d 1243 (Ala. 1977); Rainey v. State, 48 Ala. App. 530, 266 So. 2d 335 (1972). "The tenor or its

> proffer is immaterial. It becomes evidence -- the fact it imports -- when it is properly identified and exhibited before the jury in open court for their inspection." Kabase, 31 Ala. App. at 83, 12 So. 2d at 764. Although the towel had not been formally introduced, the fact that it had been used in connection with the giving of testimony made it evidence in the case which properly remained before the jury. Smith, supra.'
>
> "Murrell v. State, 377 So. 2d 1102, 1107 (Ala. Crim. App. 1979). See also Berard v. State, 402 So. 2d 1044, 1047 n.1 (Ala. Crim. App. 1981) ('Although the slides were not formally admitted, the fact that they were used in connection with the giving of testimony made them evidence in this case.')."

Thompson v. State, 153 So. 3d 84, 173 (Ala. Crim. App. 2012).

Although the projectiles were not formally admitted into evidence, the projectiles were adequately presented to the jury and therefore properly before the jury for its consideration. Therefore, there was no error, plain or otherwise, in the State's use of the projectile evidence.

VII.

Capote contends that the circuit court erred in its instructions defining capital murder and then compounded the mistake by giving an instruction regarding accomplice liability. Specifically, Capote argues that the circuit court failed to instruct the jury that capital murder requires a

real and specific intent to kill. Capote claims that the error was compounded when the court gave a general accomplice-liability instruction without describing its application to capital murder.

When reviewing a trial court's jury instructions, this Court keeps in mind the following principles:

> "A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So. 2d 1119, 1123 (Ala. Cr. App. 1992). When reviewing a trial court's instructions, '"the 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. Cr. App. 1992) (quoting Porter v. State, 520 So. 2d 235, 237 (Ala. Cr. App. 1987)); see also Beard v. State, 612 So. 2d 1335 (Ala. Cr. App. 1992); Alexander v. State, 601 So. 2d 1130 (Ala. Cr. App. 1992)."

Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999), aff'd, 795 So. 2d 785 (Ala. 2001).

> "In the context of challenged jury instructions, the plain-error doctrine has been applied as follows.
>
> > "'"'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. 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).'"
>
> "'Broadnax v. State, 825 So. 2d 134, 196 (Ala. Crim. App. 2000), quoting Pilley v. State, 789 So. 2d 870, 882-83 (Ala. Crim. App. 1998).'"

Harris v. State, 2 So. 3d 880, 910 (Ala. Crim. App. 2007)(quoting Snyder v. State, 893 So. 2d 488, 548 (Ala. Crim. App. 2003)). See also Belisle v. State, 11 So. 3d 256, 308 (Ala. Crim. App. 2007); Gobble v. State, 104 So. 3d 920, 973 (Ala. Crim. App. 2010) (quoting Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000), quoting in turn Ex parte Boyd, 715 So. 2d 852 (Ala. 1998)) ("'"The 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."'"). Because Capote did not object to the circuit court's instructions defining capital murder or accomplice liability, this Court reviews this claim for plain error only.

When instructing the jury on capital murder, the circuit court stated:

> "Now, then, ladies and gentlemen, as to Count 1, the Defendant is charged with capital murder. The law states that the intentional murder of a person by or through the use of a deadly weapon while the victim is in a vehicle is capital murder.
>
> "A person commits an intentional murder if he causes the death of another person, and in performing the act or acts that cause the death of that person, he intends to kill that person.
>
> "To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder committed by or through the use of a deadly weapon while the victim is in the vehicle: that Ki-Jana Freeman is dead; that the Defendant, Peter Capote, caused the death of Ki-Jana Freeman by or through the use of a deadly weapon; that Ki-Jana Freeman was in a vehicle at the time of the offense; and that in committing the act that caused the death of Ki-Jana Freeman, the Defendant intended to kill Ki-Jana Freeman."

(R. 1532-34.)

This Court addressed an almost identical argument in Boyle v. State, 154 So. 3d 171 (Ala. Crim. App. 2013), overruled on other grounds, Towles v. State, 263 So. 3d 1076 (Ala. Crim. App. 2018):

> "Boyle specifically argues that the circuit court's instruction that 'you act intentionally with respect to a result or conduct when you have the purpose to cause that result or to engage in that conduct' allowed the jury to convict without finding

the specific intent to kill. This portion of the court's instruction is identical to the statutory definition of 'intentional' contained in § 13A-2-2, Ala. Code 1975. Section 13A-2-2(1), Ala. Code 1975, states: 'A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to cause that result or to engage in that conduct.'

"The Alabama Supreme Court, in addressing a circuit court's use of a jury charge in a capital-murder case that contained the exact definition of 'intentional' contained in § 13A-2-2(1), stated:

> "'The trial court, in defining mental culpability, read Code 1975, § 13A-2-2, to the jury verbatim, thereby defining each mental state along the spectrum from "intentional" to "criminal negligence." Each definition was relevant to the various verdict options except "criminal negligence." The definition of "intentionally" was relevant to the court's instructions on the "intent to kill" element of the capital offense.'

"Ex parte Kennedy, 472 So. 2d 1106, 1111 (Ala. 1985).

"This Court may find plain error in a jury instruction only if 'there is a reasonable likelihood that the jury applied the instruction in an improper manner.' Williams v. State, 710 So. 2d 1276, 1306 (Ala. Crim. App. 1996). See also Pilley v. State, 789 So. 2d 870, 882-83 (Ala. Crim. App. 1998). The jury was instructed that in order to convict Boyle of capital murder the jury had to find that Boyle had the specific intent to kill. There is no reasonable likelihood that the jurors applied the challenged instruction in an improper manner.

> There was no plain error in the circuit court's instructions on intent."

154 So. 3d at 216-17. See also Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013).

Likewise, in this case, the jury was instructed that in order to convict Capote of capital murder the jury had to find that he had the intent to kill Freeman.

This Court has reviewed the circuit court's instructions on capital murder, accomplice liability, and felony murder, and we disagree with Capote's contention that the circuit court's instruction on accomplice liability allowed the jury to convict him of capital murder under the felony-murder standard. In regard to the felony-murder instruction, the circuit court instructed the jury that the intent necessary was the intent to commit the underlying felony -- not the intent to commit murder. The circuit court correctly instructed the jury that felony murder required that the defendant caused the victim's death during the commission of discharging a firearm into an occupied vehicle, and the court accurately defined the elements of discharging a firearm into an occupied vehicle. The circuit court properly apprised the jury of the elements of capital murder and felony murder. See

Smith v. State, 908 So. 2d 273, 297 (Ala. Crim. App. 2000); Freeman v. State, 555 So. 2d 196, 208 (Ala. Crim. App. 1988) (noting that "the trial judge extensively instructed the jury on the difference between capital murder, felony murder, and intentional murder"); Davis v. State, 440 So. 2d 1191, 1194 (Ala. Crim. App. 1983) (trial court instructed the jury on "the intent required for a capital felony, on the felony murder doctrine and on the distinction between the intent required for a capital felony and the intent required for the lesser included offense of non-capital murder"); Womack v. State, 435 So. 2d 754, 763 (Ala. Crim. App. 1983) (holding that "[t]he jury was given proper instructions on the 'intent to kill requirement'" when the trial court "made it clear to the jury that the felony murder doctrine was relevant only to the lesser included offense of noncapital murder, and that there could be no conviction for the capital offense absent a finding beyond a reasonable doubt that the appellant possessed the intent to kill"). The instructions were not misleading, and there is no reasonable likelihood that the jurors applied the challenged instructions in an improper manner.

Capote's reliance on Russaw v. State, 572 So. 2d 1288 (Ala. Crim. App. 1990), is misplaced. In Russaw, the circuit court erroneously failed to instruct the jury that in order to find the defendant guilty as an accomplice of capital murder during a robbery it had to find that the defendant was an accomplice in the murder as opposed to being an accomplice in the robbery. The defect in the instructions in Russaw is not present in this case.

This Court finds no plain error in the circuit court's instructions on the intent required for capital murder, on accomplice liability, or on felony murder. Accordingly, Capote is not entitled to any relief on this claim.

VIII.

Capote argues that the circuit court erred when, over his objection, it admitted a video recording of the shooting taken from surveillance cameras outside Spring Creek Apartments. Capote contends that the State failed to establish the proper predicate under the silent-witness theory for its admission. Specifically, Capote claims that the State failed to establish that the video had not been modified or edited.

As stated above, a trial court has substantial discretion in determining the admissibility of evidence, and this Court will reverse a court's judgment only when there has been a clear showing of an abuse of discretion. Ex parte Loggins, 771 So. 2d 1093 (Ala. 2000). This Court has also previously stated:

> "'There are two theories upon which photographs, motion pictures, videotapes, sound recordings, and the like are analyzed for admission into evidence: the "pictorial communication" or "pictorial testimony" theory and the "silent witness" theory. Wigmore [on Evidence], ... § 790 [(1970 & Supp. 1991)]; [2] McCormick [on Evidence], ... 214 [(1992)]; and Schroeder, [Alabama Evidence,] ... § 11-3 [(1987 & Supp.1988)]. The "pictorial communication" theory is that a photograph, etc., is merely a graphic portrayal or static expression of what a qualified and competent witness sensed at the time in question. Wigmore, supra, § 790, and McCormick, supra, § 214. The "silent witness" theory is that a photograph, etc., is admissible, even in the absence of an observing or sensing witness, because the process or mechanism by which the photograph, etc., is made ensures reliability and trustworthiness. In essence, the process or mechanism substitutes for the witness's senses, and because the process or mechanism is explained before the photograph, etc., is admitted, the trust placed in its truthfulness comes from the proposition that, had a witness been there, the witness would have sensed what the photograph, etc., records. Wigmore, supra, § 790, and McCormick, supra, § 214.
>
> "'A reasonable reading of Voudrie [v. State, 387 So. 2d 248 (Ala. Crim. App. 1980)], Carraway [v. State], [583 So. 2d 993 (Ala. Crim. App. 1991),]

> Molina [v. State], [533 So. 2d 701 (Ala. Crim. App. 1988),] and the more recent caselaw of the Court of Criminal Appeals leads us to conclude that the Court of Criminal Appeals is of the opinion that the "pictorial communication" and "silent witness" theories are mutually exclusive theories, rather than alternative theories. The proper foundation required for admission into evidence of a sound recording or other medium by which a scene or event is recorded (e.g., a photograph, motion picture, videotape, etc.) depends upon the particular circumstances. If there is no qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the "silent witness" foundation must be laid. Under the "silent witness" theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability. When the "silent witness" theory is used, the party seeking to have the sound recording or other medium admitted into evidence must meet the seven-prong Voudrie test. Rewritten to have more general application, the Voudrie standard requires:
>
> "'(1) a showing that the device or process or mechanism that produced the item being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded,
>
> "'(2) a showing that the operator of the device or process or mechanism was competent,
>
> "'(3) establishment of the authenticity and correctness of the resulting recording, photograph, videotape, etc.,
>
> "'(4) a showing that no changes, additions, or deletions have been made,

> "'(5) a showing of the manner in which the recording, photograph, videotape, etc., was preserved,
>
> "'(6) identification of the speakers, or persons pictured, and
>
> "'(7) for criminal cases only, a showing that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement.'"

Spradley v. State, 128 So. 3d 774, 780-82 (Ala. Crim. App. 2011) (quoting Ex parte Fuller, 620 So. 2d 675, 678 (Ala. 1993)).

Surveillance videos may be admissible under the pictorial-communication theory or the silent-witness theory. Id. at 782. Here, "[s]ince none of the officers were present at the site while the cameras recorded [the defendant's] activities [and no other witness testified that the videos accurately reflected what they saw] ..., the 'silent-witness' theory is appropriate." Straughn v. State, 876 So. 2d 492, 502 (Ala. Crim. App. 2003).

In the present case, the State sought to admit the video recording from the surveillance system from the apartment complex that depicted the shooting as it happened. Mary Sumerel, the property manager of the apartment complex,

testified that there were five surveillance cameras on the corners of the complex. Sumerel testified that the cameras were working on the date in question and that the date and time stamps were accurate. Sumerel testified that she had a monitor in her office on which she could review video the cameras had recorded and that the surveillance equipment saves five days of video footage before it begins recording over older footage. After the shooting, she received a telephone call that she was needed at the complex. Sumerel met law-enforcement officers at the complex and reviewed the video that had been captured on the cameras. The recording accurately captured the complex. At the direction of law-enforcement officers, Sumerel transferred to a flash drive video footage from three different cameras of the time surrounding the shooting. The officers selected recordings from only three of the five cameras, which they felt best depicted the shooting, and the officers excluded portions of the recordings that contained inactivity or irrelevant footage. Law-enforcement officers then transferred the recordings to a compact disc.

Capote's argument focuses on the fact that the video recording admitted at trial did not contain the raw video footage and, he says, limited how many angles and which portions of the video that the jury could see. Capote asserts that Sumerel did not know whether the video had been edited and that the video omitted a "critical event" -- the arrival of the white truck to the apartment complex. Thus, Capote argues, "the State did not present evidence of the 'authenticity and correctness' of the recording, nor did it show that 'no changes, additions, or deletions' were made to the video." (Capote's brief, at 57.) In short, Capote argues that the State failed to prove the third and fourth prongs of the test set out in Voudrie v. State, 387 So. 2d 248 (Ala. Crim. App. 1980). The record, however, indicates that the State presented evidence to satisfy the requirement of each of these prongs in addition to the other prongs required by the Voudrie test.[4]

Prong (3) requires that the proponent of a video recording make a showing that the video recording is authentic

[4]The State was not required to make a showing to satisfy the seventh prong of the Voudrie test because the video did not contain any statements made by Capote.

and correct. Sumerel's testimony, as set forth above, was sufficient to satisfy prong (3) of the Voudrie test.

Prong (4) requires that the proponent of a video recording make a showing that no changes, additions, or deletions have been made. Capote mischaracterizes Sumerel's testimony on this point. Although Sumerel testified that she did not know whether the video had been edited after it had left her possession, she also stated that she did not "see how [the officers] could [edit the video]" because the video is "time and date stamped." (R. 509-10.) Further, Capote's interpretation of prong (4) is too strict, as the clear import of the prong is that the video in question accurately reflects what it is purported to show. See UAW-CIO v. Russell, 264 Ala. 456, 470, 88 So. 2d 175, 186 (1956).

> "There is no doubt that motion pictures are subject to change and falsification, as is the testimony of any witness, but protection against falsification or misrepresentation lies in the requirement of preliminary proof that the picture is an accurate reproduction of the event which it depicts and in the opportunity for cross examination of the witness making such proof. People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1 [(1948)]; Heiman v. Market Street Ry. Co., 21 Cal. App.2d 311, 69 P. 2d 178 [(1937)].
>
> "The objection that a motion picture film which does not show a continuity of action is misleading

> and therefore inadmissible is treated in McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 [(1940)], in which the court held that where, as here, the photographer testified how the pictures were taken at intervals and at different times, the jury would not be misled."

UAW-CIO, 264 Ala. at 470, 88 So. 2d at 186.

Although the entire video recording was not admitted, the exhibit was nonetheless admissible. See Donahoo v. State, 505 So. 2d 1067, 1072 (Ala. Crim. App. 1986); Bridges v. State, 516 So. 2d 895 (Ala. Crim. App. 1987). See also Davis v. State, 529 So. 2d 1070, 1071-72 (Ala. Crim. App. 1988) (stating that the quality of a videotape goes to weight and not to admissibility). There is no evidence indicating that the recording was altered so as to give a misleading account of the shooting or that the video footage was anything other than what it purported to show. The portions of the recordings that were not made a part of the exhibit, particularly the purported "critical event" of the arrival of the white truck at the apartment complex, were irrelevant to the shooting.

> "'If a motion picture contains both relevant and irrelevant sequences it should be carefully edited before it is shown to the jury so as to eliminate everything except the relevant scenes.' C. Scott, Photographic Evidence, § 1298 (2d ed. 1969). One

> portion of the videotapes was deleted because the matters depicted were the subject of the motion in limine which was granted prior to trial. ... The other portions of the videotapes which were deleted were parts in which appellant Coleman was not shown. Clearly, these portions were not relevant to the trial of this appellant and the trial judge correctly refused to allow them into evidence. 'If the rule was otherwise, the court and the jury might be compelled to listen to a long recital of matters [or watch hours of a videotape], not at all connected with any matter or thing in controversy between the parties.' 29 Am. Jur. 2d Evidence § 268 (1967)."

Allison v. City of Birmingham, 580 So. 2d 1377, 1387 (Ala. Crim. App. 1991). Defense counsel indicated at trial that he had a copy of the full video. Thus, if there had been a question as to whether the video at trial accurately reflected the surveillance footage, Capote could have proffered the entire video into evidence.

The State provided sufficient evidence to authenticate the video. This Court finds no abuse of the circuit court's discretion in admitting the video. Accordingly, Capote is not entitled to any relief on this claim.

IX.

Capote argues that the State improperly bolstered the credibility of witnesses during trial. Specifically, Capote alleged that the State bolstered the credibility of witnesses

when the prosecutor: 1) asked Inv. Holland if Bates and Hammonds had changed their story when interviewed and began to tell Inv. Holland the truth; 2) asked Inv. Holland how he knew Bates and Hammonds were no longer lying; 3) asked Bates if he had told the truth; and 4) asked Hammonds if he had told law-enforcement officers the truth. (R. 757, 736, 877, 934.)

At trial Capote objected only to question (1); however, Capote's objection was sustained, and he did not seek a curative instruction. Thus, Capote did not receive an adverse ruling to that question or to any other of the alleged instances of bolstering. Therefore, the alleged errors will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

This Court has held:

> "'"'A distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial. "[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses." ...
>
> "'"'"'Attempts to bolster a witness by vouching for his credibility are normally improper and error. ' ... The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness'

> credibility .... This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity .... Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony."'"'"

Morris v. State, 60 So. 3d 326, 370 (Ala. Crim. App. 2010) (quoting Johnson v. State, 120 So. 3d 1130, 1165 (Ala. Crim. App. 2009), quoting in turn other cases).

The excerpts Capote cites to do not constitute improper bolstering of the witness. Here, the prosecutor asked an investigator whether individuals he had interviewed, Bates and Hammonds, had changed their initial stories and then provided credible information to law-enforcement officers. Also, the prosecutor asked Bates and Hammonds whether they had told the truth. The prosecutor did not personally vouch for the witnesses or suggest that information that had not been presented supported the witnesses' testimony. None of the testimony that Capote now challenges was of such a nature that the jury could have reasonably believed that the prosecutor himself was indicating a personal belief in the witnesses' credibility. See Morris, supra. No error, much less plain

error, resulted from the prosecutor's questions. Accordingly, Capote is not entitled to any relief on this claim.

X.

Capote argues that the State used its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

> "The United States Supreme Court in Batson held that it was a violation of the Equal Protection Clause of the United States Constitution for the State to remove a black prospective juror from a black defendant's jury solely based on the juror's race. In Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991), the United States Supreme Court held that Batson applied even in cases where the defendant's race differed from that of the excluded jurors. In evaluating a Batson claim, a three-step process is followed. Batson, 476 U.S. at 93-94. First, the defendant must establish a prima facie case to raise the inference of discriminatory intent. Second, if the inference of discriminatory intent is established, the prosecution must offer legitimate, race-neutral reasons for striking the jurors in question. Third, the trial court must then evaluate the evidence to determine whether the defendant has shown purposeful discrimination in the prosecution's jury strikes."

Henderson v. State, 248 So. 3d 992, 1015 (Ala. Crim. App. 2017).

After voir dire, excusals, and challenges for cause, 47 prospective jurors remained. The State exercised 18

peremptory strikes and Capote exercised 17 peremptory strikes to select the jury. The last strikes were to serve as alternates. After the jury was struck, the circuit court asked if there were any motions. Defense counsel responded: "Judge, I think we've got a Batson objection regarding [P.M.] as well as Juror No. 88 by the name of [J.J.]. I didn't show [P.M.] answering one question verbally, and that was the fact." (R. 381.) The circuit court asked the State to respond, and the prosecutor said:

> "Your Honor, we would respond that at the very beginning of the selection process when [P.M.] came in this morning, she asked the Court to be excused due to work reasons. She presented the Court with a letter, and she was not excused. I don't want her sitting on our jury and being preoccupied with work after she has not been excused, number one. Number two, she also answered that her daughter has previously lived at Chateau Orleans in response to one of the State's questions, and we don't think that given the fact that she may have knowledge of Chateau Orleans,[5] and that's going to be a scene that is at issue at this case, that it would be appropriate for her to serve as a juror on this case."

(R. 381-82.)

Defense counsel responded:

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[5]Chateau Orleans is the apartment complex at which the white truck was abandoned following Freeman's murder.

> "Your Honor, in response I would simply say that there were probably a minimum of 30 to 40 jurors who came up here and presented the Court with excuses as to why they could not serve. ... [T]here were 23 that presented this Court with excuses for reasons not to serve. And with regard to Chateau Orleans, Your Honor, the fact that she lived there is not material. I mean, she wasn't a witness to anything that occurred there. She may or may not be familiar with the area that they are going to allege that things occurred, and she wouldn't have any particular knowledge that would affect any one decision in this case in any way whatsoever."

(R. 382-83.) The circuit court stated that P.M. was the only prospective juror who had given him a written request from her employer to be excused.

The prosecutor then stated that she had additional arguments for striking P.M. The prosecutor stated that people communicating via Facebook Messenger or instant messaging was going to be an issue in the case and that P.M. had indicated that she was not familiar with Facebook, instant messaging, or text messaging. The prosecutor stated:

> "Judge, these are peremptory challenges. These are not -- we don't have to rise to some standard of cause. That seems to be what the defense is arguing here, but that's irrelevant. These are peremptory challenges. They are not challenges for cause, and these are race-neutral reasons."

(R. 385.) The circuit court denied the Batson challenge as to P.M. and asked defense counsel about the other prospective juror he had referenced in his motion.

Defense counsel challenged the State's striking of J.J., stating:

> "I don't show any response to any question that was answered -- that was asked, maybe other than the group responses when [my co-counsel] was asking a series of questions, and most everyone raised their hand. Other than those particular answers, he had no individual responses."

(R. 386.) The prosecutor responded:

> "Your Honor, as to [J.J.], as the Court may recall during the course of voir dire, [defense counsel] asked the question has anyone ever been charged with a criminal offense. He said I'm not talking about a speeding ticket, but I'm talking about something more serious such as a criminal offense, such as a DUI. Do you feel as though you were treated fairly?
>
> "Several jurors answered that they had been charged with a criminal offense, [J.J.] did not. However, our research has indicated that [J.J.] has two prior arrests for possession of marijuana in the second degree. The question was not have you been convicted, but have you been charged, and [J.J.] did not answer."

(R. 387.) Defense counsel replied: "No response, Your Honor." (R. 387.) The circuit court denied the motion as to J.J., and court was dismissed for the day.

The next morning the circuit court indicated that it had learned that three jurors could not serve due to health reasons. The circuit court excused those jurors, and both parties agreed to strike another jury. Following the second striking of the jury, no Batson motion was made. This Court notes that J.J. served on the jury following the striking of the second jury.

On appeal, Capote argues that the State exercised its peremptory strikes in a discriminatory manner when it struck prospective jurors P.M., J.J., and S.B., each of whom is African-American. Capote contends that a prima facie case of discrimination was established because the State failed to provide any reason for striking S.B. Capote further argues that the State's proffered race-neutral reasons for striking P.M. and J.J. were illegitimate and pretextual.

Because Capote did not make a Batson motion after the second jury was struck, the circuit court had no motion before it and, obviously, Capote has no adverse ruling from which to appeal. This Court has held that a Batson objection can be waived, see Calhoun v. State, 932 So. 2d 923 (Ala. Crim. App. 2005), but, because Capote has been sentenced to death, this

Court must review this argument for plain error. Rule 45A, Ala. R. App. P.[6]

> "To find plain error in the Batson 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). 'A defendant makes out a prima facie case of

[6]Capote argues that the reasons given by the State for striking P.M. and J.J. were illegitimate and pretextual. Because a second jury was struck, this Court is not required to review the reasons the State provided for striking jurors P.M. and J.J. during the selection of the first jury. However, even if this Court were to review the reasons, this Court would find the reasons to be race neutral and not pretextual or illegitimate. One of the reasons given by the State for striking P.M. was that she had sought to be excused by the circuit court and had provided a written request from her employer to be excused. A veniremember's desire not to serve on the jury has been held to be a race-neutral reason for a strike. See Stephens v. State, 580 So. 2d 11, 19 (Ala. Crim. App. 1990); Lewis v. State, 659 So. 2d 183, 186 (Ala. Crim. App. 1994). The prosecutor stated that J.J. was struck because during voir dire he did not respond that he had been arrested for a criminal offense. See Spencer v. State, 659 So. 2d 1000 (Ala. Crim. App. 1992) (holding that a veniremember's arrest record is a race-neutral reason for exercising a peremptory strike); Hall v. State, 816 So. 2d 80, 84 (Ala. Crim. App. 1999) ("A prospective juror's apparent inability to understand questions posed during voir dire examination is a race-neutral reason for striking that juror."). This Court further notes that J.J. served on the second jury selected; thus, any Batson challenge on appeal with regard to J.J. would be moot.

> discriminatory jury selection by "the totality of the relevant facts" surrounding a prosecutor's conduct during the defendant's trial.' Lewis v. State, 24 So. 3d 480, 489 (Ala. Crim. App. 2006) (quoting Batson, supra at 94), aff'd, 24 So. 3d 540 (Ala. 2009). In Ex parte Branch, 526 So. 2d 609, 622-23 (Ala. 1987), the Alabama Supreme Court discussed a number of relevant factors that can be used to establish a prima facie case of racial discrimination: (1) the veniremembers who were peremptorily struck shared only the characteristic of race and were otherwise as heterogeneous as the community as a whole; (2) a pattern of strikes against black veniremembers; (3) the prosecutor's past conduct in using peremptory challenges to strike all blacks from the venire; (4) the type and manner of the prosecutor's questions on voir dire; (5) the type and manner of questions directed to the veniremembers who were peremptorily struck, or the absence of meaningful questions; (6) disparate treatment of members of the jury venire who were similarly situated; (7) disparate examination of black veniremembers and white veniremembers; (8) the State's use of all or most of its strikes against black veniremembers."

Henderson, 248 at 1016-17. With these principles in mind, we turn to Capote's claim.

In our plain-error review of Capote's claim, this Court must first determine whether the record supplies an inference of purposeful discrimination by the State in its exercise of peremptory challenges. In reviewing whether the record raises an inference of discrimination under plain-error review, the Court must include in its analysis African-American

veniremembers who were struck, not just those to which no objection was raised. The State's use of two peremptory strikes to remove 2 of 5 African-American veniremembers, without more, does not raise an inference of racial discrimination. See Banks v. State, 919 So. 2d 1223, 1230 (Ala. Crim. App. 2005) ("[S]tatistics and opinion alone do not prove a prima facie case of discrimination." (citing Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001))). See also Johnson v. State, 120 So. 3d 1130, 1224 (Ala. Crim. App. 2009) ("[T]his Court has held that numbers or percentages alone will not substantiate a case of discrimination in this context.").

There does not appear to be a pattern to the State's peremptory strikes of African-American veniremembers.

> "In Lee v. Commissioner, Alabama Department of Corrections, 726 F.3d 1172 (11th Cir. 2013), the United States Court of Appeals for the Eleventh Circuit considered whether the State's use of all of its 21 peremptory strikes and 17 of its 18 strikes for cause against black veniremembers established a Batson violation. The court held that the striking pattern was not a per se violation under Batson. Rather, the court held, the striking pattern was a factor to be considered along with the remaining relevant factors, including the racial composition of the venire and of the jury. The court stated:
>
> > "'"[T]he number of persons struck takes on meaning only when coupled with other information such as the racial composition

> of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck." See United States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005) (internal quotation marks omitted); see also Cochran v. Herring, 43 F.3d 1404, 1412 (11th Cir. 1995) (stating that "statistical evidence is merely one factor which the court examines, and it is not necessarily dispositive" in evaluating whether a Batson violation has occurred).'
>
> "726 F.3d at 1224."

Henderson, 248 So. 3d at 1018.

The State did not exercise its peremptory challenges to dismiss all or almost all the African-American veniremembers, and three African-American veniremembers were seated on the jury. "'Of course, the fact that blacks are ultimately seated on the jury does not necessarily bar a finding of discrimination under Batson, but the fact may be taken into account in a review of all the circumstances as one that suggests that the government did not seek to rid the jury of persons who shared the defendant's race.' United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990)(internal citations omitted)." Id. The State's pattern of strikes does not establish a prima facie case of discrimination.

Our review of the jury-selection proceedings demonstrates that the State did not treat African-American veniremembers differently than it treated Caucasian veniremembers. The record does not indicate that different questions were posed to African-American veniremembers; rather, the record indicates that Caucasian veniremembers and African-American veniremembers were questioned similarly. Capote, however, argues that the State treated African-American potential jurors differently because it struck potential juror P.M., who had asked to be excused from jury duty for work reasons and who had indicated that she was unfamiliar with Facebook, but allowed another juror who was not familiar with Facebook to serve on the jury. P.M. was struck for reasons beyond her unfamiliarity with Facebook, and, although others might have sought to be excused, P.M. was the only one who had a written request from her employer to be excused.[7] P.M.'s daughter had also lived at an apartment complex that was referenced during trial. Thus, she was not "similarly situated" to the Caucasian prospective juror who was not struck for

[7]Capote does not allege that a Caucasian prospective juror who had sought to be excused for work-related reasons, but was not, was not struck.

unfamiliarity with Facebook. Accordingly, disparate treatment is not "obvious on the face of the record." Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007).

In support of his argument that the State engaged in purposeful discrimination, Capote points to the State's striking of S.B. Capote contends that S.B. would have been favorable to the State because S.B. knew the victim and one of the investigating officers. Capote's argument that S.B. should have appealed to the State as a juror does not establish that the prosecutor engaged in discrimination by striking S.B.

Further, the record does not show, and Capote does not cite to, anything indicating a history by the Colbert County District Attorney's Office of engaging in racial discrimination. Therefore, this factor does not support an inference of racial discrimination.

Based on our thorough review of the jury-selection process, this Court holds that there was no inference of purposeful discrimination by the State in the exercise of its peremptory challenges. Apparently, neither the circuit court nor defense counsel believed that a Batson violation had

occurred following the selection of the second jury. Nothing in the record -- from the type and manner of questions asked to the State's use of its strikes -- indicates that the State treated African-American veniremembers disparately. Accordingly, Capote is not entitled to any relief on this claim.

XI.

Capote argues that the circuit court erred in charging the jury on flight. Specifically, Capote contends: 1) that there was no evidence to justify giving the flight instruction; 2) that the circuit court erred when it deviated from the pattern jury instructions; and 3) that the circuit court erred when it instructed the jury that it could make only one of two conclusions regarding the evidence of flight. Capote did not object to the instruction at trial; therefore, this issue will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

> "A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. Raper v. State, 584 So. 2d 544 (Ala. Cr. App. 1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, Stewart v. State, 601 So. 2d 491 (Ala. Cr. App. 1992), aff'd in relevant part,

> 659 So. 2d 122 (Ala. 1993), and we must evaluate instructions like a reasonable juror may have interpreted them. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); Stewart v. State."

Ingram v. State, 779 So. 2d 1225, 1258 (Ala. Crim. App. 1999).

In Long v. State, 668 So. 2d 56 (Ala. Crim. App. 1995), this Court stated:

> "In Sartin v. State, 615 So.2d 135, 137 (Ala. Cr. App. 1992), this court stated:
>
> > "'"In a criminal prosecution the state may prove that the accused engaged in flight to avoid prosecution. This principle is based upon the theory that such is admissible as tending to show the accused's consciousness of guilt. The flight of the accused is admissible whether it occurred before or after his arrest.
> >
> > "'"The state is generally given wide latitude or freedom in proving things that occurred during the accused's flight. This is especially true of those acts of the accused which tend to show that the flight was impelled by his consciousness of guilt."
>
> "'C. Gamble, McElroy's Alabama Evidence, § 190.01(1) (4th ed. 1991) (citations omitted). See also 2 Wigmore, Evidence § 276(4) (Chadbourn rev. 1979); Chandler v. State, 555 So. 2d 1138 (Ala. Cr. App. 1989).'

> "The record reveals that the appellant fled the scene of the incident and turned himself in to authorities the following morning. Thus, the trial court did not err in receiving evidence of the appellant's flight."

668 So. 2d at 60-61.

Additionally, when there is evidence of flight, the trial court may give a proper jury instruction on evidence of flight. See, e.g., Boyd v. State, 715 So. 2d 825 (Ala. Crim. App.), aff'd, 715 So. 2d 852 (Ala. 1998), disapproved of on other grounds by Ex parte Bryant, 951 So. 2d 724 (Ala. 2002).

> "The prosecution is generally given wide latitude in proving things that occurred during the accused's flight. Indeed, the term 'flight' includes any conduct of the accused that is relevant to show a consciousness of guilt. Such conduct may include the use of aliases, concealment of identity, attempting to avoid arrest and the use of false exculpatory statements."

McElroy's Alabama Evidence § 190.01(1).

Here, the evidence at trial indicated that Capote, along with other members of the gang, went to Spring Creek Apartments to shoot and kill Freeman. After the shooting, the group drove away from the scene in a white truck. Later, they abandoned the truck in a parking lot of another apartment complex and buried the rifle used during the shooting. Thus, there was evidence of flight from the scene of the crime. See

Dailey v. State, 604 So. 2d 436 (Ala. Crim. App. 1992) (evidence that the robber fled the scene of the crime was sufficient to support the trial court's decision to instruct the jury on flight).

> "'The reason for the defendant's flight is a question properly reserved for the jury after a consideration of all the relevant circumstances.' Ex parte Lowe, 514 So. 2d 1049, 1050 (Ala. 1987). 'Whether the evidence is sufficient to negate the inference that he fled because of a consciousness of guilt is a question for the jury, not the court.' Harrison v. State, 580 So. 2d 73, 76 (Ala. Cr. App. 1991)."

Dallas v. State, 711 So. 2d 1101, 1109 (Ala. Crim. App. 1997), aff'd, 711 So. 2d 1114 (Ala. 1998). Accordingly, the circuit court did not abuse its discretion in instructing the jury on flight.

Capote also argues that the circuit court erred with respect to the specific flight instruction given to the jury. The circuit court instructed the jury on flight as follows:

> "In a prosecution for a crime, it is permissible for the State to offer proof of flight of the Defendant from the location as its circumstances tend to show the guilt of the accused. But where a crime has been committed including the flight of the accused is offered, the probative force of the value of the fact of flight depends entirely upon the purpose of the Defendant [to absent] himself from the location.

> "If the question as to why the Defendant left the location comes in play for the jury. And it is for the jury to determine from the evidence of all the surrounding circumstances whether the Defendant did absent himself from the location. And if [he] did, did he so absent himself out of a sense of guilt, out of a fear of or to avoid arrest, or whether he absented himself from the location for an innocent and lawful purpose disassociated with any idea of the crime for which we are trying."

(R. 1551-52.)

First, Capote claims that the instruction was erroneous because the circuit court used the word "tend" instead of the phrase "may tend," as set forth in the pattern jury instructions. Capote argues that the circuit court's deviation from the pattern jury instructions caused the court to make conclusions for the jury. However, because the language of the circuit court's instruction was permissive rather than mandatory, it did not shift the burden of proof or raise the evidence of flight to a presumption of guilt. Further, the instructions clearly informed the jury that it was for the jury to decide if there was evidence of flight and the reason for that flight.

Second, Capote contends that the circuit court's instruction indicated that the jury could make only one of two conclusions from the evidence of flight -- "either that the

flight was caused by a guilty conscious [sic] as to the charged crime, or in the alternative that it was caused by an innocent, lawful purpose." (Capote's brief, at 70.) According to Capote, the instruction "foreclosed the reasonable conclusion that flight was related to a guilty conscious [sic] from a separate crime, such as the theft of the white Dodge truck." Id. We disagree with Capote's characterization of the circuit court's instruction. The instruction did not improperly restrict the jury's consideration of the evidence of flight.

The circuit court's giving of the flight instruction and the flight instruction itself did not constitute plain error. Accordingly, Capote is not entitled to any relief on this claim.

XII.

Capote contends that the prosecutor engaged in misconduct throughout his trial. Capote claims that the prosecutor improperly commented on his failure to testify, that the prosecutor disparaged defense counsel, and that the prosecutor improperly led witnesses on direct examination. Because

Capote did not timely object during trial, these issues are reviewed for plain error only. See Rule 45A, Ala. R. App. P.

A.

First, Capote contends that the prosecutor improperly commented on his failure to testify. Capote points to two instances in the record where he alleges the improper commentary occurred. Capote points to the prosecutor's rhetorical question of the jury: "'[W]here else are you going to hear about a conspiracy between [Capote] and the others in that bedroom that killed KJ? Where other than Shawn Settles are you going to hear about the verbal and written communications between the Defendant and Thomas Hubbard?'" (Capote's brief, at 71, quoting R. 1503.) Capote also points to the prosecutor's statement during the penalty phase that there had been no evidence of Capote's showing any remorse.

> "'"A reviewing court must evaluate allegedly improper comments made by the prosecutor in the context of the entire proceeding in which the comments were made."' Duren v. State, 590 So. 2d 360 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L. Ed.2d 431 (1974)).
>
> "'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 by the jury at their true worth and are not expected to become factors in the formation 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).'

"Bankhead v. State, 585 So. 2d 97, 106 (Ala. Cr. App. 1989), aff'd in relevant part, remanded on other grounds, 585 So. 2d 112, 127 (Ala. 1991), aff'd on return to remand, 625 So.2d 1141 (Ala. Cr. App. 1992).

> "'"'During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' Rutledge v. State, 523 So. 2d 1087, 1100 (Ala. Cr. App. 1987), rev'd on other grounds, 523 So. 2d 1118 (Ala. 1988) (citations omitted). Wide discretion is allowed the trial court in regulating the arguments of counsel. Racine v. State, 290 Ala. 225, 275 So. 2d 655 (1973).

> 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, ... each case must be judged on its own merits,' Hooks v. State, 534 So. 2d 329, 354 (Ala. Cr. App. 1987), aff'd, 534 So.2d 371 (Ala. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citation omitted) (quoting Barnett v. State, 52 Ala.App. 260, 264, 291 So. 2d 353, 357 (1974))..... 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' Mitchell v. State, 480 So. 2d 1254, 1257-58 (Ala. Cr. App. 1985) (citations omitted). 'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.' Twilley v. State, 472 So. 2d 1130, 1139 (Ala. Cr. App. 1985) (citations omitted)."
>
> "'Coral v. State, 628 So. 2d 954, 985 (Ala. Cr. App. 1992).'

"Lockhart v. State, 715 So. 2d 895, 902-03 (Ala. Cr. App. 1997). See also Miles v. State, 715 So. 2d 913, 917 (Ala. Cr. App. 1997) ('It is possible for the prosecutor to ask the jury to draw inferences from the lack of evidence as well as from the evidence presented.').

"This Court in Baxter v. State, 723 So. 2d 810, 815-16 (Ala. Cr. App. 1998), stated:

"'Although direct comments on a defendant's failure to testify can amount to reversible error, whether they do must be determined on a case-by-case basis, and, under certain circumstances, the comment may be curable or may be harmless. In deciding whether such an improper remark constitutes harmless error, courts have looked at certain factors. The Tennessee Supreme Court listed the following five factors to consider in making this determination:

> "'"'1. The conduct complained of viewed in the context of the light of the facts and circumstances of the case.
>
> "'"'2. The curative measures taken by the court and the prosecution.
>
> "'"'3. The intent of the prosecutor making the improper statement.
>
> "'"'4. The cumulative effect of the improper conduct and any other errors in the record.
>
> "'"'5. The relative strength or weakness of the case."

"'"Judge [v. State], 539 S.W.2d [340], 344 [(Tenn. Crim. App.

> 1976), approved in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).] The court should also consider whether the remarks were lengthy and repeated or whether they were single and isolated. Id. Moreover, courts must remain cognizant of the fact that remarks require reversal only when the remarks 'so infected the trial with unfairness as to make the subsequent conviction a denial of due process.' In addition to these factors consideration should be given to the principal that a prompt instruction by the trial judge generally cures any error, since the jury is presumed to have followed the trial judge's instructions."
>
> "'State v. Taylor, (Ms. 02C01-9501-CR-00029, October 10, 1996) (Tenn. Crim. App. 1996) (some citations omitted) (unpublished opinion).'"

Duncan v. State, 827 So. 2d 838, 859-860 (Ala. Crim. App. 1999).

Contrary to Capote's assertion, the comments by the prosecutor were not directed at Capote's failure to testify. Instead, when viewed in their entirety, one comment referenced the witnesses -- Bates, Hammonds, and Settles -- the State had to use at trial to prove the conspiracy to murder Freeman. The other comment -- that there had been no evidence of

Capote's showing any remorse -- was not a comment on Capote's failure to testify but, instead, a reference to Capote's behavior after the murder and the lack of any evidence indicating that he was remorseful. A defendant's lack of remorse is a proper argument in the penalty phase. Jackson v. State, 169 So. 3d 1, 48 (Ala. Crim. App. 2010). This Court holds that no error, much less plain error, occurred. Accordingly, Capote is not entitled to any relief on this claim.

B.

Capote argues that the prosecutor repeatedly derided defense counsel as someone who would intentionally mislead a jury. During an objection to Capote's opening statement, the prosecutor objected on the ground that defense counsel was "misleading the jury on what the law is." (R. 440.) During the State's closing argument in the guilt phase and during its opening statement of the penalty phase, the prosecutor argued to the jury that the defense was attempting to mislead them. Capote contends that by repeatedly claiming that defense counsel would mislead the jury, the prosecutor labeled counsel

as unethical and damaged Capote's opportunity to present his case before the jury.

Arguments with similar language and tone have been upheld as comments on the lack of evidence and not as an attack on the integrity of defense counsel.

> "'"One of the most prevalent arguments to a jury is that the position and argument of the adversary is unwarranted, silly, fanciful or illogical." Crook v. State, 276 Ala. 268, 270, 160 So. 2d 896, 897 (1963). "[A] prosecutor's remarks during closing argument pointing out the flaws in the defense's theory of the case do not constitute improper argument." Reeves v. State, 807 So. 2d 18, 45 (Ala. Crim. App. 2000). See also Hall v. State, 820 So. 2d 113, 142 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001) (prosecutor's reference to the defense as a "smoke screen" was not improper) (emphasis omitted); West v. State, 793 So. 2d 870, 884 (Ala. Crim. App. 2000) (prosecutor's comment that a statement made by defense counsel was "part of the fairy tale that y'all have been hearing from the defense side" was not improper or prejudicial) (emphasis omitted); Woodall v. State, 730 So. 2d 627, 650 (Ala. Crim. App. 1997), aff'd in pertinent part, rev'd on other grounds, 730 So. 2d 652 (Ala. 1998) (prosecutor's comment that defense's theory was "an attempt to sell the jury 'oceanfront property in Arizona'" was not improper or prejudicial); Smith v. State, 588 So. 2d 561, 569 (Ala. Crim. App. 1991) (prosecutor's reference to defense counsel as "'merchants of reasonable doubt'" was

> not improper); Haywood v. State, 501 So. 2d 515, 519 (Ala. Crim. App. 1986) (prosecutor's comment that "'devious tricks to distort the truth'" had occurred during the trial was not improper); Thomas v. State, 393 So. 2d 504, 508-09 (Ala. Crim. App. 1981) (prosecutor's comments "'Judge, I think this lawyer needs to have a little lesson in proper evidence'" and that trial counsel had "'lied'" were not prejudicial); and Crook, 276 Ala. at 269, 160 So. 2d at 896-97 (prosecutor's comments "'You don't listen to some new fangled, disgusting theory that springs out from the minds of the imaginative lawyers'" and "'We aren't supposed to tamper around with any kind of disgusting new fangled theory'" were not improper) (emphasis omitted).'"

Harris v. State, 2 So. 3d 880, 923-24 (Ala. Crim. App. 2007) (quoting Minor v. State, 914 So.2d 372, 423-24 (Ala. Crim. App. 2004)).

Here, the prosecutor's comments were comments about the facts of the case and his interpretation of the law. This Court finds no error, plain or otherwise, in the prosecutor's comments. Accordingly, Capote is not entitled to any relief on this claim.

C.

Capote argues that the prosecutor engaged in improper leading throughout trial. Capote alleges that the prosecutor supplied his witnesses with the answers on two occasions and

cites to four other pages in the record. Capote contends that the leading questions constitute flagrant violations requiring reversal. In reviewing Capote's cited examples, the record reveals that Capote objected to leading only once, and that objection was sustained by the circuit court.

> "Leading questions should not be used on the direct examination of a witness, except when justice requires that they be allowed. Leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

Rule 611(c), Ala. R. Evid. Alabama has never enforced an across-the-board ban on leading questions by a prosecutor during direct examination. "Every question may be said in some sense to be leading." Donnell v. Jones, 13 Ala. 490, 507 (1848). As we stated in Williams v. State, 568 So. 2d 354, 356-57 (Ala. Crim. App. 1990):

> "'Any question expressly or impliedly assuming a material fact not theretofore testified to, so that the answer may affirm such fact, is leading. Smith v. S.H. Kress & Co., 210 Ala. 436, 98 So. 378 [(1923)].' Ray v. State, 32 Ala. App. 556, 559, 28 So.2d 116, 118 (1946). '"[T]he trial judge has discretion to allow some leading questions, especially since prior testimony is simply being repeated." Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 944 (Ala. 1983). "Whether to allow or disallow a leading question is within the discretion of the trial court

> and except for a flagrant violation there will not be reversible error." Bradford v. Stanley, 355 So. 2d 328, 331 (Ala. 1978).' Lynn v. State, 543 So. 2d 704, 707 (Ala. Cr. App. 1987), affirmed, 543 So.2d 709 (Ala. 1988), cert. denied, [493] U.S. [945], 110 S. Ct. 351, 107 L. Ed. 2d 338 (1989). Thus, leading questions may be allowed on direct examination, depending on the circumstances of the particular case. Certain subjects are especially conducive to a leading form, '"else the counsel and witness cannot be made to understand each other,"' among them '"[p]roof of ... personal identity."' C. Gamble, McElroy's Alabama Evidence § 121.05(2)(3d ed. 1977)."

See also Evans v. State, 794 So. 2d 415 (Ala. Crim. App. 2000), and James v. State, 788 So. 2d 185 (Ala. Crim. App. 2000). This Court has refused to find error when a circuit court has allowed leading questions on preliminary matters that are not disputed, see Womble v. State, 211 So.2d 881 (1968); when a witness is hostile, see Dennis v. State, 584 So. 2d 548 (Ala. Crim. App. 1991); when a witness is immature, see McCurley v. State, 455 So. 2d 1014 (Ala. Crim. App. 1984); when a witness's memory has failed, see Garth v. State, 536 So. 2d 173 (Ala. Crim. App. 1988); and to establish the predicate for admission of a confession, see Jones v. State, 292 Ala. 126, 290 So. 2d 165 (1974). In other words, leading questions, without more, do not necessarily require reversal.

This Court has examined the instances cited by Capote in his brief and can find no instance where illegal evidence was admitted as a result of the prosecutor's leading questions. Capote has failed to establish that the State could not have properly elicited the same testimony by simply altering the form of the questions. Therefore, no plain error occurred in the circuit court's allowing the State to ask leading questions. Accordingly, Capote is not entitled to any relief on this claim.

XIII.

Capote claims that the State erroneously introduced evidence of Capote's gang affiliation. Specifically, Capote contends that the State mentioned Capote's gang affiliation more than 40 times during the guilt and penalty phases of trial. While admitting that defense counsel also referenced Capote's gang affiliation throughout the trial,[8] Capote argues that evidence of his gang affiliation was improper under Rule 404(b), Ala. R. Evid., irrelevant, and unduly prejudicial.

[8]In fact, defense counsel was the first to mention Capote's gang affiliation, doing so during his opening statement. (R. 429.)

Because Capote did not object to the references at trial, this claim is reviewed for plain error.

> "'The admission or exclusion of evidence is a matter within the sound discretion of the trial court.' Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001). 'The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion.' Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000). In addition, '[t]rial courts are vested with considerable discretion in determining whether evidence is relevant, and such a determination will not be reversed absent plain error or an abuse of discretion.' Hayes v. State, 717 So. 2d 30, 36 (Ala. Crim. App. 1997).
>
> "Rule 402, Ala. R. Evid., provides that '[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State.' Rule 401, Ala. R. Evid., defines 'relevant evidence' as 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' 'Alabama recognizes a liberal test of relevancy, which states that evidence is admissible "if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence."' Hayes, 717 So. 2d at 36, quoting C. Gamble, Gamble's Alabama Evidence § 401(b). '[A] fact is admissible against a relevancy challenge if it has any probative value, however[] slight, upon a matter in the case.' Knotts v. State, 686 So. 2d 431, 468 (Ala. Crim. App. 1995), aff'd, 686 So. 2d

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

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

In Griffin v. State, 790 So. 2d 267 (Ala. Crim. App. 1999), rev'd on other grounds, 790 So. 2d 351 (Ala. 2000), this Court held:

> "Griffin relies on Ex parte Thomas, 625 So. 2d 1156 (Ala. 1993), in which the Alabama Supreme Court stated that allowing the state to comment on any possible gang affiliation is equal to allowing the state to introduce evidence of collateral criminal acts.
>
> "Rule 404(b), Ala. R. Evid., states, in pertinent part:
>
> > "'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive....'
>
> "(Emphasis added.) This Court has previously held that a defendant's involvement in gang activity may be relevant to prove motive in a particular case.

Siler v. State, 705 So. 2d 552 (Ala. Crim. App. 1997); see also Knotts v. State, 686 So. 2d 431, 469 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala. 1996), cert. denied, 520 U.S. 1199, 117 S. Ct. 1559, 137 L. Ed. 2d 706 (1997) (holding that 'the appellant's possible membership in an organization that espouses racial hatred is relevant to a possible motive for the homicide').

"The theory of the state's case was that Griffin, a member of the Crew, was paid to come to Birmingham to kill Davis because Davis had refused to return the drugs to Bimbo, a drug dealer affiliated with the Crew. Griffin's defense was that he was not in Alabama when Davis was murdered and that he was not involved in Davis's murder. Clearly, Griffin's motive was at issue -- motive for a homicide is always a proper inquiry. Chambliss v. State, 373 So. 2d 1185 (Ala. Crim. App.), cert. denied, 373 So. 2d 1211 (Ala. 1979). Because '[evidence] tending to show motive is always admissible,' we find no error in the trial court's ruling. Benefield v. State, 726 So. 2d 286 (Ala. Crim. App. 1997).

"Moreover, Rule 403, Ala. R. Evid., states:

> "'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'

"We note that the trial court was acutely aware of the provisions of the Rule 403, Ala. R. Evid., balancing test with regard to evidence of Griffin's affiliation with the Crew. In a pretrial hearing on Griffin's motion in limine, the trial court indicated that it would be 'very circumspect' about

allowing the state to mention Griffin's bad acts during its opening statement. In addition, the trial court indicated to the state that he felt certain testimony concerning 'hit gang stuff' was prejudicial and that he was unsure of its probative value. (R. 66.)

"In R.D.H. v. State, 775 So. 2d 248, 252-53 (Ala. Crim. App. 1997), we stated:

> "'"Evidence of any offense other than that specifically charged is prima facie inadmissible. Nicks v. State, 521 So. 2d 1018 (Ala. Crim. App. 1987), aff'd, 521 So. 2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S. Ct. 2916, 101 L. Ed. 2d 948 (1988). However, evidence of collateral crimes or bad acts is admissible as part of the prosecutor's case if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty of the charged offense because of his past misdeeds. Nicks v. State; Brewer v. State, 440 So. 2d 1155 (Ala. Crim. App. 1983).
>
> "'"'....'
>
> "'"... All of the exceptions relate to the relevancy of the evidence, which means that evidence of separate and distinct crimes is admissible only when the evidence is relevant to the crime charged. Mason v. State, 259 Ala. 438, 66 So. 2d 557 (1953); Nicks v. State. If the

> evidence is not so remote as to lose its relevancy, the decision to allow or to not allow evidence of collateral crimes or acts as part of the state's case rests in the sound discretion of the trial court. McGhee v. State, 333 So. 2d 865 (Ala. Crim. App. 1976)."
>
> "'....
>
> "'That being said, we are, however, also mindful of the well-settled principle that even where the proffered evidence of collateral bad acts is relevant, its probative value must not be substantially outweighed by the danger of undue and unfair prejudice for the evidence to be admissible. Ex parte Smith, 581 So. 2d 531, 535 (Ala. 1991); Hargress v. City of Montgomery, 479 So. 2d 1137 (Ala. 1985); Thomas [v. State] 625 So. 2d [1149] at 1153 [(Ala. Crim. App. 1992)]; Jones v. State, 473 So. 2d 1197 (Ala. Cr. App. 1985). See McElroy's Alabama Evidence, §§ 20.01 and 21.01(4). "Prejudicial" in this context means "'an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.'" Averette v. State, 469 So. 2d 1371, 1374 (Ala. Crim. App. 1985), quoting State v. Forbes, 445 A.2d 8, 12 (Me. 1982). Before the probative value of evidence of collateral bad acts may be held to outweigh its potential prejudicial effect, the evidence must be "reasonably necessary" to the state's case. Bush [v. State, 695 So. 2d 70] at 85 [(Ala. Crim. App. 1995), aff'd, 695 So. 2d 138 (Ala. 1997)]; Averette, 469 So. 2d at 1374.'

> "According to the state's theory, this homicide centered around Davis's alleged refusal to return drugs to Bimbo, a distributor for the Crew. Griffin's membership in the Crew played a key role in his participation in Davis's murder. It was alleged that Griffin, because he was a 'security' man for the Crew, was paid to come to Alabama to kill Davis. To omit this crucial affiliation would have fragmented the presentation of the evidence and confused the jury. Griffin's membership in the Crew and the Crew's stake in selling drugs in Birmingham established the motive for Davis's murder. There was no less prejudicial means of presenting this evidence of motive. Therefore, based on the state's theory of the case and the above analysis, we find the trial court's admission of Griffin's association with the Crew was not error."

Griffin, 790 So. 2d at 297-99.

Here, Capote was a member of the Almighty Imperial Gangsters. The evidence established that this group is associated with gang activity. The evidence also established that Hubbard's home had been burglarized and that Hubbard, the leader of the gang, wanted to kill whomever was responsible. Hubbard was led to believe that Freeman had been involved in the burglary. It was the State's theory of the case that the gang devised a plan to murder Freeman and that Capote, a loyal gang member, committed the murder. "To omit this crucial affiliation would have fragmented the presentation of the evidence and confused the jury." Griffin, supra. The

evidence was relevant to show Capote's motive for shooting Freeman and, in this case, was not unduly prejudicial. Griffin, supra; see also Proctor v. City of Prattville, 830 So. 2d 38, 41 (Ala. Crim. App. 2001). Further, under the circumstances of this case, a sua sponte limiting instruction by the circuit court was not required. See Revis v. State, 101 So. 2d 247, 316 (Ala. Crim. App. 2011) (quoting Johnson v. State, 120 So. 3d 1119, 1129-30 (Ala. 2006)). This Court finds no error, plain or otherwise, in the prosecutor's references to Capote's gang affiliation. Accordingly, Capote is not entitled to any relief on this claim.

XIV.

Capote argues that his death sentence is unconstitutional under Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616, 198 L.Ed. 2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002).

This claim has been rejected by the Alabama Supreme Court in Ex parte Bohannon, 222 So. 2d 525 (Ala. 2016), and by this Court in State v. Billups, 223 So. 3d 954, 963 (Ala. Crim.

App. 2016) ("The Court in Hurst did nothing more than apply its previous holdings in Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),] and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. ... The Alabama Supreme Court has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring. See, e.g., Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002); Ex parte Hodges, 856 So. 2d 936 (Ala. 2003); Ex parte Martin, 931 So. 2d 759 (Ala. 2004); Ex parte McNabb, 887 So. 2d 998 (Ala. 2004); and Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004)."). See also Creque v. State, 272 So. 3d 659, 729-30 (Ala. Crim. App. 2018), and Knight v. State, [Ms. CR-16-0182, Aug. 10, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018). Accordingly, Capote is not entitled to any relief on this claim.

XV.

Capote argues that he was denied due process because his indictment did not allege any aggravating circumstances. This Court, however, has specifically rejected this argument and has held repeatedly that aggravating circumstances do not have

to be alleged in a capital-murder indictment. E.g., Woodward v. State, 123 So. 3d 989, 1053-54 (Ala. Crim. App. 2011); Lewis v. State, 24 So. 3d 480, 534-35 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009); Stallworth v. State, 868 So. 2d 1128, 1186 (Ala. Crim. App. 2001). Accordingly, Capote is not entitled to any relief on this claim.

XVI.

Capote argues that the circuit court erroneously failed to find the existence of an uncontested, statutory mitigating circumstance. Capote argues that the circuit court failed to find that his age at the time of the offense was a mitigating factor. Capote also contends that "the trial court effectively turned this mitigating circumstance into non-statutory aggravating evidence in support of a death sentence." (Capote's brief, at 87.)

Section 13A-5-45(g), Ala. Code 1975, provides that, "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual

existence of that circumstance by a preponderance of the evidence." Further,

> "[t]he United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), requires that a circuit court consider all evidence offered in mitigation when determining a capital defendant's sentence. However,
>
> > "'"[M]erely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that [circumstance]. Mikenas [v. State, 407 So. 2d 892, 893 (Fla. 1981)]; Smith [v. State, 407 So. 2d 894 (Fla. 1981)]." Harrell v. State, 470 So. 2d 1303, 1308 (Ala. Cr. App. 1984), aff'd, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).'
>
> "Perkins v. State, 808 So. 2d 1041 (Ala. Crim. App. 1999). '"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). '"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)."

Albarran v. State, 96 So. 3d 131, 212-13 (Ala. Crim. App. 2011). Thus, a circuit court is not required to find that a

capital defendant's evidence supports a mitigating circumstance; rather, "whether the evidence ... actually [supports a] mitigating [circumstance] is in the discretion of the sentencing authority." Id.

In this case, the circuit court considered the evidence presented by Capote and found that it did not support the statutory mitigating circumstance defined in § 13A-5-51(7), Ala. Code 1975: "The age of the defendant at the time of the crime." In its sentencing order, the circuit court made the following findings concerning its determination that Capote's age did not constitute a mitigating circumstance:

> "The Court finds that the Defendant was 22 years old at the time of the commission of the crime. The Court also finds that the Defendant has a history of significant criminal activity as reflected in his conviction of Aggravated Battery in DuPage County, Ill. referenced earlier in this Order, and from information describing his criminal activity referenced in the Pre-Sentence Investigation Report prepared in this case. The Court also finds that Defendant has participated in Gang activity since he was approximately 14-16 years of age and living in Chicago. Therefore, the Court finds that the mitigating circumstance listed in § 13A-5-51(7), Code of Alabama, as amended, does not exist and the Court does not consider it."

(C. 282-83.)

> "In Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999), affirmed, 779 So. 2d 1283 (Ala. 2000),

cert. denied, 531 U.S. 1193 (2001), this court found that the trial court's determination that Ingram's age did not support the statutory mitigating circumstance was proper, although there was evidence indicating that Ingram was 24 years old when in fact he was 22 years old at the time of the offense. This court held that the trial court's decision rested on the evidence concerning Ingram's circumstances and maturity and was therefore proper. It stated:

> "'The record shows that the crime was committed on July 31, 1993. Thus, to be exact, he was 22 years, 4 months, and 23 days of age on the date the crime was committed and 24 years, 5 months, and 14 days of age at the time of sentencing, a difference of approximately 2 years and 21 days. The record shows that the trial court considered the presentence report in arriving at its sentence. The record also shows that just before sentencing on June 16, 1995, the trial court asked Ingram, "How old are you now?" Ingram responded, "Twenty-four." (R. 1051-52.) The state suggests that the finding could have been a typographical or clerical error, and if not, because of Ingram's obvious maturity at the time the crime was committed, it would have made no reasonable difference to the trial court, even if the finding had been that he was 22 years of age. In other words, the state maintains that whether he was 24 or 22 would have made no difference in the trial court's findings in this case. In support of its argument, the state correctly points out that before committing the crime, Ingram had fathered a child, had embarked on a career as a drug dealer, and was no longer a youth but was "living out in the world." We note from the record that although unmarried, Ingram was the

> father of a one-year-old child, had spent much of his life in Brooklyn, New York, had dropped out of school when he was 10 years of age, was obviously dealing in drugs, was worldly and streetwise, and was sui juris and legally responsible for his acts. We agree with the state that whether Ingram was 24 or 22 when he committed this crime, his age had no reasonable bearing upon its commission. We think that under the facts presented, even if the trial court's finding had been that Ingram was 22 at the time he committed the crime, its ruling would have been the same.'
>
> "779 So. 2d at 1244. Thompson v. State, 542 So. 2d 1286, 1297 (Ala. Crim. App. 1988), affirmed, 542 So. 2d 1300 (Ala.), cert. denied, Thompson v. Alabama, 493 U.S. 874 (1989) (affirming the trial court's finding that 'while the age of a criminal defendant is an important consideration, it is not "solely determinative of the existence of a mitigating circumstance"'; Thompson was 20 at the time of the offense and, under the facts of the case, this mitigating circumstance was properly not found to exist). See McMillan v. State, [139 So. 3d 184, 212] (Ala. Crim. App. 2010) (finding that trial court's determination that the mitigating circumstance of age, where McMillan was 18 years old at time of offense, was to be accorded little weight was not improper based on the facts and circumstances of the case)."

Revis v. State, 101 So. 3d 247, 321-22 (Ala. Crim. App. 2011).

The circuit court's determination regarding this mitigating circumstance was not improper. Further, contrary to Capote's claim, the circuit court did not use Capote's involvement with gangs at a young age and difficult upbringing

as a nonstatutory aggravating circumstance. This Court finds no error, much less plain error, in the circuit court's consideration of Capote's mitigating evidence. Accordingly, Capote is not entitled to any relief on this claim.

XVII.

Capote argues that the circuit court erred when it charged the jury on reasonable doubt, which, he claims, lowered the State's burden of proof. Capote claims that the circuit court erred when it equated reasonable doubt with an "abiding conviction" and when it failed to direct the jury that the lack of evidence can create reasonable doubt. According to Capote, the circuit court's instruction violates Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed. 2d 339 (1990). Because Capote did not object to the circuit court's instruction on reasonable doubt, this Court reviews this claim for plain error only. See Rule 45A, Ala. R. App. P.

The circuit court instructed the jury on reasonable doubt as follows:

> "The State of Alabama has the burden of proving the guilt of the Defendant beyond a reasonable doubt, and this burden remains on the State

> throughout the case. The Defendant is not required to prove his innocence.
>
> "The phrase 'reasonable doubt' is self-explanatory, [a]nd efforts to define it do not always clarify the term. But it may help you some to say that the doubt that would justify an acquittal must be a reasonable doubt and not a mere possible doubt. A reasonable doubt is not a mere guess or surmise and is not a forced or capricious doubt.
>
> "If, after considering all of the evidence in this case, you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt. And it would be your duty to convict the Defendant. The reasonable doubt which entitles an accused an acquittal is not a mere fanciful, vague, conjectural, or speculative doubt, but a reasonable doubt arising from the evidence and remaining after a careful consideration of the testimony such as reasonable, fair-minded, and conscientious men and women would entertain under all of the circumstances.
>
> "You would observe that the State is not required to convince you of the Defendant's guilt beyond all doubt but simply beyond all reasonable doubt, after comparing and considering all of the evidence in this case your minds are left in such condition that you could not say that you have an abiding conviction of the Defendant' guilt, then you are not convinced beyond a reasonable doubt[, a]nd the Defendant would be entitled to an acquittal."

(R. 1524-26.)

Both this Court and the Alabama Supreme Court have repeatedly held that an instruction informing the jury that, if it had "an abiding conviction of the truth of the charge,

then you are convinced beyond a reasonable doubt" but that, if it did not have "an abiding conviction of the Defendant's guilt, then you are not convinced beyond a reasonable doubt," is proper and does not violate Cage and its progeny. (R. 1525-26.) See Ex parte Brooks, 695 So. 2d 184, 192 (Ala. 1997); Callen v. State, [Ms. CR-13-0099, April 28, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017); Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015).

With respect to Capote's argument that the circuit court should have instructed the jury that a lack of evidence can create reasonable doubt, Capote has cited no authority that requires a circuit court to instruct the jury specifically that reasonable doubt may arise not only from the evidence presented at trial but also from the lack of evidence presented at trial. Capote correctly states that the reasonable-doubt instructions contained in the Alabama Pattern Jury Instructions in effect at the time of his trial included such language. See Alabama Pattern Jury Instructions: Criminal, General Jury Instructions, Burden of Proof (adopted November 13, 2014) (currently found at

http://judicial.alabama.gov/docs/library/docs/General_Jury_Instructions.pdf)(Instruction I.4: A reasonable doubt "is a doubt which arises from all or part of the evidence or from the lack of evidence and remains after a careful consideration of the evidence.") "However, Alabama courts have not held that a trial court's failure to follow the pattern instruction in its entirety results in reversible error." Hosch v. State, 155 So. 3d 1048, 1087 (Ala. Crim. App. 2013).

In addressing this same claim in Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ___ So. 3d. ___ (Ala. Crim. App. 2017), this Court stated:

> "In Lambeth v. State, 380 So. 2d 923 (Ala. 1979), the Alabama Supreme Court upheld the refusal of requested charges that reasonable doubt may arise from 'part of the evidence' where the trial court instructed the jury that reasonable doubt could be based on the evidence produced at trial or the lack of evidence produced at trial. 380 So. 2d at 924. The Court held that if 'the jury is presented a discussion of the reasonable doubt standard as applied to the evidence in its totality, then the failure to give instructions' that reasonable doubt may arise from part of the evidence is not reversible error. Lambeth, 380 So. 2d at 925. Subsequently, in Shields v. State, 397 So. 2d 184 (Ala. Crim. App. 1981), this Court expanded the scope of Lambeth and upheld the refusal of a requested charge that reasonable doubt may arise from 'a want of evidence' when the trial court instructed the jury that reasonable doubt could arise '"from the evidence."' 397 So. 2d at 187-88.

This Court, following Lambeth, held that refusal of the requested instruction was not reversible error because the jury had been instructed on the reasonable-doubt standard as applied to the evidence in its totality. Other jurisdictions have held similarly. See Johnson v. State, 518 N.E.2d 1073, 1076-77 (Ind. 1988) (holding that the trial court did not err in refusing a requested charge that reasonable doubt may arise from the lack of evidence where the trial court's instructions as a whole correctly conveyed the concept of reasonable doubt); and State v. Preston, 122 N.H. 153, 161, 442 A.2d 992, 997 (1982) (same).

"In this case, the trial court's charge adequately conveyed the concept of reasonable doubt to the jury. The court correctly instructed the jury that the burden was on the State to prove Floyd's guilt beyond a reasonable doubt and that a reasonable doubt was not a doubt based on conjecture or speculation, but was a doubt grounded in reason after consideration of all the evidence. In Gonzalez v. State, 511 So. 2d 703 (Fla. Dist. Ct. App. 1987), Florida's Third District Court of Appeals rejected a claim identical to Floyd's:

> "'[W]e reject Gonzalez's claim that a new trial is required because the lower court inadvertently omitted a portion of the standard jury instruction which provided in part that a reasonable doubt could arise from a "lack of evidence" -- as the defendant argued to the jury was true of the state's case here. While again, the omission was unfortunate and should not be repeated, it does not entitle the defendant to a reversal. Unlike Simmons v. State, 156 Fla. 353, 22 So. 2d 803 (1945), upon which Gonzalez relies, the charge actually given below did not "affirmatively" state or suggest that a reasonable doubt could not arise from a lack of evidence. Hence,

> as was directly held in the subsequent and controlling case of Miller v. State, 225 So. 2d 409 (Fla. 1969), the lack of evidence qualification was sufficiently implied by the general reasonable doubt instruction so as to render it unnecessary to give (and therefore harmless not to) an explicit charge to the same effect. Accord Vasquez v. State, 54 Fla. 127, 44 So. 739 (1907); Cobb v. State, 214 So. 2d 372 (Fla. 2d DCA 1968), cert. denied, 222 So. 2d 747 (Fla. 1969); Egantoff v. State, 208 So. 2d 843 (Fla. 2d DCA 1968), cert. denied, 218 So. 2d 164 (Fla. 1968); see also Barwicks v. State, 82 So. 2d 356 (Fla. 1955).'

"511 So. 2d at 704 (footnote omitted). See also United States v. Ndhlovu, 510 Fed. Appx. 842, 848 (11th Cir. 2013) (holding that pattern instructions on reasonable doubt that 'did not state explicitly that reasonable doubt could be found from a lack of evidence' were not deficient) (not selected for publication in the Federal Reporter); People v. Guerrero, 155 Cal. App. 4th 1264, 1267-69, 66 Cal. Rptr. 3d 701, 702- 04 (2007) (holding that the trial court did not err in not specifically instructing the jury that it could find reasonable doubt based on the lack of evidence); Brown v. United States, 881 A.2d 586, 596-97 (D.C. Cir. 2005) (holding that the trial court's failure to instruct the jury that reasonable doubt may arise from the lack of evidence was error because it failed to follow the pattern instructions, but nonetheless holding that the error did not render the court's instruction constitutionally deficient and did not rise to the level of plain error); State v. Cohen, 157 Vt. 654, 656, 599 A.2d 330, 332 (1991) (holding that the trial court did not err in instructing the jury that 'a reasonable doubt is a doubt "which arises from consideration of all the evidence"' because the instruction 'did not foreclose a reasonable doubt arising from a lack of evidence'); People v.

> Nazario, 147 Misc.2d 934, 559 N.Y.S.2d 609 (1990) (holding that a trial court is not required to instruct the jury that reasonable doubt may arise from the lack of evidence as long the court properly instructs the jury on the distinction between a reasonable doubt and a doubt based on whim or conjecture); and State v. Lambert, 463 A.2d 1333, 1338-39 (R.I. 1983) (holding that the trial court's instruction that reasonable doubt is a doubt '"based on the evidence"' was not reversible error even though it would have been 'appropriate to inform the jury that a lack of evidence may give rise to a reasonable doubt').
>
> "Similarly, here, the trial court did not affirmatively state, or even imply, that a reasonable doubt could not arise from the lack of evidence, and no reasonable juror could have interpreted the court's instructions as saying such. Although we encourage trial courts to follow the pattern instructions if possible, and trial courts should be especially cautious when instructing the jury on reasonable doubt, under the circumstances in this case, language that reasonable doubt may arise from the lack of evidence would have added nothing to the court's charge 'that [wa]s not already obvious to people of common sense. That lack of evidence may cause one to have a reasonable doubt is self-evident.' United States v. Rogers, 91 F.3d 53, 57 (8th Cir. 1996).
>
> "Therefore, we find no error, much less plain error, in the trial court's instructions on reasonable doubt."

___ So. 3d at ___.

As in Floyd, the circuit court's instruction did not affirmatively state, or even imply, that a reasonable doubt could not arise from the lack of evidence. The circuit

court's instructions accurately conveyed to the jury the concept of reasonable doubt and did not lessen the State's burden of proof. This Court finds no error, much less plain error, in the circuit court's instruction on reasonable doubt. Accordingly, Capote is not entitled to any relief on this claim.

XVIII.

Capote contends that the State and the circuit court incorrectly informed the jury that its penalty-phase verdict was merely a recommendation. Capote acknowledges Ex parte Phillips, [Ms. 1160403, Oct. 19, 2018] ___ So. 3d ___ (Ala. 2018), in which the Alabama Supreme Court upheld well-settled law that comments informing a jury of the extent of its sentencing authority, that its sentencing verdict was a recommendation, and that the trial court would make the final decision as to sentence does not violate Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985); however, Capote maintains that the decision of the Supreme Court of the United States in Hurst, taken together with Caldwell, "makes clear that [his] jury should not have been informed that its verdict was merely advisory and [his]

death sentence cannot rest on this recommendation from the jury." (Capote's brief, at 90.) The Alabama Supreme Court and this Court have already rejected this argument. Ex parte Phillips, ___ So. 3d at ___ ("Consequently, we find no merit to Phillips's argument that the United States Supreme Court's decision in Hurst, taken together with its prior holding in Caldwell, establishes that his jury should not have been informed that its verdict was merely advisory and that, therefore, his death sentence cannot rest on its recommendation."), and Phillips v. State, [Ms. CR-12-0197, Oct. 21, 2016] ___ So. 3d ___ (Ala. Crim. App. 2015) (opinion on return to remand). Even if this Court were inclined to revisit the issue -- and we are not -- "this Court is bound by the decisions of the Alabama Supreme Court and has no authority to modify those decisions." Vanpelt v. State, 74 So. 3d 32, 86 n.13 (Ala. Crim. App. 2009) (citing § 12-3-16, Ala. Code 1975). Accordingly, Capote is not entitled to any relief on this claim.

XIX.

Next, Capote argues that death-qualifying the prospective jurors resulted in a conviction-prone jury and

disproportionately excluded minorities and women. Capote acknowledges that in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986), the United States Supreme Court held that prospective jurors in a capital-murder case may be "death-qualified"; however, he contends that "extensive social science evidence has since shown that death-qualified juries are significantly more prone to convict than ordinary ones and are significantly more likely to sentence a defendant to death rather than life." (Capote's brief, at 91.)

Even so, Alabama has repeatedly upheld this practice.

> "'A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Neither the federal nor the state constitution prohibits the state from ... death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391-92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1297, 122 L. Ed. 2d 687 (1993).'
>
> "Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand).

> "The circuit court correctly allowed the prospective jurors to be death-qualified concerning their views on capital punishment."

Graham v. State, [Ms. CR-15-0201, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). See also Dotch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010); Vanpelt v. State, 74 So. 3d 32 (Ala. Crim. App. 2009); Sneed v. State, 1 So. 3d 104 (Ala. Crim. App. 2007). Accordingly, Capote is not entitled to any relief on this claim.

XX.

Capote argues that his sentence of death is grossly disproportionate to the sentences imposed for similar defendants and offenses and to that of his codefendant, Hubbard, who received a sentence of life in prison without the possibility of parole.

Pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Capote's conviction and his sentence of death. Capote was indicted for, and convicted of, one count of capital murder for the murder of Freeman by use of deadly weapon while Freeman was inside a vehicle, see § 13A-5-40(a)(17), Ala. Code 1975. The jury, by a vote of 10-2, recommended that Capote be sentenced to death.

The record does not reflect that Capote's sentence of death was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The circuit court correctly found that the aggravating circumstance outweighed the mitigating circumstance. In making this determination, the circuit court found that the State proved the existence of one aggravating circumstance -- that Capote had previously been convicted of a felony involving the use or threat of violence to the person. See § 13A-5-49(2), Ala. Code 1975.

Regarding mitigating circumstances, the circuit court found the existence of no statutory mitigating circumstances but did find that the defense established one nonstatutory mitigating circumstance -- Capote's family background. The circuit court further indicated in its sentencing order that it had considered the jury's recommended sentence of death by a vote of 10 in favor of death to 2 in favor of life imprisonment without the possibility of parole and gave it due weight under the law.

The sentencing order shows that the circuit court properly weighed the aggravating circumstance and the mitigating circumstance and correctly sentenced Capote to death. The record supports the circuit court's findings.

Section 13A-5-53(b), Ala. Code 1975, requires this Court to reweigh the aggravating circumstance and the mitigating circumstance to determine whether Capote's sentence of death is proper. After independently weighing the aggravating circumstance and the mitigating circumstance, this Court finds that Capote's death sentence is appropriate.

As required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must now determine whether Capote's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. Capote was convicted of one count of murder for shooting Freeman while he was inside a vehicle. Further, the circuit court found that Capote had previously been convicted of a crime involving the use or threat of violence to a person. A sentence of death has been imposed for similar crimes throughout this State. See Dotch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010); Key v. State, 891 So. 2d 353 (Ala. Crim. App. 2002); Knight v. State, 907 So. 2d 470

(Ala. Crim. App. 2004). This Court also notes that Young, a codefendant, was sentenced to death. This Court finds that the sentence was neither excessive nor disproportionate. Accordingly, Capote is not entitled to any relief on this claim.

Finally, this Court has meticulously searched the entire record for any error, plain or preserved below, that may have adversely affected Capote's substantial rights. This Court has found no merit to any issue preserved below for appellate review and no indicia of plain error. See Rule 45A, Ala. R. App. P.

Accordingly, Capote's convictions and his sentences, including his death sentence, are affirmed.

AFFIRMED.

Kellum, McCool, Cole, and Minor, JJ., concur.