Rel: August 5, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-18-0060

Derrick Dearman

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-17-1628; CC-17-1629; CC-17-1630; CC-17-1631; and CC-17-1632)

McCOOL, Judge.

The appellant, Derrick Dearman, was charged with six counts of murder made capital for intentionally killing six people – Robert Lee

Brown, Chelsea Reed, Chelsea Reed's unborn child, Justin Reed, Joseph Adam Turner, and Shannon Randall – during the course of a burglary, see § 13A-5-40(a)(4), Ala. Code 1975, six counts of murder made capital because the victims were murdered by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, and two counts of first-degree kidnapping, see § 13A-6-43, Ala. Code 1975. In exchange for the State dismissing the two capital-murder charges related to the murder of the unborn child and the two first-degree kidnapping charges, Dearman pleaded guilty to five counts of murder made capital because the murders were committed during a burglary and five counts of murder made capital because the victims were murdered by one act or pursuant to one scheme or course of conduct. The matter was then presented to a jury for the jury to determine whether the State had proven its case against Dearman beyond a reasonable doubt, as required by § 13A–5–42, Ala. Code 1975. The jury returned a verdict of guilty for each of the 10 counts of capital murder. Subsequently, during the penalty-phase of Dearman's trial, the jury unanimously recommended a sentence of death. On October 12, 2018, the circuit court followed the jury's recommendation and sentenced Dearman to death. Dearman was

also ordered to pay $1,000 to the Alabama Crime Victims Compensation Commission. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-53, Ala. Code 1975.

Brief Recitation of the Facts

Dearman and Laneta Lester were involved in a longtime, volatile relationship. On the evening of August 19, 2016, Lester was staying at the residence of her brother, Joseph Adam Turner, and his wife, Shannon Randall, in Citronelle. Dearman was told that he was not allowed to stay the night, and he had been asked to leave earlier in the evening. In the early morning hours of August 20, 2016, Dearman broke into the house through two sliding glass doors on the front of the house, which were locked at the time. Dearman was armed with an axe that he had retrieved from the front yard of Randall's residence. Dearman proceeded to use the axe to strike Robert Lee Brown, who was asleep in the recliner in the living room just inside the door of the house, multiple times in his head. Lester was asleep on an air mattress in the living room. Dearman then proceeded to a bedroom in the residence that was occupied by Turner, Randall, and their three-month-old infant. Dearman proceeded to strike Turner multiple times in the head with the axe. Dearman also struck

Randall in the head with the axe when Randall was awakened by Dearman's presence. Dearman then went into another bedroom in the house that was occupied by Chelsea Reed ("Chelsea")[1] and Justin Reed ("Justin"). Dearman confronted and struck Chelsea multiple times with the axe before turning to Justin and striking him multiple times with the axe, as Dearman and Justin wrestled for a gun that Justin possessed. Brown, Chelsea and Justin were severely injured, but were not killed after being struck by the axe. Next, Dearman used the gun that he had taken from Justin to shoot Chelsea, Justin, and Turner. Dearman subsequently shot Randall in the back of the head as she lay in the bed with the infant. The infant was unharmed. Dearman returned to the living room where Brown was still suffering from the axe wounds, and Dearman shot Brown in the head. Lester was unharmed. Dearman then stole the keys to Randall's vehicle and fled the scene with the infant and Lester. The following day, Dearman turned himself in to law enforcement.

Procedural History

[1]The record indicates that Chelsea was 18-weeks pregnant at the time of the murders.

On March 24, 2017, Dearman was indicted for 12 counts of capital murder and 2 counts of first-degree kidnapping. On May 18, 2017, Dearman appeared in circuit court with his counsel and pleaded not guilty to each charge.

At a subsequent hearing held on August 14, 2017, the court stated that it had received a copy of a letter that had been handwritten by Dearman. The letter was addressed to the district attorney and was postmarked July 10, 2017. The court indicated that a copy of the letter had been delivered to the court by the district attorney at Dearman's request. According to the court, Dearman indicated in the letter that he intended to plead guilty to the charges against him; however, Dearman indicated that, after talking to his counsel, he was going to allow his not-guilty plea to stand. That same day, the circuit court ordered that Dearman undergo a mental evaluation.

At a status conference held on April 18, 2018, Dearman asked the court to allow him to plead guilty and inquired about the possibility of speeding up the guilty-plea process; however, the circuit court explained that the court had to wait until it had received the reports from the

mental evaluations performed on Dearman before proceeding with the guilty-plea process.

On August 27, 2018, Dearman filed a motion for a hearing to determine his competency to stand trial. On August 30, 2018, after it had reviewed the mental-evaluation reports, the circuit court held a hearing on the issue of whether reasonable grounds existed to doubt Dearman's competency, during which the circuit court found that no reasonable grounds existed to doubt Dearman's mental competency either to plead guilty or to stand trial. At the hearing, Dearman again informed the circuit court that he intended to plead guilty and that he wanted to waive his right to counsel. Following the hearing, the circuit court issued a written order denying Dearman's motion for a competency hearing.

The next day, on August 31, 2018, the circuit court conducted a hearing regarding Dearman's request to proceed without the assistance of counsel. The circuit court found that Dearman had "knowingly, freely, intelligently, and voluntarily waived [his] right to assistance of counsel." (R. 192.) The circuit court appointed advisory counsel to be present and available to assist Dearman during trial proceedings. Following a lengthy colloquy, the circuit court also accepted Dearman's guilty plea to five

counts of murder made capital because the murders were committed during a burglary and five counts of murder made capital because the victims were murdered by one act or pursuant to one scheme or course of conduct.

Pursuant to § 13A-5-42, Ala. Code 1975, the matter was presented to a jury so the jury could determine whether the State had proven its case against Dearman beyond a reasonable doubt. The jury returned a verdict of guilty for 10 counts of capital murder. Following a penalty-phase of trial, the jury unanimously recommended a sentence of death. On October 12, 2018, the circuit court followed the jury's recommendation and sentenced Dearman to death. This appeal follows.

Standard of Review

This Court reviews the proceedings before and during the guilt phase of the trial for jurisdictional errors. See § 13A-5-42, Ala. Code 1975; see also Davis v. State, 740 So. 2d 1115, 1118 (Ala. Crim. App. 1998); Hutcherson v. State, 727 So. 2d 846, 851 (Ala. Crim. App. 1997). Further, this Court reviews the penalty-phase proceedings for any error, whether preserved or plain, as required by Rule 45A, Ala. R. App. P., which provides:

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

Additionally, this Court has explained the plain-error rule as follows:

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

"Ex parte Brown, 11 So. 3d 933, 935-36 (Ala. 2008) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999)). See Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007); Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997); Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998) ('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.'). See also Harris v. State, 2 So. 3d 880, 896 (Ala. Crim. App. 2007) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App.

> 1999)). Although [a defendant's] failure to object at trial will not preclude this Court from reviewing an issue, it will weigh against any claim of prejudice he now makes on appeal. See Dotch v. State, 67 So. 3d 936, 965 (Ala. Crim. App. 2010) (citing Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)). Further,
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> > "'"'the plain[-]error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."'" Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed. 2d 862 (1995).'
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> "Centobie v. State, 861 So. 2d 1111, 1118 (Ala. Crim. App. 2001)."

Shanklin v. State, 187 So. 3d 734, 753 (Ala. Crim. App. 2014).

Discussion

I.

Dearman claims that he was not competent to plead guilty, to waive his right to counsel, or to stand trial. He alleges that the trial court's failure to hold a competency hearing violated state and federal law, and that the trial court's ultimate determination that he was competent to stand trial was erroneous. Specifically, in his brief on appeal, Dearman argues that the finding of Dr. Bhushan S. Agharkar, M.D., that he was

not competent to stand trial "provide[d] exactly the 'reasonable grounds' necessary to trigger the hearing requirement of Rule 11.6(a)[, Ala. R. Crim. P.]" (Dearman's brief, at 36), and that the evidence of his "serious mental illness, neurocognitive dysfunction, and history of trauma" established that he was "incapable of understanding the nature and object of the proceedings against him" and that he lacked the ability to consult with counsel or assist in preparing his defense. (Dearman's brief, at 33.)

The record indicates that, at the request of the State, the trial court ordered that Dearman undergo a mental evaluation. Dearman's counsel also requested an independent psychiatric evaluation of Dearman. On August 27, 2018, Dearman filed a motion for a hearing to determine his competency to stand trial.

The psychological reports resulting from the mental evaluations of Dearman are contained in the record on appeal. The record shows that Dr. John D. Toppins, a certified forensic examiner at Taylor Hardin Secure Medical Facility, in both his initial report resulting from his forensic evaluation of Dearman dated December 10, 2017, and a supplemental report resulting from an evaluation performed on August

30, 2018, advised that Dearman was capable of a factual and rational understanding of the court proceedings and that he had the ability to communicate with his attorney to assist in his defense. He opined that Dearman did not display any symptoms of a mental disorder that would impair his ability to participate in legal proceedings. Dr. Toppins also performed an evaluation concerning Dearman's mental state at the time of the offense, and, in his report dated March 28, 2018, Dr. Toppins concluded that Dearman was "not experiencing symptoms of a severe mental disorder at the time of the crimes" and that, although Dearman was "abusing methamphetamine at the time, [he] appears to have been aware of his actions and their effects on the victims and to have been able to discern the wrongfulness of his behavior." (C. 298.) Thus, Dr. Toppins stated, he did not believe that Dearman met the conditions necessary for an impaired-mental-state defense.

Dr. Robert L. Bare, a licensed psychologist and certified forensic examiner, conducted a brief mental-status examination of and administered intelligence testing on Dearman. In Dr. Bare's report concerning Dearman's intellectual functioning, Dr. Bare stated that Dearman's full scale IQ was 96, which is in the average range. Dr. Bare

also stated that there was no indication that Dearman met the criteria for suffering from an intellectual disorder.

Dr. Leesha Ellis-Cox, M.D., performed a psychiatric evaluation on Dearman. She stated in her report that Dearman presented symptoms that were indicative of bipolar disorder, post-traumatic stress disorder ("PTSD"), and "Polysubstance Use Disorder in remission." (C. 299.) Dr. Ellis-Cox provided treatment recommendations for each of those conditions.

Additionally, Dr. Melissa Ogden, a licensed psychologist and certified forensic examiner, performed a neuropsychological evaluation on Dearman. Her report indicated that her findings were based on her own evaluation of Dearman, as well as her review of Dearman's medical records including: Dr. Toppins's initial report, Dr. Bare's intellectual-functioning assessments, Dr. Ellis-Cox's report, records from the sheriff's office concerning the circumstances of the crime, and a timeline of Dearman's life and history from Dearman's legal defense team. Dr. Ogden concluded that Dearman met the diagnostic criteria for the following diagnoses:

1. Attention deficit hyperactivity disorder ("ADHD");

> 2. Mild neurocognitive disorder, the criteria for which is met when an individual exhibits "'evidence of modest cognitive decline from a previous level of performance in one or more cognitive domains'" that does not interfere with capacity for independent functioning";
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> 3. Stimulant-use disorder, which was in sustained remission in a controlled environment; and
>
> 4. Unspecified depressive disorder.

(C. 309-10.)

Dr. Agharkar, who evaluated on Dearman at the request of the defense, submitted a lengthy report with his findings. Dr. Agharkar summarized his findings as follows:

> "To summarize, Mr. Dearman knows the charges against him, the roles of the participants at a trial, and the plea bargain process. He understands the plea options he has and, while not recommended, is competent to plead guilty if he so chooses. However, as it relates to waiving the penalty phase of his trial or controlling what information gets presented and what does not, it is my opinion this decision is heavily influenced by suicidal thinking, mood symptoms, and brain dysfunction. It is therefore my opinion, to a reasonable degree of medical certainty, that Mr. Dearman is incompetent to stand trial."

(C. 318.) In a letter dated August 21, 2018, Dr. Agharkar opined:

> "For the same reasons set forth in my previous report, it is my opinion Mr. Dearman would not be competent to represent himself in the penalty phase of his pending capital trial. Due to my concerns regarding his probable mood disorder, suicidal thinking, and brain dysfunction negatively affecting his

> thought processes and decision-making, I believe he would self-sabotage and take whatever steps he deemed necessary to ensure a death verdict. This would include what information to put on as mitigation and what witnesses to call. Therefore it is my opinion, to a reasonable degree of medical certainty, that Mr. Dearman is incompetent to go pro se in his pending capital trial sentencing phase."

(C. 320.)

On August 30, 2018, the circuit court held a hearing on the matter of whether reasonable grounds existed to doubt Dearman's competency. At the August 30, 2018, hearing, the court first confirmed with Dearman that he was not under the influence of any prescribed medications that would affect his ability to think clearly and to understand what he was doing. At the court's request, Dearman also explained to the court that it was his understanding that he was in court that day for the trial judge to determine his competency relating to his trial and mitigation. The court then provided a list of the psychological-evaluation reports that it had received, and each of the doctors' reports were entered into the record as the court's exhibits. The court also noted that Dr. Toppins had evaluated Dearman on the date of the hearing and had again provided a supplemental report indicating that Dr. Toppins believed Dearman was competent to stand trial. (R. 159-160.)

The court continued to ask Dearman open-ended questions about the details of his case, and Dearman was able to provide the information sought by the court, including the victims' names, the charges that had been brought against him, and the date and location of the incident. Dearman indicated to the court that he spoke to his attorneys at least once a week, that he had spoken to counsel every day during the week of the hearing, and that he maintained e-mail correspondence with his counsel despite being incarcerated. Dearman told the court that he had no difficulty understanding the things his counsel had explained to him, including the options available to him and various trial strategies, and that he had no difficulty remembering the content of his discussions with his attorneys with the passage of time.

In regard to Dearman's understanding of the court system and the proceedings against him, Dearman explained to the court that he understood that, following an indictment, the district attorney's "job" was to "present the evidence that will support the charge" and that, in order to get a conviction for the charge, the district attorney had the burden to prove capital murder by showing "first, that [he] killed that person ... [and t]hen they have to prove if [the murder] was murder in the first or

cap[ital murder.]" (R. 163.) He further explained that, if the State met its burden and obtained a guilty verdict, the possible sentences that he could receive were "life without [the possibility of parole] or the death penalty." (R. 164.) Dearman continued to describe his understanding of the difference between the guilt-phase of a trial, where the jury would determine whether he was guilty, and the sentencing-phase of the trial process, where the jury would "have to balance" the State's arguments with the mitigating arguments presented by the defense and make a recommendation as to his sentence. (R. 165.) Dearman provided a description of mitigation evidence, providing the court with examples in his own case, and stated that he understood that, if he did not present mitigating evidence, none of the mitigating evidence would be in the record and, thus, he would "lose his shot" and the scale would "tip" toward the State. (R. 167.) Dearman told the court that his understanding was that 10 out of 12 jurors would have to recommend a death sentence for him to be sentenced to death.

The judge, noting the information that it had seen in the reports from Dearman's psychological evaluations, inquired into Dearman's alleged request for his attorneys to not enter mitigation evidence during

his sentencing. Dearman explained that he did not want to use his "religion as a crutch" or require his family to have to be put on the stand to testify, and that he felt like such a decision was "best for [him] and his family regardless of [] the outcome," which he understood was likely to be the death penalty. (R. 168.) Dearman emphasized that the decision not to present mitigation evidence was his decision and that it was what he wanted to do. Dearman also indicated that there was nothing that his counsel had informed him about that he did not understand from a legal perspective.

Following the hearing, the circuit court, finding that no reasonable ground existed to doubt Dearman's mental competency to plead guilty or to stand trial, issued a written order denying Dearman's motion for a hearing to determine his competency to stand trial. In its order, the court stated:

> "The Court has carefully reviewed the reports from medical professionals conducting evaluations of [Dearman's] mental status. The reports were admitted as Exhibits 5-12 during a colloquy between the Court and [Dearman] conducted August 30, 2018. The Court questioned [Dearman] to determine if [he] possessed a factual and rational understanding of the facts making the basis of pending charges and a rational understanding of the legal proceedings. It clearly appeared [Dearman] does have such rational understandings. His answers to the Court's questions were responsive and his

> understanding of trial proceedings was above normal. Eye contact was maintained during questioning, and nothing regarding his appearance or actions were abnormal."

(C. 395.)

This Court has held that the circuit court shall use the same standard to determine competency to stand trial as it uses to determine competency to plead guilty. See Roberts v. State, 62 So. 3d 1071, 1076 (Ala. Crim. App. 2010) (holding that the standard of competence to stand trial parallels the standard of competence to plead guilty). Rule 11.1, Ala. R. Crim. P., provides: "A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant." Rule 11.6(a), Ala. R. Crim. P., provides:

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

> At this hearing all parties shall be prepared to address the issue of competency."
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> This Court has stated:
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> > "Clearly, 'a trial court has an independent duty to inquire into an accused's state of mind when there are reasonable grounds to doubt the accused's competency to stand trial.' Ex parte LaFlore, 445 So. 2d 932, 934 (Ala. 1983). However, '[i]t is the burden of a defendant who seeks a pretrial competency hearing to show that a reasonable or bona fide doubt as to his competency exists.' Woodall v. State, 730 So. 2d 627, 647, (Ala. Crim. App. 1997), aff'd. in relevant part, 730 So. 2d 652 (Ala. 1998)(emphasis added). '"The determination of whether a reasonable doubt of sanity exists is a matter within the sound discretion of the trial court and may be raised on appeal only upon a showing of an abuse of discretion."' Id. See also Tankersley v. State, 724 So. 2d 557, 564 (Ala. Crim. App. 1998)."

Jackson v. State, 791 So. 2d 979, 994 (Ala. Crim. App. 2000).

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

> "'After reviewing the reports, if the judge finds reasonable grounds to doubt the defendant's mental competency, the judge must schedule a competency hearing within forty-two (42) days after the date the last report is received."

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

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

Lindsay v. State, 326 So. 3d 1, 17-18 (Ala. Crim. App. 2019), quoting Tankersley v. State, 724 So. 2d 557, 565 (Ala. Crim. App. 1998). "'"The trial court is in a far better position than the reviewing court to determine a defendant's competency to stand trial."'" Matthews v. State, 671 So. 2d 146, 148 (Ala. Crim. App. 1995), quoting Dill v. State, 600 So. 2d 343, 371 (Ala. Crim. App. 1991).

In Luong v. State, 199 So. 3d 173, 195 (Ala. Crim. App. 2015), this Court further explained:

> "'Competency to stand trial is a factual determination.' United States v. Boigegrain, 155 F.3d 1181, 1189 (10th Cir. 1998). 'There are of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are

> implicated.' Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). 'In making a determination of competency, the ... court may rely on a number of factors, including medical opinion and the court's observation of the defendant's comportment.' United States v. Nichols, 56 F.3d 403, 411 (2d Cir. 1995). ...'Given that "a defendant's behavior and demeanor at trial are relevant as to the ultimate decision of competency," we stress that the observations and conclusions of the district court observing that behavior and demeanor are crucial to any proper evaluation of a cold appellate record.' United States v. Cornejo–Sandoval, 564 F.3d 1225, 1234 (10th Cir. 2009). '[O]ne factor a court must consider when determining if there is reasonable cause to hold a competency hearing is a medical opinion regarding a defendant's competence.' United States v. Jones, 336 F.3d 245, 257 (3d Cir. 2003)."

However, although the circuit court must consider a medical opinion concerning a defendant's competence, this Court has also held that "[t]he trial judge is not bound by the conclusion and recommendation of an expert as to the competency of the accused." Bailey v. State, 421 So. 2d 1364, 1366 (Ala. Crim. App. 1982), citing Miles v. State, 408 So. 2d 158, 162 (Ala. Crim. App. 1981).

Additionally, this Court has stated:

> "'[T]he law is clear that "proof of the incompetency of an accused to stand trial involves more than simply showing that the accused has mental problems or psychological difficulties." Bailey v. State, 421 So. 2d 1364, 1366 (Ala. Crim. App. 1982).

> "'"'A distinction must be made between mental illness and mental incompetency to stand trial, and the fact that a defendant is mentally ill does not necessarily mean that he is legally incompetent to stand trial. Thus, not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence of defendant's mental unfitness must indicate a present inability to assist counsel or understand the charges.'"
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> "'Cowan v. State, 579 So. 2d 13, 15 (Ala. Crim. App. 1990) (quoting 22A C.J.S. Criminal Law § 550 (1989) (footnotes omitted)) .... Lee v. Alabama, 406 F.2d 466, 471-72 (5th Cir. 1968) ("one may be suffering from a mental disease which is at the root of antisocial action and simultaneously have a rational and factual understanding of court proceedings and be able to consult with a lawyer on a reasonably rational basis"), cert. denied, 395 U.S. 927, 89 S. Ct. 1787, 23 L. Ed. 2d 246 (1969); Committee Comments to Rule 11.1 (as amended effective October 1, 1996), Ala. R. Crim. P. ("Although some States require that the defendant's mental incompetence be attributable to a 'mental disease or defect,' the majority view is that the mere presence of a mental disorder, whatever its severity, is not a sufficient basis for a finding of incompetency to stand trial.").'"

Nicks v. State, 783 So. 2d 895, 913-14 (Ala. Crim. App. 1999), quoting Thomas v. State, 766 So. 2d 860, 881-82 (Ala. Crim. App. 1998), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005). With these principles in mind, we turn to the specific issue presented in this case.

Dearman's argument that the trial court erred in failing to hold a full competency hearing rests on his belief that a finding of incompetency by one expert alone, even accompanied by a conflicting finding of competency from a different medical expert, automatically provides the reasonable doubt necessary to require the circuit court to set a competency hearing. We disagree. Although such a finding by an expert could potentially provide a reasonable and bona fide doubt of the defendant's competency that would require a competency hearing under Rule 11.6(a), the opinion of one medical expert that a defendant is incompetent to stand trial does not necessitate a finding of reasonable doubt as to a defendant's competency. Such a determination must be evaluated on a case-by-case basis based on the totality of the circumstances in each particular case, and the trial court's determination will not be overturned absent a showing that the trial court has abused its discretion. See Jackson, 791 So. 2d at 994.

First, in this particular case, our review of the context of the entirety of Dr. Agharkar's report causes us to question whether Dr. Agharkar's opinion was truly a finding of incompetency to stand trial, and, at the very least, creates some confusion regarding his opinion on

the topic. For example, even in Dr. Agharkar's paragraph summarizing his opinion, he stated that Dearman understands the charges against him and the plea-bargain process, and he concludes that Dearman "is competent to plead guilty if he so chooses"; however, in the same paragraph, Dr. Agharkar also explained that, because he believes Dearman's decision to waive the penalty phase of his trial or control what information is presented to the jury is "heavily influenced by suicidal thinking, mood symptoms, and brain dysfunction," Dearman is "incompetent to stand trial." (C. 318.) Regardless, even assuming that Dr. Agharkar's opinion was truly a finding that Dearman was incompetent to stand trial under Alabama law, Dr. Agharkar's opinion does not automatically establish a reasonable doubt as to Dearman's competency that triggers the requirement in Rule 11.6(a) that the trial court order a competency hearing. Thus, we must evaluate Dr. Agharkar's findings in conjunction with the remainder the evidence before the court at the time he made his determination, including the medical reports containing the opinions of the other mental-health experts who evaluated Dearman and the transcript from the preliminary hearing, to determine whether the

circuit court abused its discretion in finding that there was no reasonable doubt as to Dearman's competency.

In support of Dearman's allegation that Dr. Agharkar's findings undoubtedly established a duty on the part of the court to hold a full competency hearing, he relies on the Alabama Supreme Court's holding in Ex parte Janezic, 723 So. 2d 725 (1997), and this Court's holding in Blankenship v. State, 770 So. 2d 642, 643 (Ala. Crim. App. 1999). Both of these cases, however, are distinguishable from the instant case.

In Ex parte Janezic, the trial court initially conducted a separate jury trial to determine whether Janezic was competent to stand trial. At the competency hearing, two experts testified and agreed that Janezic was hampering her defense by not helping her counsel in formulating an insanity defense. However, one of the experts, Dr. Maier, believed that Janezic's refusal to help was not based on her mental illness and was a deliberate choice by Janezic to resist because she believed that was "the most effective way to avoid being convicted," thereby opining that Janezic was competent to stand trial. Ex parte Janezic, 723 So. 2d at 727. To the contrary, the other expert, Dr. Rinn, testified that he believed that Janezic's resistence to an insanity defense was based on a mental illness

that made her unable to assist her attorney and, thus, made her incompetent to stand trial. Faced with the conflicting testimony from two experts, the jury determined that Janezic was competent to stand trial. Following a jury trial, Janezic was convicted of murder. At the sentencing hearing, Dr. Maier, who had previously opined that Janezic was competent to stand trial, informed the court that he now questioned Janezic's competency because she appeared to have "'very little awareness or concern about what was going on'" during the guilt-phase of her trial, and that, after his examination of Janezic the day before the sentencing hearing, he believed that Janezic had "'deteriorated significantly psychologically'" and that he was now unsure whether she was "'capable of rational thought or decision-making.'" Id. Following Dr. Maier's revelations, the court initially postponed sentencing; however, the court eventually determined that Janezic's condition had improved in response to medication and subsequently sentenced Janezic. Janezic appealed her conviction and sentence, and this Court initially affirmed Janezic's conviction. See Janezic v. State, 723 So. 2d 696 (Ala. Crim. App. 1996). However, the Alabama Supreme Court later reversed Janezic's conviction and remanded the case to the trial court.

In Ex parte Janezic, the Alabama Supreme Court found that the case should be remanded for the trial court to inquire "for further consideration of the question of Janezic's competency to stand trial during the guilt-determination phase of her trial," stating:

> "[W]hen a trial court is faced with facts that create a reasonable and bona fide doubt as to the mental competency of the defendant to stand trial, the trial court must take steps to assure that a reasonable legal determination of competency is reached. See, e.g., Atwell v. State, 354 So. 2d 30, 35 (Ala. Crim .App. 1977), cert. denied, 354 So. 2d 39 (Ala.1978). In other words, in such situations, the trial court must inquire into the defendant's competency, generally by conducting a competency hearing. Ex parte LaFlore, 445 So. 2d 932 (Ala. 1983). In this case, Janezic was afforded a competency hearing, but it appears to be uncontroverted that the only mental health professional who had testified at the pre-trial competency hearing that Janezic was competent changed his opinion after she was convicted and that this change in opinion was based in part on what he had observed while testifying during the guilt-determination phase of Janezic's trial."

723 So. 2d at 727. Thus, the Alabama Supreme Court stated:

> "Although the evidence on record does not conclusively prove that Janezic had become incompetent during the course of her trial, we believe that Dr. Maier's shift of opinion, especially when considered in the context of the other evidence related to Janezic's mental health, created a reasonable and bona fide doubt as to Janezic's competency during the guilt-determination phase of her trial."

Id., at 729. Importantly, when making its decision, the Alabama Supreme Court noted that it was the fact that the only expert who had previously opined that Janezic was competent to stand trial had subsequently changed his opinion, combined with the other evidence before the court related to Janezic's mental health, that created a reasonable and bona fide doubt as to Janezic's competency.

The present case is distinguishable from Ex parte Janezic. In the present case, the evidence before the court at the time the court made its decision still contained the reports of another mental-health expert who had evaluated Dearman and found him to be competent to stand trial. The record indicates that Dr. Toppins evaluated Dearman multiple times and that each time, including his evaluation of Dearman on the date of the hearing, Dr. Toppins reported that he believed that Dearman was competent to stand trial. Thus, unlike the situation in Ex parte Janezin where there was no remaining evidence that Janezin was competent to stand trial, there was at the very least conflicting evidence concerning Dearman's competency. Additionally, although Dearman suggests that Dr. Ellis-Cox's and Dr. Ogden's reports support a finding of incompetency because they indicate that Dearman exhibited characteristics of someone

suffering from several possible mental illnesses, such mental illnesses do not necessarily render a defendant incompetent to stand trial. See Nicks, 783 So. 2d at 914.

Dearman also relies on this Court's holding in Blankenship v. State, 770 So. 2d 642, 643 (Ala. Crim. App. 1999), to support his assertion that reasonable grounds existed for the circuit court to doubt his competency in this case. In Blankenship, an initial report from the Department of Mental Health and Mental Retardation stated that Blankenship was not competent to stand trial. The Department of Mental Health and Mental Retardation indicated in a later, second report that Blankenship was competent to stand trial. Following the second report, the trial court allowed Blankenship to plead guilty to murder. Relying on the Alabama Supreme Court's holding in Ex parte Janezic, this Court held that, because "the record [was] silent as to whether the trial court conducted a competency hearing or made any inquiry into [Blankenship's] competency at the time he entered his plea," and because the Department of Mental Health and Mental Retardation had initially found that he was incompetent to stand trial, there was reasonable doubt as to Blankenship's competency. Blankenship, 770 So. 2d at 643. Therefore,

this Court held, a remand was necessary for the circuit court to hold a hearing on the issue of Blankenship's competency at the time he entered his plea.

Dearman's reliance on Blankenship in support of his specific argument, however, is misplaced. The instant case is distinguishable from Blankenship because the record in this case contains other evidence that supports the circuit court's finding of competency. Here, again, we highlight the fact that the evidence before the court when the court made its determination contained reports from other mental-health experts who had evaluated Dearman and found Dearman to be competent to stand trial and to be of average intelligence. Further, unlike in Blankenship, the record in the present case sufficiently indicates that the circuit court held a hearing and conducted a meaningful inquiry into Dearman's competency before making a preliminary determination concerning Dearman's competency.

In conclusion, after thoughtfully taking into consideration the reports from the mental-health experts, as well as its own observations of Dearman during the hearing, the court found Dearman to be competent to stand trial. The court conducted a lengthy colloquy with

Dearman, even asking Dearman to explain in his own words his understanding of the court proceedings and his case. The court also specifically questioned Dearman about his alleged request that his attorneys not enter mitigation evidence during sentencing, which was one of Dr. Agharkar's main concerns that caused him to doubt Dearman's competency. Dearman explained his reasoning for his decision and emphasized that the decision not to present mitigation evidence was his own choice.

On appeal, Dearman now insists that, in light of Dr. Agharkar's findings, the court could not rely on its own observations of Dearman's behavior and appearance to support a finding that Dearman was competent to stand trial. Although we agree that the court must consider the reports of the medical experts, the court is also allowed to consider its own observations of the defendant's behavior and demeanor. See Lindsay, 326 So. 3d at 18 (holding that, based on the court's review of the findings of the medical expert and the court's personal dealings with the defendant, the circuit court properly found that there was no reasonable ground to make a further inquiry into the defendant's competency.) Here, the circuit court did not rely solely on Dearman's

demeanor and behavior in court and, instead, relied also on the lengthy and detailed findings and opinions of other medical experts who considered Dearman to be competent to stand trial. The circuit court was not bound by the findings of Dr. Agharkar, who was only one of several medical experts who evaluated Dearman. See Bailey, 421 So. 2d at 1366. Therefore, based on the record before us, including all the medical records, and considering the court's personal dealings with Dearman, we conclude that the circuit court did not abuse its discretion in finding that no reasonable grounds existed to require further inquiry into Dearman's competency.

II.

Dearman argues that his convictions are due to be reversed because § 13A-5-42, Ala. Code 1975, the statute under which he pleaded guilty, "unconstitutionally deprives him of the ability to ensure the validity of the jury's guilty verdicts." (Dearman's brief, at 11.) Specifically, Dearman claims that the statute's mandate for the State to prove the defendant's guilt beyond a reasonable doubt to a jury coupled with the statute's imposition of a waiver of appellate review of all nonjurisdictional defects, with the exception of a challenge to the sufficiency of the evidence,

violates his rights to due process, equal protection, a fair trial by an impartial jury, and a reliable conviction and sentence. He asserts in his brief on appeal that he was "forced" to plead guilty under a statute that improperly "required him to undergo a full-scale jury trial in order to obtain jury verdicts on his guilt while unconstitutionally denying him of any meaningful opportunity to appeal the proceedings that resulted in those verdicts." (Dearman's brief, at 10.) He claims that the requirement of the statute "entirely undermine the law's mandate that all defendant's sentenced to death be convicted on evidence 'beyond a reasonable doubt to a jury' ... and constitutionally deprive [him] of his ability to ensure the reliability of the full proceedings that resulted in his death sentences." (Dearman's reply brief, at 3.)

Dearman's argument should be construed as facial attack on the constitutionality of § 13A-5-42. See State v. Adams, 91 So. 3d 724, 754 (Ala. Crim. App. 2010)("To prevail on a facial challenge to the constitutionality of a statute, it must be established 'that no set of circumstances exists under which the [statute] would be valid.'" (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987))). Additionally, because Dearman raises this claim for the first

time on appeal, this claim will be reviewed under the plain-error standard. See Rule 45A, Ala. R. App. P.; see also Scott v. State, 937 So. 2d 1065, 1085 (Ala. Crim. App. 2005)(recognizing that the plain-error standard of review was the appropriate standard to be applied to constitutional claims challenging Alabama's death-penalty statutes where the defendant failed to raise the claims at trial).

This Court has explained:

> "[W]e point out that 'statutes are presumed to be constitutional,' State v. Adams, 91 So. 3d 724, 732 (Ala. Crim. App. 2010), and courts 'should be very reluctant to hold any act unconstitutional.' Ex parte Boyd, 796 So. 2d 1092, 1094 (Ala. 2001). In reviewing the constitutionality of a statute, courts '"must afford the Legislature the highest degree of deference, and construe its acts as constitutional if their language so permits."' Adams, 91 So. 3d at 732 (quoting Monroe v. Harco, Inc., 762 So. 2d 828, 831 (Ala. 2000)). '"[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government."' Herring v. State, 100 So. 3d 616, 620 (Ala. Crim. App. 2011) (quoting Alabama State Fed. of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944)). 'It is the duty of a court to sustain an act unless [the court] is convinced beyond a reasonable doubt of [the act's] unconstitutionality.' Handley v. City of Montgomery, 401 So. 2d 171, 180 (Ala. Crim. App. 1981)."

State v. Billups, 223 So. 3d 954, 960 (Ala. Crim. App. 2016).

Section 13A-5-42 provides:

"A defendant who is indicted for a capital offense may plead guilty to it, but the state, only in cases where the death penalty is to be imposed, must prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of Section 13A-5-43(d)."

This Court has previously recognized:

"'The Due Process Clause of the Fourteenth Amendment prohibits state governments from depriving "any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV, § 1. This clause has two components: the procedural due process and the substantive due process components.' Singleton v. Cecil, 176 F.3d 419, 424 (8th Cir. 1999). Although procedural and substantive due process 'are not mutually exclusive' doctrines, Becker v. Kroll, 494 F.3d 904, 918 n.8 (10th Cir. 2007) (quoting Albright v. Oliver, 510 U.S. 266, 301, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (Stevens, J., dissenting)), '[t]he two components are distinct from each other because each has different objectives, and each imposes different constitutional limitations on government power.' Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996).

"'"[P]rocedural due process, protected by the Constitutions of the United States and this State, requires notice and an opportunity to be heard when one's life, liberty, or property interest are about to be affected by governmental action."' Ex parte Fountain, 842 So. 2d 726, 729 (Ala. 2001) (quoting Brown's Ferry Waste Disposal Ctr., Inc. v. Trent, 611 So. 2d 226, 228 (Ala. 1992)). Thus, the essential threshold inquiry in a procedural due-process claim is whether the

claimant can establish governmental interference with a protected liberty or property interest. See Stephenson v. Lawrence Cty. Bd. of Educ., 782 So. 2d 192, 200 (Ala. 2000) (noting that a 'protected property interest' is 'an essential threshold requirement for establishing a claim based on an alleged deprivation of procedural due process'); and Crawford v. State, 92 So. 3d 168, 171 (Ala. Crim. App. 2011) (noting that, '[t]o prevail on a procedural-due-process claim,' the claimant 'must show that the [government] deprive[d] him of a protected liberty interest'). In the absence of a protected liberty or property interest, procedural due process is not required in conjunction with government interference. See Stephenson, 782 So. 2d at 201 (holding that the appellant was not entitled to procedural due process because she did not have a 'protectable property interest' in her employment); and Crawford, 92 So.3d at 172 (considering whether the appellant satisfied 'the first prong of the procedural due-process analysis,' i.e., establishing a 'protected liberty interest,' before considering 'whether the procedure accompanying the deprivation of his liberty interest was constitutionally adequate'). See also Rezaq v. Nalley, 677 F.3d 1001, 1017 (10th Cir. 2012) (holding that, because the appellants 'lack a cognizable liberty interest' in avoiding transfer between prisons, 'no due process protections were required before they were transferred'); and Cucciniello v. Keller, 137 F.3d 721, 724 (2d Cir. 1998) ('Since no protected liberty interest is being impaired, no due process is required.').

"The substantive due-process component of the Fourteenth Amendment, on the other hand, 'protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them."' Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (emphasis added)). It prohibits governmental interference with individual liberty that is 'unreasonable, arbitrary, or capricious,' Walter v. City of Gulf Shores, 829 So.

> 2d 181, 186 (Ala. Crim. App. 2001), by 'forc[ing] courts to step beyond merely assuring ... that a state actor fairly followed a particular procedure (procedural due process) and to examine whether the particular outcome was itself "fair" or whether it was impermissibly "arbitrary or conscience shocking."' Alabama Republican Party v. McGinley, 893 So. 2d 337, 344 (Ala. 2004) (quoting Waddell v. Hendry Cty. Sheriff's Office, 329 F.3d 1300, 1305 (11th Cir. 2003)). In doing so, substantive due process 'protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."' Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations omitted). Of course, substantive due process is not an absolute prohibition of governmental interference with individual liberty but, rather, requires courts to balance the sanctity of individual liberty against the necessity of the government's interference with that liberty. Hernandez v. Foster, 657 F.3d 463, 478 (7th Cir. 2011); Norris v. Engles, 494 F.3d 634, 638 (8th Cir. 2007)."

State v. B.T.D., 296 So. 3d 343, 352-53 (Ala. Crim. App. 2019).

Further, in regard to the right to equal protection of the law, this Court has stated:

> "The constitutional guaranty of equal protection of the law requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The equal protection clause does not forbid discrimination with respect to things that are different. The test is whether the difference in treatment is an invidious discrimination. City of Hueytown v. Jiffy Chek Co., 342 So. 2d 761 (Ala. 1977); 16A Am.Jur.2d, Constitutional Law, § 738 (1979). The purpose of the equal protection clause of the Fourteenth Amendment is to protect every person

> within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. 16A Am. Jur. 2d, Constitutional Law, § 802 (1979)."

Ellard v. State, 474 So. 2d 743, 753 (Ala. Crim. App. 1984). With these general principles in mind, we turn to a discussion of whether § 13A-5-42 violates due-process or equal-protection principles.

In making his argument that § 13A-5-42 is unconstitutional, Dearman relies, in part, on the principles set forth by the United States Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1856) and Evitts v. Lucey, 469 U.S. 387 (1985). Dearman notes that in those cases, the United States Supreme Court has held that appellate review is an "integral part" of the "trial system for finally adjudicating the guilt or innocence of a defendant," and, thus, he claims that § 13A-5-42 deprives defendants who plead guilty in a death-penalty case the access to the appellate courts for guilt-phase claims based on a "distinction that has nothing to do with the potential merits of the claims" in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Dearman's brief, at 12-13.)

In Griffin, the United States Supreme Court addressed the issue whether a state may "administer [a] statute so as to deny adequate appellate review to the poor while granting such review to all others." 351 U.S. at 13. A state statute was operating in a manner that prohibited indigent defendants from obtaining appellate review of trial errors solely because they were "too poor" to buy a transcript. Id., at 16. The United States Supreme Court recognized that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but that where a State does grant appellate review, the Due Process and Equal Protection Clauses prohibit the State from providing appellate review in a way that discriminates against "some convicted defendants on account of their poverty" or in a way that involves other "invidious discriminations." Id., at 18. Consequently, in Griffin, the United States Supreme Court held:

> "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript

> but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Griffin, 351 U.S. at 18-19.

In Evitts, the United States Supreme Court again acknowledged its previous holding in Griffin by noting that where a state establishes a system of appeal as of right, the state could not violate equal-protection principles by distinguishing between the poor and rich, nor could the state violate due-process principles by deciding the appeal in a way that "was arbitrary with respect to the issues involved." 469 U.S. at 403-404 (citing Griffin, 351 U.S. at 17-18). The Court further noted:

> "[E]ach Clause triggers a distinct inquiry: '"Due Process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal Protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.'"

Id., at 405.

Dearman is correct in his assertion of the rights that are generally afforded to criminal defendants at trial and on appeal. However, it is also

well settled that a criminal defendant may waive many of the protections afforded defendants under the law, provided that the defendant does so knowingly and voluntarily. In Lay v. State, 82 So. 3d 9, 13 (Ala. Crim. App. 2011), this Court recognized:

> "We conclude that, because many other constitutional, statutory, and procedural protections—even some that contain mandatory language—have been found to be waivable, a criminal defendant can waive his right to credit for time spent in incarceration pending trial pursuant to a negotiated plea agreement. For instance, in United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995), the United States Supreme Court, in holding that a criminal defendant had waived the protections of Rule 11(e)(6), Fed. R. Crim. P. (now Rule 11(f)), recognized that a criminal defendant could waive beneficial provisions of federal statutes, procedural and evidentiary rules, and even fundamental constitutional protections:
>
> > "'Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. See Shutte v. Thompson, 15 Wall. 151, 159, 21 L.Ed. 123 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit"); Peretz v. United States, 501 U.S. 923, 936, 111 S.Ct. 2661, 2669, 115 L.Ed.2d 808 (1991) ("The most basic rights of criminal defendants are ... subject to waiver"). A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 10, 107 S.Ct. 2680, 2685–2686, 97 L.Ed.2d 1 (1987) (double jeopardy defense waivable by pre-

> trial agreement); Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (Sixth Amendment right to counsel may be waived). Likewise, absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties. See, e.g., Evans v. Jeff D., 475 U.S. 717, 730–732, 106 S.Ct. 1531, 1538–1540, 89 L.Ed.2d 747 (1986) (prevailing party in civil-rights action may waive its statutory eligibility for attorney's fees).'

"Alabama law also recognizes that a criminal defendant may waive many constitutional, statutory, and procedural rights. See G.E.G. v. State, 54 So. 3d 949, 955 (Ala. 2010)('By pleading guilty, a defendant waives three constitutional rights: the right against self-incrimination, the right to trial by jury, and the right to confront his accusers.' Heptinstall v. State, 624 So. 2d 1111, 1112 (Ala. Crim. App. 1993)(citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969))). Likewise, a defendant's decision to plead guilty also waives nonjurisdictional constitutional rights, such as claims involving (1) an illegal search and seizure, (2) a coerced confession, (3) an improper grand-jury selection, and (4) the denial of a speedy trial. Gordon v. Nagle, 647 So. 2d 91, 94 (Ala.1994); Boykin, supra. Additionally, a defendant can waive his right to testify on his own behalf, but that right must be waived by the defendant, not defense counsel. Ex parte McWilliams, 640 So. 2d 1015, 1021 (Ala. 1993); Reeves v. State, 974 So. 2d 314, 325 (Ala. Crim. App. 2007).

"Further, a criminal defendant waives his statutory right to appeal when he enters a guilty plea. Watson v. State,

> 808 So. 2d 77 (Ala. Crim. App. 2001); See § 12–22–130, Ala. Code 1975. In a capital case, a defendant may also waive his right to have the sentencing hearing conducted before the jury. Belisle [v. State, 11 So. 3d 256 (Ala. Crim. App. 2007)]; Turner [v. State, 924 So. 2d 737 (Ala. Crim. App. 2002)]; see § 13A–5–46, Ala. Code 1975.
>
> "In addition, a criminal defendant may waive the right to be represented by counsel. Tomlin v. State, 601 So.2d 124, 128 (Ala.1991) (citing Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)) (recognizing the right to self-representation); Rule 6.1(b), Ala. R. Crim. P. A criminal defendant may also waive his right to arraignment, to be present, and to a jury trial. See Hargett v. State, 813 So. 2d 948, 949 (Ala. Crim. App. 2001) (arraignment); Rule 14.1(a) and (b), Ala. R. Crim. P., and Simpson v. State, 874 So. 2d 575, 578 (Ala. Crim. App. 2003) (citing Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973))(right to be present); and Rule 9.1(b), Ala. R. Crim. P., and Arrington v. State, 773 So. 2d 500, 502 (Ala. Crim. App.2000) (right to jury trial); Rule 18.1(b)(1), Ala. R. Crim. P."

(Footnotes omitted.)

Further, as the State points out in its brief, this Court has previously stated:

> "In Boykin v. Alabama, 395 U.S. 238, 895 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), the United States Supreme Court implied that a defendant may plead guilty to a capital offense if he does so knowingly and voluntarily. Alabama has set forth the requirements for accepting a guilty plea in Rule 14.4, Ala. R. Crim. P., and § 13A–5–42, Ala. Code 1975. In this case, the trial court engaged the appellant in a thorough guilty plea colloquy, as required by Boykin and Rule 14.4. After that colloquy, the trial court accepted the appellant's guilty plea

pursuant to § 13A–5–42, Ala. Code 1975, which provides as follows:

> "'A defendant who is indicted for a capital offense may plead guilty to it, but the state must in any event prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of Section 13A–5–43(d).'
>
> "Thus, even after a defendant pleads guilty to a capital offense, the State must still prove his guilt to a jury beyond a reasonable doubt. Davis v. State, 682 So.2d 476 (Ala. Crim. App. 1995), cert. denied, 682 So. 2d 483 (Ala.1996); Russo v. State, 548 So. 2d 1083 (Ala. Crim. App. 1989); Cox v. State, 462 So. 2d 1047 (Ala. Crim. App. 1985). If the State proves a defendant's guilt, then the defendant is entitled to a full sentencing hearing, just as any other defendant convicted of a capital offense would be. In that hearing, the defendant is entitled to the same constitutional safeguards as any other capital defendant. A capital defendant is provided sufficient constitutional safeguards to assure that his plea is knowingly, understandingly, and voluntarily entered."

Davis v. State, 740 So. 2d 1115, 1131 (Ala. Crim. App. 1998).

Considering the aforementioned principles, we conclude that § 13A-5-42, Ala. Code 1975, is not facially unconstitutional. Contrary to Dearman's contention, the statute does not deprive a criminal defendant

of any of his or her rights to due process and equal protection. In reality, the statute affords more rights to a capital-murder defendant who, like Dearman, wishes to plead guilty to the offense(s) charged. When a non-capital-murder defendant pleads guilty, the State bears no burden of proof, and is not required to put on any evidence before a jury, whereas the opposite is true in the case of a guilty plea in a capital-murder case such as in Dearman's circumstance.

Furthermore, unlike the statute in Griffin that operated in a way that deprived the poor access to adequate appellate review, § 13A-5-42 does not involve any invidious discrimination, nor does it decide any issues on appeal in an arbitrary manner, which would violate a defendant's right to due process and equal protection. Rather, the statute provides a framework and a process by which a defendant can knowingly and voluntarily waive certain rights, including his or her right to appeal certain issues, by choosing to plead guilty to a capital offense even when the State is seeking the imposition of the death penalty. The application of the statute is not forced upon any defendant, as Dearman suggests in his brief. Instead, the statute applies only to a defendant who exerts his or her own free will and chooses to exercise his or her right to plead guilty

to a capital offense. Dearman contends that it is the additional language in § 13A-5-42, requiring the State to still prove the defendant's guilt to a jury beyond a reasonable doubt, that renders the statute unconstitutional; however, when a defendant knowingly and voluntarily enters a guilty plea under § 13A-5-42, Ala. Code 1975, a defendant knowingly and voluntarily acknowledges and accepts that the State will still be required prove his guilt to a jury beyond a reasonable doubt and simultaneously waives the appeal of all nonjurisdictional defects, except for sufficiency of the evidence, that may occur during the guilt-phase of the defendant's trial. Accordingly, because it is not clear beyond a reasonable doubt that § 13A-5-42 violates fundamental law, we hold the statute is not unconstitutional. See Handley, 401 So. 2d at 180.

III.

Dearman alleges that his guilty plea was unknowingly and involuntarily entered because, he says, the trial court failed to inform him of the consequences of a guilty plea sufficient to meet the constitutional requirements under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). Specifically, he argues that the circuit court failed to properly address three "main consequences" associated with a guilty plea

in a capital case: 1) that "had [Dearman] retained his plea of not guilty and been sentenced to death, the [guilt-phase] of his trial would have been subject to appellate review regardless of whether or not he had objected to any errors occurring there"; 2) that Dearman "would lose his right to appeal any nonjurisdictional or non-sufficiency-of-the-evidence errors at the [guilt-phase,] regardless of whether those errors had been preserved, in terms that he could have actually understood"; and 3) that "the court's discussion of the [§ 13A-5-42] waiver did not explain that [he] could reserve specific issues for appeal at the time he pled guilty," as required under Rule 14.4(a)(1)(viii), Ala. R. Crim. P. (Dearman's brief, at 27-30.)

Dearman insists that the circuit court in this case failed to meet the United States Supreme Court's requirement in Boykin v. Alabama, 395 U.S. 238 (1969), for an "affirmative showing" that the guilty plea was voluntarily and intelligently made with a full understanding of the significance and consequences of the guilty plea. This Court has explained that

> "'[a] guilty "plea is only properly accepted ... upon satisfaction of the requisites of Boykin [v. Alabama, 395 U.S. 238 (1969)] including the trial judge's determination that the guilty plea was knowingly and voluntarily entered by the accused. The

> record must reflect sufficient facts from which such determination could properly be made." Dingler v. State, 408 So.2d 530, 532 (Ala.1981).'"

Herring v. State, 185 So. 3d 492, 495 (Ala. Crim. App. 2014)(quoting Brewster v. State, 624 So. 2d 217 (Ala. Crim. App. 1993)). "[D]ue process requires that the plea be a voluntary, knowing, and intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'" Smith v. State, 494 So. 2d 182, 183 (Ala. Crim. App. 1986), quoting Brady v. United States, 397 U.S. 742 (1970). With these principles in mind, we turn to the specific issues presented here.

A.

Dearman first contends that his guilty plea was involuntarily entered because, he says, the circuit court failed to inform him that if he proceeded to trial instead of pleading guilty and was then sentenced to death, "the [guilt-phase] of his trial would have been subject to appellate review regardless of whether or not he had objected to any errors occurring there." (Dearman's brief, at 27.) In other words, Dearman claims that the court failed to inform him that, by pleading guilty, he would lose his right to plain-error review of most guilt-phase issues, which is generally provided in death-penalty cases. He further claims

that the court failed to "give any explanation of what those expanded appellate rights involved, or how they 'would likely [have] appl[ied]' in his case if they [had not been] waived." Id. Dearman alleges that the court failed to adequately explain to him that he would lose the right to appeal any nonjurisdictional issues, except for sufficiency of the evidence, regardless of whether the issues were preserved. We disagree.

Although this Court generally reviews death-penalty cases on appeal under the plain-error standard of review, see Rule 45A, Ala. R. App. P., § 13A-5-42 provides that a defendant may plead guilty in cases where the death penalty is to be imposed and that the guilty-plea "shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in a conviction except the sufficiency of the evidence." In Hutcherson v. State, 727 So. 2d 846 (Ala. Crim. App. 1997), this Court recognized:

> "This statute distinguishes a guilty plea entered in a capital case from a guilty plea entered in a noncapital case. We interpret the phrase 'proceeding resulting in conviction' to mean the guilt phase of a capital trial. Therefore, we read this statute to provide that, in a capital case, a guilty plea shall have the effect of waiving all non-jurisdictional defects, except the sufficiency of the evidence, occurring before and during the guilt phase of the trial."

727 So. 2d at 851.

Dearman points to no legal authority specifically mandating that the circuit court inform a defendant before the entry of a guilty plea to the offense of capital murder that the defendant would lose the right to plain-error review of guilt-phase issues on appeal and lose the right to appeal most non-jurisdictional issues; regardless, even assuming without deciding that the waiver of those particular rights would fall under the purview of Boykin and the requirement that the defendant have sufficient awareness of the relevant circumstances and likely consequences of his plea, the record in this particular case indicates that the circuit court adequately informed Dearman of such a waiver.

During a lengthy colloquy at the August 31, 2018, guilty-plea hearing, the following occurred:

> "[Prosecutor:] According to Alabama law [§] 13A-5-42, the Defendant must understand and know, prior to his plea of guilty, that the guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceedings resulting in the conviction except the sufficiency of the evidence.
>
> "THE COURT: That's fine. What she's saying is that – As I mentioned a moment ago, if you don't plead guilty and we go to trial, I'll make a series of rulings on evidence and procedures and, if I'm wrong, your lawyers will make that as a – we call it an assignment of error. They'll make that as a basis of the appeal. But the code section, which [the prosecutor] has alluded to, says that if you enter the plea, those types of rulings – you won't have the opportunity to

> make those kind of rulings and that you are waiving those types of non-jurisdictional defects.
>
> "A jurisdictional defect is very limited such as the offense occurred outside the State of Alabama so the court has no jurisdiction. That would be a jurisdictional type of defect. And also, you can challenge, once all the evidence is in from the State, whether that evidence was sufficient under the law to make out all the elements of the offenses for which you're charged. Those are very difficult and very limited basis for appeal, but a plea of guilty waives all other defects. Do you understand that?
>
> "[Dearman]: Yes, sir."

(R. 208-209.) Although the circuit court did not use the exact language that Dearman suggests the court should have used such as "plain-error" or "heightened scrutiny," it is apparent from the record that Dearman was clearly informed that he was waiving appellate review of all nonjurisdictional issues during the guilt-phase of his trial, except for a claim challenging the sufficiency of the evidence, and that judicial review would be very limited. Further, Dearman indicated to the court that he understood the appellate rights that he was waiving by pleading guilty. Therefore, these claims are refuted by the record and are meritless.

B.

Dearman also alleges that his guilty plea was involuntary because the circuit court did not explain to Dearman that he "could reserve

specific issues for appeal at the time he [pleaded] guilty" under Rule 14.4(a)(1)(viii), Ala. R. Crim. P. (Dearman's brief, at 30.)

Rule 14(a)(1)(viii), Ala. R. Crim. P., provides:

> "(a) … [T]he court shall not accept a plea of guilty without first addressing the defendant personally in the presence of counsel in open court for the purposes of:
>
> > "(1) Ascertaining that the defendant has a full understanding of what a plea of guilty means and its consequences, by informing the defendant of and determining that the defendant understands:
> >
> > > "….
> > >
> > > "(viii) The fact that there is no right to appeal unless the defendant has, before entering the plea of guilty, expressly reserved the right to appeal with respect to a particular issue or issues, win which event appellate review shall be limited to a determination of the issue or issues so reserved…"

(Emphasis added.)

However, Section 13A-5-55, Ala. Code 1975, provides that

> "[i]n all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in Section 13A-5-53."

This Court has repeatedly recognized a defendant's automatic right to appellate review in cases involving the death penalty. See e.g., Peterson

v. State, 326 So. 3d 535, 547 (Ala. Crim. App. 2019); Gaston v. State, 265 So. 3d 387, 396 (Ala. Crim. App. 2018); Phillips v. State, 287 So. 3d 1063, 1078 (Ala. Crim. App. 2015).

The purpose of Rule 14.4(a)(1) is to set forth certain requirements to ensure that a defendant understands what his guilty plea "connotes and … its consequences," as required by Boykin. On its face, the specific purpose of Rule 14.4(a)(1)(viii) is to inform the defendant that he or she has no right to appeal unless he or she does certain things. The purpose of Rule 14.4(a)(1)(viii) is not to inform the defendant that he or she has a "right" to reserve issues. Further, because, under § 13A-5-55, a defendant has an automatic right to appeal a conviction and sentence in cases involving the death penalty, the provision in Rule 14.4(a)(1)(viii), requiring the court to inform a defendant that he or she has no right to appeal has no applicability in such cases. In the present case, Dearman had an automatic right to appeal, and the circuit court was not required to misstate the law, i.e., the court was not required to inform Dearman that he had no right to appeal unless he reserved issues for review. Therefore, because Rule 14.4(a)(1)(viii) does not apply in death-penalty

cases, the circuit court did not err by failing to inform Dearman of that subsection. Thus, Dearman's argument is without merit.

IV.

Dearman claims that he was allowed to represent himself at his capital-murder trial without a knowing and voluntary waiver of his right to counsel in violation of the Sixth Amendment. Specifically, Dearman contends that the court failed to ensure that he "actually understood 'the significance and consequences'" of his waiver of counsel, and that the record "makes 'apparent that [his] decision to represent himself was not knowingly, intelligently, or voluntarily made.'" (Dearman's brief, at 44.) Dearman claims that his lack of education and inexperience with criminal law combined with the fact that he suffered from mental illness and had been found incompetent to stand trial rendered him incapable of understanding the significance of his waiver of counsel.

In Flagg v. State, 272 So. 3d 233 (Ala. Crim. App. 2018), this Court explained:

> "It is well settled that, under the Sixth Amendment to the United States Constitution, an 'indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel.' Martinez v. Court of Appeal of California, 528 U.S. 152, 158, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000)

> (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). At the same time, however, the United States Supreme Court has also held that, under the Sixth Amendment, a defendant in a criminal trial has a constitutional right of self-representation. See Faretta [v. California], 422 U.S. [806] at 832, 95 S.Ct. 2525 [(1975)](recognizing a constitutional right of self-representation, but also recognizing that 'the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel').
>
> "In Faretta, the United States Supreme Court held that a defendant has a Sixth Amendment right to represent himself in a criminal case. In order to conduct his or her own defense, the defendant must 'knowingly' and 'intelligently' waive his or her right to counsel, because, in representing himself or herself, a defendant is relinquishing many of the benefits associated with the right to counsel. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541. The defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."' Faretta, 422 U.S. at 835, 95 S.Ct. at 2541 (citations omitted)."

272 So. 3d at 236. Additionally, this Court has also stated:

> "The Alabama Rules of Criminal Procedure have incorporated and expanded the accused's protections announced in Faretta [v. California, 422 U.S. 806 (1975)]. Rule 6.1, Ala. R. Crim. P., permits the right to counsel to be waived after the trial court has ascertained that the accused knowingly and intelligently desires to forgo his right to counsel. Also, the rule mandates that the trial court inform the accused that the waiver may be withdrawn and counsel

appointed or retained at any stage of the proceedings. See Farid v. State, 720 So. 2d 998, 999 (Ala. Crim. App. 1998).

"In addressing the validity of a waiver of the assistance of counsel, this Court stated in Baker v. State, 933 So.2d 406 (Ala. Crim. App. 2005):

> "'"'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.'
>
> "'"Johnson v. Zerbst, 304 U.S. 458, 465, [58 S.Ct. 1019, 82 L.Ed. 1461] (1938).
>
> "'"....

"'"Certainly, the provisions of Rule 6.1(b) are mandatory, and, if a defendant properly preserves and presents an argument on appeal that the trial court faltered in its application of the mandatory provisions of Rule 6.1(b), he is entitled to relief. See, e.g., Ex parte King, 797 So.2d 1191 (Ala. 2001). However, the fact that a trial court forgoes those provisions does not necessarily indicate that a defendant unknowingly, unintelligently, and involuntarily has waived his right to counsel. That is, the fact that a trial court fails to abide by the letter of Rule 6.1(b) and Faretta [v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975),] does not necessarily result in the defendant's being deprived of counsel and, thus, the trial court's being jurisdictionally barred from rendering a judgment. See Tomlin v. State, 601 So. 2d 124, 128 (Ala. 1991)('Although the Supreme Court in Faretta states that a defendant should be made aware of the dangers and disadvantages of self-representation, the Supreme Court does not require a specific colloquy between the trial judge and the defendant.'). See also Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986) ('The ultimate test is not the trial court's express advice, but rather the defendant's understanding.').

"'"Whether a defendant who chooses to represent himself has

knowingly, intelligently, and voluntarily waived his right to counsel can be indicated by the record or by the totality of the circumstances surrounding the waiver. See Johnson v. Zerbst, 304 U.S. 458, 464, [58 S.Ct. 1019, 82 L.Ed. 1461](1938)('The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'). See also Clemons v. State, 814 So. 2d 317 (Ala. Crim. App. 2001)(citing Monte v. State, 690 So. 2d 517 (Ala. Crim. App. 1996)); Johnston v. City of Irondale, 671 So. 2d 777 (Ala. Crim. App. 1995); Warren v. City of Enterprise, 641 So. 2d 1312 (Ala. Crim. App. 1994); Siniard v. State, 491 So.2d 1062 (Ala. Crim. App. 1986). See also Faretta, 422 U.S. at 835, [95 S.Ct. 2525] ('Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. [269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)].')."

"'Coughlin v. State, 842 So.2d 30, 33–35 (Ala. Crim. App. 2002). Similarly, in Tomlin v. State, 601 So.2d 124 (Ala. 1991), the Alabama Supreme Court stated:

> "'"In Faretta v. California, 422 U.S. 806, [95 S.Ct. 2525, 45 L.Ed.2d 562] (1975), the Supreme Court held that a defendant has a Sixth Amendment right to represent himself in a criminal case. In order to conduct his own defense, the defendant must 'knowingly' and 'intelligently' waive his right to counsel, because in representing himself he is relinquishing many of the benefits associated with the right to counsel. Faretta, 422 U.S. at 835, [95 S.Ct. 2525]. The defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."' Faretta, 422 U.S. at 835, [95 S.Ct. 2525](other citations omitted).
>
> "'"The burden of proof in the present case is on the defendant. When a defendant has clearly chosen to relinquish his right to counsel and has asserted his right to self-representation, and on appeal asserts that he was denied the right to counsel, he has the burden of showing, '"by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to

counsel."' Teske v. State, 507 So. 2d 569, 571 (Ala. Crim. App. 1987), quoting Moore v. Michigan, 355 U.S. 155, 161–62, [78 S.Ct. 191, 2 L.Ed.2d 167] (1957). The Supreme Court in Carnley v. Cochran, 369 U.S. 506, 516–17, [82 S.Ct. 884, 8 L.Ed.2d 70] (1962), held that when the record clearly shows that a defendant has expressly waived his right to counsel, the burden of proving that his waiver was not made knowingly and intelligently is on the defendant. 'A waiver of counsel can only be effectuated when the defendant asserts a "clear and unequivocal" right to self-representation.' Westmoreland v. City of Hartselle, 500 So. 2d 1327, 1328 (Ala. Crim. App. 1986), citing Faretta, 422 U.S. 806, [95 S.Ct. 2525]. If the record is not clear as to the defendant's waiver and request of self-representation, the burden of proof is on the State. Carnley, 369 U.S. at 517, [82 S.Ct. 884]. Presuming a waiver from a silent record is impermissible. Carnley.

"'"....

"'"Although the Supreme Court in Faretta states that a defendant should be made aware of the dangers and disadvantages of self-representation, the Supreme Court does not require a specific colloquy between the trial judge and the defendant. 'The case law reflects that, while a waiver hearing expressly

> addressing the disadvantage of a pro se defense is much to be preferred, it is not absolutely necessary. The ultimate test is not the trial court's express advice but rather the defendant's understanding.' Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) (citations omitted). In each case the court needs to look to the particular facts and circumstances involved, 'including the background, experience, and conduct of the accused.' Johnson v. Zerbst, 304 U.S. 458, 464, [58 S.Ct. 1019, 82 L.Ed. 1461] (1938).
>
> > "'"This court looks to a totality of the circumstances involved in determining whether the defendant knowingly and intelligently waived his right to counsel. Jenkins v. State, 482 So. 2d 1315 (Ala. Crim. App. 1985); King v. State, 55 Ala. App. 306, 314 So. 2d 908 (Ala. Cr. App. 1975), cert. denied; Ex parte King, 294 Ala. 762, 314 So.2d 912 (1975)."
>
> "'601 So. 2d 124, 128–29.'

"Baker v. State, 933 So.2d 406, 409–11 (Ala. Crim. App. 2005).

"In determining whether the waiver in this case was made knowingly and intelligently, we also look to the factors set out in Fitzpatrick [v. Wainwright, 800 F.2d 1057 (11th Cir. 1986)], including

> "'"(1) whether the colloquy between the court and the defendant consisted merely of pro forma answers to pro forma questions, United States v.

> Gillings, 568 F.2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919, 98 S.Ct. 2267, 56 L.Ed.2d 760 (1978); (2) whether the defendant understood that he would be required to comply with the rules of procedure at trial, Faretta [v. California, 422 U.S.] at 835–36, 95 S.Ct. at 2541–42; Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 197[6]); (3) whether the defendant had had previous involvement in criminal trials, United States v. Hafen, 726 F.2d 21, 25 (1st Cir.), cert. denied, 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984); (4) whether the defendant had knowledge of possible defenses that he might raise, Maynard, supra; (5) whether the defendant was represented by counsel before trial, Hafen, supra; and (6) whether "stand-by counsel" was appointed to assist the defendant with his pro se defense, see Faretta, supra, at 834 n. 46, 95 S.Ct. at 2540–41 n. 46; Hance v. Zant, 696 F.2d 940, 950 n.6 (11th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), overruled on other grounds, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)."'"

Battles v. State, 263 So. 3d 1087, 1090 (Ala. Crim. App. 2018), quoting Tomlin v. State, 601 So. 2d 124, 129 (Ala. 1991).

In the present case, the circuit court conducted a hearing, during which Dearman informed the court that he wished to waive counsel and represent himself with the assistance of standby counsel. At a hearing on August 30, 2018, the circuit court reminded Dearman of his constitutional right to the assistance of counsel, as well as his right to

represent himself without the assistance of counsel. Dearman informed the court that he intended to represent himself moving forward and agreed to the assistance of standby counsel. The following day, Dearman again appeared in open court and reaffirmed his wish to waive his right to counsel and to represent himself. The court told Dearman that such a decision was "ill-advised"; however, the court subsequently conducted a colloquy to ensure that Dearman's decision was knowing and voluntary. (R. 181.)

The court's colloquy was not limited strictly to pro forma questions and answers; rather, the court also asked follow-up questions to ensure Dearman's understanding. The court's questions were very detailed and the court took great care to assure that Dearman understood the nature and complexity of the charges against him and the ways in which counsel would be beneficial. Dearman admitted that he had limited experience with criminal law, and the court reminded Dearman that he would have to follow the rules of evidence and the rules of procedure at trial. The court also explained that there was a "great wealth of information" that a person needed to know to proceed and to be accurately represented, which Dearman did not possess. (R. 182.) The court walked through the

entire trial process, providing Dearman with an explanation of the expectations and hardships he would face during each stage of trial if he chose to represent himself. Dearman specifically stated that he understood that he would be at a disadvantage based on his inexperience and lack of training in the law. The court informed Dearman that he would be appointing advisory counsel and that if Dearman decided at any point that he wished for his counsel to "take over and participate in [Dearman's] defense," Dearman could "withdraw [his] waiver" of counsel. (R. 190.) The record also indicates that Dearman was represented by counsel before trial and that he was assigned standby counsel to assist in his pro se defense following his waiver of counsel. Based on the totality of the circumstances contained in the record before us, we conclude that the record clearly indicates that Dearman knowingly, intelligently, and voluntarily waived his right to the assistance of counsel.

V.

Dearman contends that the State exercised its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Although Dearman's "guilty plea waived this nonjurisdictional claim from review as it relates to the guilt phase[,

b]ecause the same jury heard the penalty phase of the proceeding, we will review the claim on appeal as it relates to that phase of the trial." See Key v. State, 891 So. 2d 353, 371 (Ala. Crim. App. 2002). Additionally, because Dearman failed to raise a Batson claim at trial, this Court will review this claim for plain error only. See Gobble v. State, 104 So. 3d 920, 948 (Ala. Crim. App. 2010)(reviewing for plain error a Batson claim that was not raised at trial). We note that both this Court and a plurality of the Alabama Supreme Court have recently questioned whether Batson claims that were not raised at trial should be reviewed on appeal, even under the plain-error standard applicable in death-penalty cases. See Lane v. State, 327 So. 3d 691, 728-29 (Ala. Crim. App. 2020)(citing cases in which this Court and a plurality of the Alabama Supreme Court have questioned the propriety of raising a Batson claim for the first time on appeal). Regardless, we find no plain error with respect to Dearman's Batson claims.

> "In Batson, the United States Supreme Court held that black veniremembers could not be struck from a black defendant's jury because of their race. In Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 69 (1991), the Court extended its decision in Batson to apply also to white defendants."

Grimsley v. State, 678 So. 2d 1194, 1195 (Ala. Crim. App. 1995). Further, "[f]or plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in 'purposeful discrimination' in the exercise of its peremptory challenges. See Ex parte Watkins, 509 So. 2d 1074 (Ala.), cert denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226(1987)." Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007).

Dearman claims that a prima facie case of discrimination was established in this case based on: 1) the "sheer weight of statistics," which, he says, created a presumption that the State exercised its strikes in a racially biased manner, and 2) the prosecutor's past conduct in using peremptory challenges to strike all blacks from the venire. (Dearman's brief, at 55.)

This Court has explained:

> "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 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, 106 S. Ct.

> 1712), 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 v. State, 248 So. 3d 992, 1016-17 (Ala. Crim. App. 2017). We have carefully examined the record in light of the factors set forth above, and we hold that the record does not raise an inference of racial discrimination.

Dearman alleges that the State exercised its strikes in a racially biased manner because the State "used 7 of her 17 peremptory challenges to eliminate 6 of the 8 qualified African Americans and the lone Asian American from the venire." (Dearman's brief, at 55.) Thus, Dearman alleges, the State used 41% of its peremptory strikes to eliminate people of color from the jury. Although the statistics may be relevant when

coupled with other evidence in the record that tend to indicate that the State used its peremptory strikes in a racially discriminatory manner, "'numbers and statistics do not, alone, establish a prima facie case of racial discrimination' in the State's use of its peremptory strikes." Lane v. State, 327 So. 3d 691, 729-30 (Ala. Crim. App. 2020), citing Petersen v. State, 326 So. 3d 535, 567 (Ala. Crim. App. 2019).

Dearman attempts to support his argument that a prima facie case of discrimination was present in his case by arguing that District Attorney Ashley Rich and the Mobile County District Attorney's office engaged in a "persistent pattern of excluding disproportionate numbers of qualified nonwhite veniremembers in death penalty cases." (Dearman's brief, at 56.) However, as the State contends in its brief, the cases cited by Dearman do not establish a history of discrimination by District Attorney Ashley Rich or the Mobile County District Attorney's Office. In most of the cases cited by Dearman in support of his position, this Court did not find evidence of a Batson violation. See Keaton v. State, [Ms. CR-14-1570, Dec. 17, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021); Lane v. State, 327 So. 3d 691 (Ala. Crim. App. 2020); DeBlase v. State, 294 So. 3d 154 (Ala. Crim. App. 2018); Shaw v. State, 207 So. 3d 79 (Ala.

Crim. App. 2014); and Whatley v. State, 146 So. 3d 437 (Ala. Crim. App. 2010). In both Penn v. State, 189 So. 3d 107 (Ala. Crim. App. 2014), and Lane v. State, 80 So. 3d 280 (Ala. Crim. App. 2010), this Court remanded the case on other issues and did not address any Batson claims. The remainder of the cases cited by Dearman all occurred more than 20 years ago and, thus, that history is attenuated and do not establish a prima facie case of racial discrimination because of the passage of time. See McCray v. State, 88 So. 3d 1, 24 (Ala. Crim. App. 2010)("[A]lthough the Houston County District Attorney's Office has a history of using its peremptory strikes in an improper manner, this factor, based on the passage of time, does not establish a prima facie case of racial discrimination."). Further, this Court has previously held, "[s]tatistics, even coupled with the [district attorney office's] history of discrimination, are simply not sufficient to establish a prima facie case of discrimination." Bryant v. State, 181 So. 3d 1087, 1118 (Ala. Crim. App. 2011)(citing Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008)). Therefore, Dearman's claim does not establish a prima facie case of racial discrimination in the State's use of its peremptory strikes in this case.

To the extent that Dearman contends that a prima facie case of racial discrimination is presumed in this case because the prosecutor provided reasons for her strikes, we disagree. In Henderson, 248 So. 3d at 1020 (Ala. Crim. App. 2017), this Court addressed a similar situation and explained:

> "Henderson argues that, because the State volunteered its reasons for striking black veniremembers, this Court is obligated to review those reasons under a Batson inquiry. He cites Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), for its statement that 'once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot' and argues that Hernandez and Alabama cases relying on that rule of law, e.g., Dallas v. State, 711 So. 2d 1101 (Ala. Crim. App. 1997), require this Court to review the State's reasons for its strikes. This case is not controlled by Hernandez, Dallas, and cases in that same procedural posture, however, because this case is distinguishable. Unlike the defendants in those cases, Henderson did not make a Batson motion, and the trial court did not 'rule[] on the ultimate question of intentional discrimination.' Therefore, the preliminary question of whether the record raises an inference that the State engaged in purposeful discrimination and struck black veniremembers on the basis of race necessarily had to be addressed in this case to determine whether plain error occurred. Having found no inference of discrimination in the record pursuant to our plain-error review, consideration of the State's unsolicited proffer of reasons for its strikes is beyond the scope of that review, and it is both unwarranted and unnecessary."

See also Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ___ So. 3d ___, ____ (Ala. Crim. App. 2019). Likewise, in the instant case, Dearman did not make a Batson motion and the circuit court did not rule on the question of intentional discrimination. We have reviewed the totality of the circumstances in the instant case and have found no inference that the State engaged in purposeful discrimination. Thus, although the prosecutor opted to preserve her reasons for her peremptory strikes for the record in this case, "[h]aving found no inference of discrimination in the record pursuant to our plain-error review, consideration of the State's unsolicited proffer of reasons for its strikes is beyond the scope of that review, and it is both unwarranted and unnecessary." See Henderson, 248 So. 3d at 1020. Therefore, Dearman is not entitled to relief on this claim.

VI.

Dearman contends that the circuit court, while sentencing him, failed to consider evidence of his mental illness, in violation of the Eighth Amendment and Alabama law. Dearman specifically claims that "the trial court was presented with clear evidence establishing that Mr. Dearman suffers from severe mental illness," citing the psychological

evaluations performed by Dr. Ellis-Cox, Dr. Ogden, and Dr. Agharkar, as well as medical records from Singing River Hospital. However, Dearman alleges, the court "failed entirely to consider that evidence when sentencing him to death." (Dearman's brief, at 66.)

Dearman relies heavily on the United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), and its subsequent progeny to support his position. However, as the State suggests in its brief on appeal, Dearman's reliance on those cases is somewhat misguided because he ignores an important component of the Supreme Court's holdings that is necessary for those holdings to be applicable in the instant case. In Lockett, a plurality opinion of the United States Supreme Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer … not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (emphasis added). See Eddings v. Oklahoma, 455 U.S. 104 (1982)(accord). The plurality in Lockett found that, because "the imposition of death by public authority is so profoundly different from all other penalties, … an individualized

decision is essential in capital cases." Id., at 605. This Court has further explained:

> "'A sentencer in a capital case may not refuse to consider or be "precluded from considering" mitigating factors.' Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). The defendant in a capital case generally must be allowed to present any relevant mitigating evidence regarding the defendant's character or record and any of the circumstances of the offense, and consideration of that evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987); Ex parte Henderson, 616 So. 2d 348 (Ala. 1992); Haney v. State, 603 So. 2d 368 (Ala. Crim. 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); Williams v. State, 710 So. 2d 1276 (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). Although the trial court is required to consider all mitigating circumstances, the decision whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. Carroll v. State, 599 So. 2d 1253 (Ala. Crim. App. 1992), aff'd, 627 So. 2d 874 (1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994). See also Ex parte Harrell, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985). Moreover, the trial court is not required to specify in its sentencing order each item of proposed nonstatutory mitigating evidence that it considered and found not to be mitigating. Morrison v. State, 500 So. 2d 36 (Ala. Crim. App. 1985), aff'd, 500 So.2d 57 (Ala. 1986), cert. denied, 481 U.S. 1007, 107 S.Ct. 1634, 95 L.Ed.2d 207 (1987); Williams v. State."

Ingram v. State, 779 So. 2d 1225, 1246 (Ala. Crim. App. 1999). Thus, contrary to Dearman's contention, Lockett and its progeny only require the court to consider the mitigation evidence that is proffered by the defendant as mitigation evidence and do not place any type of requirement upon courts to consider evidence that is not proffered as mitigation evidence.

We have reviewed the entirety of the record from the penalty-phase of Dearman's trial. None of the evidence that Dearman now claims should have been considered by the circuit court was presented by Dearman as mitigation evidence during the penalty-phase of his trial. The only evidence specifically referenced by Dearman in his brief that he claims should have been considered by the circuit court during sentencing that was admitted during the penalty-phase of Dearman's trial was a copy of the medical records from Singing River Hospital from Dearman's childhood. Those records were proffered by the State during its cross-examination of Dearman's father and were admitted into evidence. The circuit court's order appears to indicate that the court did consider the Singing River Hospital records because, when discussing mitigation evidence concerning Dearman's childhood, the court stated:

> "According to the voluminous mental health and school records admitted by the State, the Defendant had a history beginning at the age of five of disciplinary problems, temper tantrums, and a tumultuous family/living situation. The records continue into 2007 and are replete with references to his aggressive, defiant behavior and diagnosis of oppositional defiant disorder. The records depict a clear theme of a complete lack of respect for authority. The Court finds that any mitigating evidence regarding Dearman's childhood is outweighed by his history recorded in his mental health records."

(C. 487.) Moreover, Dearman concedes in his brief on appeal that the Singing River Hospital records were merely corroborating evidence to support the testimony of Dearman's father. Accordingly, this claim is meritless.

VII.

Dearman argues that the circuit court improperly allowed the State to introduce testimony during the penalty phase from Dr. John Toppins about his pretrial mental-status examination of Dearman because, he says, he never entered a plea of not guilty by reason of mental disease or defect and, thus, the circuit court was not authorized to order him to submit to an examination to determine his mental condition at the time of the alleged offense. Dearman argues that the circuit court's order "improperly compelling [Dearman] to be subjected to a mental status

examination, and its subsequent admission of the results of that examination at [Dearman's] capital trial, violated his rights against self-incrimination as well as his rights to due process, equal protection, a fair trial by an impartial jury, and a reliable conviction and sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Dearman's brief, at 76.) Dearman failed to raise this argument in the circuit court; thus, this claim will be reviewed for plain error only. See Rule 45A, Ala. R. App. P.

During the penalty phase of Dearman's trial, the State called Dr. Toppins as a rebuttal witness. Dr. Toppins was qualified as an expert in the field of clinical and forensic psychology. Dr. Toppins testified that, based on his evaluations of Dearman, he did not believe that Dearman committed the offense while under the influence of extreme mental or emotional disturbance and that he believed Dearman was "able to appreciate the criminality of his actions and to conform his behavior to the requirements of the law." (R. 1641.)

"Under Rule 11.2(a)(2), [Ala. R. Crim. P.,] the trial court obtains discretion to order an examination to determine the defendant's mental condition at the time of the alleged offense only after the defendant has

raised the defense of not guilty by reason of mental disease or defect." Ex parte Cate, 134 So. 3d 870, 875 (Ala. 2013). Rule 11.2(b)(2), Ala. R. Crim. P., provides, in pertinent part:

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

The State concedes in its brief on appeal that, because "Dearman did not enter a plea of not guilty by reason of mental disease or defect," the circuit court "lacked the discretion to order a mental examination to determine his mental condition at the time of the offense." (State's brief, at 79.) However, the State claims, the admission of Dr. Toppins's testimony was harmless error.

This Court has held that "even in capital cases, the harmless-error rule applies to contentions that Rule 11.2 was violated." Lockhart v.

State, 163 So. 3d 1088, 1108 (Ala. Crim. App. 2013). Rule 45, Ala. R. App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

In Lewis v. State, 889 So. 2d 623 (Ala. Crim. App. 2003), this Court explained:

> "'The United States Supreme Court has recognized that most errors do not automatically render a trial unfair and, thus, can be harmless.' Whitehead v. State, 777 So. 2d 781, 847 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 854 (Ala. 2000), cert. denied, 532 U.S. 907, 121 S.Ct. 1233, 149 L.Ed.2d 142 (2001), citing Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).
>
> > "'After finding error, an appellate court may still affirm a conviction or sentence on the ground that the error was harmless, if indeed it was. Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]; Sattari v. State, 577 So. 2d 535 (Ala. Crim. App.1990), cert. denied, 577 So. 2d 540 (Ala. 1991); [Ala.] R. App. P. 45. Moreover, the harmless error rule applies in capital cases. Ex parte Whisenhant, 482 So. 2d 1241 (Ala. 1983); Henderson v. State, 583 So. 2d 276 (Ala. Crim. App. 1990), aff'd, 583 So. 2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d

> 496 (1992); Musgrove v. State, 519 So. 2d 565 (Ala. Crim. App.), aff'd, 519 So. 2d 586 (Ala. 1986), cert. denied, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988). In order for a constitutional error to be deemed harmless under Chapman, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence. In order for a nonconstitutional error to be deemed harmless, the appellate court must determine with 'fair assurance ... that the judgment was not substantially swayed by the error.' Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). See Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); Vines v. United States, 28 F.3d 1123, 1130 (11th Cir. 1994).... In order for the error to be deemed harmless under Ala. R. App. P. 45, the state must establish that the error did not or probably did not injuriously affect the appellant's substantial rights.... The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing.'
>
> "Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999)."

889 So. 2d at 666.

In the present case, the judgment was not substantially swayed by any possible error in the admission of Dr. Toppins's testimony. Although there was evidence indicating that Dearman used illegal drugs before the murders, there was no evidence presented at trial indicating that

Dearman was unable, at the time of the offense, to appreciate the nature and quality of the wrongfulness of his acts. Additionally, contrary to Dearman's contention that the circuit court relied on Dr. Toppins's testimony from the penalty-phase of the trial, our review of the record does not indicate that the circuit court specifically referred to or relied on Dr. Toppins's testimony in making its sentencing decision. During the penalty phase of his trial, Dearman himself stated that "[d]rugs are not an excuse." (R. 1636.) Consequently, considering the record before this Court, we hold that any error in the admission of Dr. Toppins's testimony did not injuriously affect Dearman's substantial rights and, thus, was harmless.

VIII.

Next, Dearman argues that the circuit court "failed to inquire properly into repeated instances of jury contamination." (Dearman's brief, at 76.) Specifically, Dearman alleges: 1) that the court did not perform adequate inquiry into an incident involving Onrie Brown, the uncle of one of the victims, during which the uncle entered the jury assembly room and had a brief conversation with a veniremember; 2) that the court responded improperly to jurors' expressions that they were

uncomfortable in the courtroom; and 3) that the trial court failed to conduct a proper inquiry into alleged veniremember misconduct during voir dire. (Dearman's brief, at 78). Although Dearman waived this claim from review as the result of his guilty plea, we will review the claim as it relates to the penalty phase of the trial because the same jury also sat at the penalty phase. See Key, 891 So. 2d at 371. Dearman failed to raise these claims in the circuit court; thus, these claims will be reviewed for plain error only. See Phillips v. State, 287 So. 3d 1063, 1121 (Ala. Crim. App. 2015) (reviewing for plain error the defendant's claim that the trial court's investigation into juror misconduct was insufficient because the defendant "did not object to the trial court's handling of the investigation").

Regarding a trial court's duty to investigate juror misconduct, this Court has stated that

> "'"the trial judge has a duty to conduct a 'reasonable investigation of irregularities claimed to have been committed' before he concludes that the rights of the accused have not been compromised." Holland v. State, 588 So. 2d 543, 546 (Ala. Crim. App. 1991) (emphasis added).

> "'What constitutes a "reasonable investigation of irregularities claimed to have been committed" will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.
>
> > "'"Th[e] discretion of the trial court to grant a mistrial includes the discretion to determine the extent and type of investigation requisite to a ruling on the motion...."
>
> "'Woods v. State, 367 So. 2d 974, 980 (Ala. Cr. App.), reversed on other grounds, 367 So. 2d 982 (Ala. 1978), partially quoted in Cox v. State, 394 So. 2d 103, 105 (Ala. Cr. App. 1981). As long as the court makes an inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry.'
>
> "Sistrunk v. State, 596 So. 2d 644, 648-49 (Ala. Crim. App. 1992)"

Shaw v. State, 207 So. 3d 79, 91-92 (Ala. Crim. App. 2014). With these principles in mind, we address the alleged juror-misconduct allegations.

A.

Dearman contends that the circuit court failed to adequately investigate an incident involving contact between a victim's family member, Onrie Brown, and the venire that occurred during a court recess as the juror veniremembers were filling out juror questionnaires.

The record indicates that, after the incident, the circuit judge returned to the courtroom with Brown and addressed the situation with both parties present. The judge explained to the parties that during the recess, the circuit judge had spoken with Brown in a "fairly extended conversation" and determined that Brown had come to the courthouse and had gone into a jury-assembly room "where people were filling out papers." (R. 375.) The court explained to the parties that, according to Brown, when he entered the jury-assembly room, Brown inquired of a potential juror "whether this was the jury selection in the Dearman case," and the potential juror responded, "Yes, are you … in the jury pool?" (R. 375.) Brown said that he answered the potential juror's question by stating, "No. I'm family." (R. 375.) Brown claimed that that was the extent of the conversation, that he did not identify whose family he was associated with, and that he left the jury-assembly room after approximately five minutes. Brown stated that when he left the jury-assembly room, he spoke to security guards who were in the hallway and that he later spoke to the circuit judge. The circuit court then inquired of the parties whether either party had questions about the incident.

Neither the State nor Dearman had any further questions about the incident, and neither party objected to the interaction.

Dearman now claims the court's investigation was inadequate because, he says, the court "failed to identify or examine the juror [Brown] spoke to," "failed to determine whether other veniremembers overheard the exchange," and "failed to evaluate the incident's 'possible influence upon the jury.'" (Dearman's brief, at 78.) Dearman also claims that the court's investigation was flawed because the court's ex parte communication with Brown occurred "in violation of its own grant" of his motion requesting that the court record "all jury selection proceedings and in-chambers conferences." (Dearman's brief, at 78.)

This Court has held:

> "'Whether there has been a communication with a juror and whether it has caused prejudice are questions of fact to be determined by the trial court in the exercise of sound discretion.' Gaffney v. State, 342 So. 2d 403, 404 (Ala. Crim. App. 1976). 'An unauthorized contact between the jurors and a witness does not necessarily require the granting of a mistrial. It is within the discretion of the trial court to determine whether an improper contact between a juror and a witness was prejudicial to the accused.' Ex parte Weeks, 456 So. 2d 404, 407 (Ala. 1984), quoted in Knox v. State, 571 So. 2d 389, 391 (Ala. Crim. App. 1990)."

Woodward v. State, 123 So. 3d 989, 1052 (Ala. Crim. App. 2011).

In this case, there is nothing to suggest that the scope of the court's investigation was unreasonable, much less that the court's lack of further investigation rose to the level of plain error. When the court was informed of the contact between Brown and the veniremember, the court had a thorough conversation with Brown about the incident and then brought the matter to the attention of the parties. There is no indication in the record that the conversation was heard by other prospective jurors or that, even if the jurors did hear the conversation, it would have had any influence or bearing on the jurors or affected the rights of the accused in any way. Based on Brown's testimony, he never informed the jury to whose family he belonged, and he had no further discussions with the veniremember. Neither Dearman nor his advisory counsel requested further actions by the court. "[Dearman's] failure to raise any objection to the scope of the trial court's inquiry at the time it was conducted weighs against his claim of prejudice now." See Woodward, 123 So. 3d at 1053. Based on the record before this Court, we hold that no plain error occurred in the circuit court's decision to forgo additional inquiry into the situation. Thus, Dearman is not entitled to relief on this claim.

B.

Dearman also claims that the circuit court responded improperly to "jurors' expressions that they were uncomfortable in the courtroom." (Dearman's brief, at 78.) Immediately before Dearman testified during the penalty phase of Dearman's trial, outside the presence of the jury, the clerk of the court stated, "Judge, I need to speak with you for a moment outside the presence of everyone." (R. 1633.) The circuit judge excused himself and, presumably, had a private discussion with the clerk. The record is unclear whether the discussion happened inside or outside the court room. After a brief recess, trial proceedings resumed with the jury present and the following occurred:

> "THE COURT: All right. Y'all doing okay? All right. Have a seat, everybody.
>
> "We're at a stage of the proceedings where I'm advised that Mr. Dearman has – who you know is representing himself, wishes to make a statement or testify, and he has a right to do that and we're going to give him that opportunity. He'll be subjected to the rules of evidence like everyone else is. I'll maintain – I'll deal with those issues.
>
> "It's been related [sic] to me, and I'm not sure I fully understand exactly the context, that some of you have been made to feel uncomfortable by something that occurred in the courtroom. I wasn't aware of that. I want to assure you and reassure you that this is a courtroom and everyone has conducted themselves appropriately and that will continue. There will be no reason for anyone to feel uncomfortable about being in the courtroom. And so, rest assured, we are going to

> control this proceeding and I believe we'll be concluded with it in fairly short order.
>
> "So, everybody understand that? Anybody got any issues with that or anything I need to know about specifically?
>
> "(No audible response.)"

(R. 1634-35.) Trial proceedings then continued with Dearman testifying in his own behalf.

Dearman insists that the "clear subtext of the court's remarks was that some of the jurors had been made to feel uncomfortable by Mr. Dearman," and that by making these remarks, the court "broadcast this subtext to the entire jury, right before Mr. Dearman's penalty-phase testimony." (Dearman's brief, at 79-80). We disagree. Dearman's entire argument rests solely on his own speculation regarding what may have occurred. Nothing in the record indicates whether the clerk's conversation was even related to the court's commentary that followed, whether the court was speaking directly to the jury, the spectators of the trial, or the attorneys present in the courtroom when he provided a comment on the situation, or whether the individuals who felt uncomfortable were even jurors. Neither party inquired further into the alleged complaints, nor did they request further investigation. "This

Court cannot predicate errors on matters not shown by the record, nor can we presume error from a silent record. …Where the record is silent on appeal, it will be presumed that what ought to have been done was not only done, but rightly done." Gaddy v. State, 698 So. 2d 1100, 1130 (Ala. Crim. App. 1996)(internal citations omitted). Therefore, Dearman is not entitled to relief on this claim.

C.

Dearman also argues that the court failed to conduct an adequate inquiry into three instances of alleged veniremember misconduct. First, he claims the court erred by failing to further investigate a situation involving a veniremember, W.S., who stated in his questionnaire that "one of the people sitting around [him] said [he knew] what that guy done." (Dearman's brief, at 80.) Second, he claims that another veniremember, J.N., reported in her questionnaire that she had heard that Dearman had murdered five people, one of whom was pregnant, and that the court erroneously excused J.N. without further questioning. Lastly, Dearman claims that the court failed to investigate the "prejudicial reach," as Dearman puts it – i.e, whether prejudice existed and, if so, how far that prejudice reached within the jury venire -- of

veniremember K.M.'s statement that he had heard someone in the jury room comment that Dearman was representing himself.

In regard to the incident involving veniremember W.S., despite W.S.'s comment on his juror questionnaire that he heard someone say that he knew what Dearman had done, nothing in the record suggests that what W.S. allegedly overheard contained any statement of the facts of the offense, that the potential juror who possessed the information that W.S. allegedly overheard actually knew what Dearman had done, or that W.S. or any other juror had a preconceived notion as to Dearman's guilt or innocence. Before they filled out the questionnaire, the circuit court had already informed all the veniremembers that they were there for the jury-selection process in a "murder case" against Dearman. (R. 222.) The United States Supreme Court has recognized that "[i]t is not required … that the jurors be totally ignorant of the facts and issues involved"; rather, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Dearman failed to object or even mention this situation at trial, which weighs against his allegation of prejudice now. See Woodward, 123 So. 3d at 1053. There is nothing in the record to

suggest that the court should have investigated the situation further. Moreover, W.S. was excused from jury service by the court because of a health issue, and Dearman agreed with the court's decision to excuse him from the jury panel. See (R. 1032).

Concerning J.N.'s statement on her questionnaire that she had learned that one of the victims was pregnant at the time of the crime, the court did not abuse its discretion in failing to investigate the situation further. Following a discussion about J.N.'s alleged knowledge of the pregnancy, the parties and the court agreed to excuse the juror "because of her health reasons and pretrial publicity." (R. 550.) There is no evidence in the record indicating how J.N. had knowledge of the pregnancy of one of the victims or any allegation that there had been discussion about the case by another panel member. There was also nothing in the record to suggest that, even if a discussion had taken place, there was anything prejudicial to Dearman's rights. Thus, the court did not abuse its discretion by not investigating this situation further.

Lastly, regarding veniremember K.M.'s revelation to the court during individual voir dire that he "found out from people in the jury room that [Dearman was] representing himself," see (R. 597,) our review

of the record indicates that there was no reason for the court to conduct further investigation into this matter. During voir dire, defense counsel asked K.M. about the discussion that occurred in the jury room, and K.M. explained that he was reading a book when he overheard someone say the phrase "he's representing himself," and that the statement stood out to him because he had not realized that Dearman was representing himself. (R. 602.) K.M. further explained that, although the three ladies were "chatting" in the jury room, they were not chatting about the case and that he would not classify the conversation as a "discussion;" rather, K.M. claimed, one of the ladies merely made a statement like, "I think he's representing himself." (R. 603.) Based on the record before us, we do not find that the court abused its discretion by not conducting further inquiry into this matter.

Because the court's investigation into each of these matters was reasonable under the circumstances, Dearman is not entitled to relief on this claim. See Shaw, 207 So. 3d at 91-92.

IX.

Dearman alleges that the prosecutor made improper comments about Dearman's choice to represent himself, which, he claims, burdened

his decision to exercise his constitutional right to self-representation. Specifically, Dearman claims that the prosecutor improperly questioned multiple potential jurors during voir-dire examinations about whether Dearman's election to proceed pro se, despite having two qualified attorneys, would make the jurors feel sorry for Dearman and cause them to automatically vote to impose a sentence of life imprisonment without the possibility of parole instead of the death penalty. Dearman also claims that the prosecutor made an improper argument to the jury during her closing argument in the penalty phase of his trial, when she stated:

> "In this case, I know that [Dearman] has done something unusual. He has represented himself. And, in this case, you know, as to why, I can argue why. So you could see him in another setting, so that you could feel sorry for him, so that you could empathize with him, so that he would seem real to you. He is real, but what he did far outweighs anything else in this case. What he did was real, and what he did was heinous, atrocious, and cruel, and what he did is deserving of the death penalty."

(R. 1646.)

This Court has held that

> "'[i]n judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' Bankhead [v. State], 585 So. 2d [97,] 107 [(Ala.Crim.App.1989),] quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986)

> (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala.), cert. denied, [528] U.S. 939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead, 585 So. 2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, McCullough v. State, 357 So. 2d 397, 399 (Ala. Crim. App.1978), and that court is given broad discretion in determining what is permissible argument.' Bankhead, 585 So. 2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. Id."

Ferguson v. State, 814 So. 2d 925, 945–46 (Ala. Crim. App. 2000).

Dearman did not object to any of the now challenged instances of prosecutorial misconduct.

> "'"While this failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice." Ex parte Kennedy, 472 So. 2d [1106,] at 1111 [(Ala.1985)] (emphasis in original). "This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful." Johnson v. Wainwright, 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987).'

"Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990)." Bohannon v. State, 222 So. 3d 457, 501 (Ala. Crim. App. 2015). With these principles in mind, we turn to the issue before us.

Dearman relies mainly on two cases from the United States Supreme Court to support his contention that the prosecutor's questions to the jury panel during voir dire and her comments during her closing argument improperly "burdened [his] constitutional right to self-representation," and placed a "price" on Dearman's right to proceed pro se. (Dearman's brief, at 82.) In Griffin v. California, 380 U.S. 609, 614 (1965), the United States Supreme Court held that "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." In Carter v. Kentucky, 450 U.S. 288, 305 (1981), the United States Supreme Court further recognized that

> "just as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,' [Griffin, 380 U.S. at 614,] the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an

> impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify."

However, this particular caselaw does not support Dearman's position on this particular claim because these legal principles establish a prohibition on improper comments from a prosecutor or the court regarding a defendant's right to refrain from testifying. The authority cited by Dearman does not address a situation in which a prosecutor or the court comments on a defendant's right to represent himself or herself, which is the situation here. Dearman has failed to cite to any legal authority extending the reach of the law to prohibit comment on a defendant's decision to represent himself or herself, and we know of no such binding precedent. Thus, Dearman has not established that the prosecutor's comments during voir dire or closing arguments concerning his choice to represent himself constituted error, much less plain error.

Moreover, in the present case, the questions proposed to jurors by the prosecutor during voir dire were not "adverse commentary" by the prosecutor. Here, the prosecutor merely inquired of the potential jurors whether Dearman's decision to represent himself at trial would influence

their decision to recommend the death penalty. Thus, the prosecutor's questions were clearly intended to ensure that the jurors were death-qualified and, thus, did not deprive Dearman of an impartial jury. See Lee v. State, 44 So. 3d 1145, 1161-62 (Ala. Crim. App. 2009)(recognizing that death-qualification of juries in capital cases does not deprive a defendant of an impartial jury).

To the extent that Dearman does cite to specific instances in the record that he contends amount to the State improperly commenting during voir dire on his choice to remain silent and not testify, the record refutes his claims. In each of the cited instances, following the prosecutor's questions about whether Dearman's decision to represent himself affected the juror's ability to impose the death penalty, the prosecutor followed up by asking whether the potential juror would automatically rule out recommending the death penalty if Dearman chose to exercise his right to "stand silent and not present a case," if he chose to present no evidence or mitigating factors, or if he did not question any witnesses or present any evidence in his defense. See (R. 731-32, 864-65, 1046). Although the prosecutor used the language during its inquiries such as if the defendant "stands silent," the record is clear

that the prosecutor was not referring to the defendant's choice to refrain from taking the stand to testify himself but, instead, was referring to the possibility of the defendant exercising his right to refrain from presenting any evidence or putting forth a defense at trial. Regardless, even if the prosecutor had referred to the possibility that Dearman may not testify in his own behalf, the prosecutor did not make any adverse remarks concerning Dearman's possible decision not to present evidence or testify; rather, the prosecutor asked questions inquiring into the potential jurors' beliefs regarding whether they could still recommend the death penalty if the defendant chose to not present evidence or question witnesses.

Based on the foregoing, the prosecutor's comments during voir dire and during the penalty-phase closing arguments did not constitute error, much less plain error. Accordingly, Dearman is not entitled to relief on this claim.

X.

Next, Dearman claims that the circuit court committed reversible error in its instructions to the jury during the guilt-phase of his trial. Specifically, he claimed that the court erroneously charged the jury on the elements of capital murder under § 13A-5-40(a)(10), Ala. Code 1975;

that it improperly instructed the jury on intoxication; and that the court failed to give an accompanying lesser-included offense instruction. However, by pleading guilty, Dearman waived his right to appeal these nonjurisdictional claims. See § 13A-5-42, Ala. Code 1975. Thus, because Dearman waived these arguments, they will not be considered on appeal.

XI.

Dearman alleges that the State failed to present sufficient evidence that he had the specific intent to commit capital murder because, he says, he was "so intoxicated at the time of the crime that it would have been impossible for him to have formed the 'particularized' intent to kill … necessary for a conviction of capital murder." (Dearman's brief, at 88.)

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should

> submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).
>
> "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Crim. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Crim. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Crim. App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004), quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992).

Dearman pleaded guilty to five counts of the capital offense of burglary-murder, "[m]urder by the defendant during a burglary in the first or second degree," see § 13A-5-40(a)(4), Ala. Code 1975, and five counts of murder made capital because the victims were murdered by one

act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. A person commits murder if, "[w]ith intent to cause the death of another person, he causes the death of that person." § 13A-6-2(a)(1), Ala. Code 1975. Additionally,

> "Alabama appellate courts have repeatedly held that, to be convicted of capital offense and sentenced to death, a defendant must have had a particularized intent to kill and the jury must have been charged on the requirement of specific intent to kill. E.g., Gamble v. State, 791 So. 2d 409, 444 (Ala. Crim. App. 2000); Flowers v. State, 799 So. 2d 966, 984 (Ala. Crim. App. 1999); Duncan v. State, 827 So. 2d 838, 848 (Ala. Crim. App. 1999)."

Ziegler v. State, 886 So. 2d 127, 140 (Ala. Crim. App. 2003). With regard to intent, this Court has stated, "intent, ... being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence." Connell v. State, 7 So. 3d 1068, 1090 (Ala. Crim. App. 2008)(internal citations omitted). This Court has also held that intent "may be inferred from the character of the assault, the use of a deadly weapon and other attendant circumstances.'" Jones v. State, 591 So. 2d 569, 574 (Ala. Crim. App. 1991), quoting Johnson v. State, 390 So. 2d 1160, 1167 (Ala. Crim. App. 1980). The question of intent is generally a matter for determination by the finder of

fact. See Rivers v. State, 624 So. 2d 211, 213 (Ala. Crim. App. 1993) (stating "the question of intent is always a jury question").

Further, in Fletcher v. State, this Court stated:

> "'Voluntary drunkenness neither excuses nor palliates crime.' Ray v. State, 257 Ala. 418, 421, 59 So. 2d 582, 584 (1952). 'However, drunkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime.' Commentary to [§ 13A–3–2, Ala. Code 1975]. Where the defendant is charged with a crime requiring specific intent and there is evidence of intoxication, '"drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent."' Silvey v. State, 485 So. 2d 790, 792 (Ala. Crim. App. 1986)(quoting Chatham v. State, 92 Ala. 47, 48, 9 So. 607 (1891))."

621 So. 2d 1010, 1019 (Ala. Crim. App. 1993). We recognize that "[t]he degree of intoxication necessary to negate specific intent ... must amount to insanity." Ex parte Bankhead, 585 So. 2d 112, 121 (Ala. 1991). "A jury is capable of determining whether a defendant's intoxication rendered it impossible for the defendant to form a particular mental state." Id. "The law concerning drug intoxication is the same as for alcohol intoxication." Hooks v. State, 534 So. 2d 329, 352 (Ala. Crim. App. 1987).

Additionally, this Court stated:

> "A charge on intoxication should be given if '"there is an evidentiary foundation in the record sufficient for the jury to

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

Fletcher, 621 So. 2d at 1019.

In the present case, there was sufficient evidence presented from which the jury could, by fair inference, find the defendant guilty of capital murder.

In making his argument that his intoxication negated his ability to form the intent to commit the murders, Dearman relies primarily on his own statements to police, in which he described his drug use and the effects of his drug use on his mental state at the time of the offense – i.e., experiencing hallucinations and delusions. A copy of Dearman's statements was admitted into evidence and played for the jury. Dearman

also relies on testimony from Deborah Guy, a lifelong acquaintance of Dearman's. Guy testified at trial that she had seen Dearman the night of the incident at the gas station at which she worked. She testified that Dearman did not look the same as he normally did and that his eyes were "sunk in." (R. 1446.) Guy claimed that Dearman was acting "antsy" and "kind of hyper." Id. Dearman further cites the medical records from Dr. Toppins's mental evaluation, in which Dr. Toppins noted that he had interviewed Guy and that Guy told Dr. Toppins that Dearman appeared to be under the influence of drugs when she saw Dearman the day before the murders. Dearman is also correct that, during Dearman's trial, the State acknowledged Dearman's drug use and voluntary intoxication.

Despite the evidence indicating that Dearman was under the influence of drugs at the time of the murders, there was also ample evidence presented from which the jury could infer that Dearman was not so intoxicated that he could not form the intent to commit the murders. For example, Dearman's sister, Abigail Dearman, testified that Dearman and Lester visited her house at approximately 7:00 a.m. on the morning following the incident, and she claimed Dearman "acted normal to [her]" and was not acting "like he was high." (R. 1332.) Abigail claimed

that she had seen Dearman when he was high before; however, based on his behavior when he was at her house on the morning following the incident, she did not believe that he was high. Additionally, Scott Jessie, a longtime friend of Dearman, testified only that Dearman appeared nervous when Dearman came to his parent's house the morning after the incident. John Jessie, Scott Jessie's father, also testified that Dearman was acting like himself and just appeared to be tired when he observed Dearman the morning after the murders. Despite Dearman's admission that he was under the influence of drugs during the murders, he was still able to provide a large amount of details concerning the crime during his confessions, including the order in which he harmed the victims, where the victims were located in the home when he harmed them, and the details of the events preceding the murders. He also provided a diagram of the crime scene and location of the victims. Dearman admitted to using an axe to severely injure each of the victims and using a gun to shoot each of the victims to ensure that they were dead. The details Dearman provided in his confessions were later corroborated by Lester's statement and were confirmed by the investigation of the crime conducted by law enforcement. In this case, the court also gave the jury an instruction on

voluntary intoxication, and the jury, after considering all the evidence presented, made the determination that Dearman's intoxication did not negate his ability to form the intent to kill. Further, the jury was informed that Dearman had entered a guilty plea to each of the capital-murder charges, which could also be considered by the jury "in determining whether the state had met its burden of proof." See § 13A-5-42, Ala. Code 1975. Considering the evidence in the light most favorable to the State, we conclude that the State presented sufficient legal evidence from which the jury could infer that Dearman had the requisite intent to commit capital murder.

XII.

Dearman contends that the circuit court abused its discretion in allowing the admission of allegedly highly prejudicial and cumulative crime-scene and autopsy photographs and videos. Specifically, he claims that the court improperly admitted pictures that were cumulative to other photographs admitted into evidence, crime-scene images of Shannon Randall that were "irrelevant to any material inquiry," an autopsy photograph of Robert Lee Brown's scalp after his autopsy, and a crime-scene video. (Dearman's brief, at 92.) He claims that, because he

pleaded guilty to all charges in this case, the introduction of the photographs and videos was unnecessary and resulted in a denial of due process. The State argues that the photographs and videos were relevant to establish the injuries in the guilt-phase and to establish during the penalty-phase of the trial the aggravating factor that the murders were especially heinous, atrocious, or cruel.

Dearman did not object to the admission of the photographs or the video during trial, and he waived this claim as it relates to the guilt-phase of the trial by pleading guilty; however, because the same jury sat on the penalty-phase of the trial, this claim will be reviewed for plain error. See § 13A-5-42, Ala. Code 1975; and Rule 45A, Ala. R. App. P.

"'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' that the trial court exceeded its discretion." Williams v. State, 73 So. 3d 738, 741 (Ala. 2011) (quoting Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000)). This Court has held:

> "'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 Magwood v. State, 494 So. 2d 124, 141 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 154 (Ala. 1986), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (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). '[P]hotographic 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). 'The fact that a photograph is gruesome and ghastly is no reason to exclude it from the evidence, so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury.' Bankhead, 585 So. 2d at 109–10.

"'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 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), on remand to, 851 So.2d 453 (Ala. 2002). '[A]utopsy photographs depicting the internal views of wounds are likewise admissible.' Broadnax v. State, 825 So. 2d 134, 159 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001). See also Dabbs v. State, 518 So. 2d 825 (Ala. Crim. App. 1987); Hamilton v. State, 492 So. 2d 331 (Ala. Crim. App. 1986); Fike v. State, 447 So. 2d 850 (Ala. Crim. App. 1983); and McKee v.

> State, 33 Ala. App. 171, 31 So. 2d 656 (1947) (all holding that photographs of internal injuries were properly admitted although they were gruesome)."

Eggers v. State, 914 So. 2d 883, 914-15 (Ala. Crim. App. 2004). These same principles apply to video recordings. See Keaton, ___ So. 3d at ___.

Dearman's contention that the photographs and video recording should have been excluded because they were cumulative and irrelevant are not convincing. The fact that other photographs were admitted that depicted injuries that were shown in other photographs does not render the photographs inadmissible. See Eggers, supra. The photographs of Randall's injuries and autopsy photographs of Brown were relevant because they tended to establish the character and extent of the victims' injuries and the location of the wounds on the victims' bodies. See Eggers, 914 So. 2d at 914. See also Gobble v. State, 104 So. 3d 920, 964 (Ala. Crim. App. 2010)(upholding the admission of autopsy photographs showing the victim's exposed skull). The photographs and video recordings were also relevant in the penalty-phase of the trial to prove the aggravating circumstance that the crime was especially heinous, atrocious, and cruel when compared to other capital murders.

To the extent that Dearman alleges that the photographs and video recordings were unfairly prejudicial, we first note that Dearman's failure to object to the introduction of the photographs and video recordings at trial weigh against a finding that he was prejudiced by their admission. See Keaton, ___ So. 3d at ___. Additionally, the question is not whether he was prejudiced by the admission of the photographs and video recording, but whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Rule 403, Ala. R. Evid. Considering the circumstances of this particular case, because we cannot conclude that the admission of the photographs or video recording seriously affected Dearman's substantial rights or had an unfair prejudicial impact on the jury's deliberations, we cannot say that the circuit court committed plain error by admitting the photographs and video recording. See Rule 45A, Ala. R. App. P.

XIII.

Dearman contends that the circuit court's sentencing order was deficient because the court failed to include specific findings regarding the statutory aggravating circumstances that the court found did not exist in his case. At time of the offense in this case, Section 13A-5-47(d),

Ala. Code 1975, provided, in pertinent part, that "the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A–5–49, each mitigating circumstance enumerated in Section 13A–5–51, and any additional mitigating circumstances offered pursuant to Section 13A–5–52."[2] Our review of the sentencing order in the present case reveals that although the court set out the three aggravating circumstances that it found to apply to Dearman's case, the court failed to address the nonexistence of each of the remaining aggravating circumstances found in § 13A-5-49, Ala. Code 1975. However, despite the technical deficiency of the court's order in the present case, remand is unnecessary in this particular case.

In Reynolds v. State, 114 So. 3d 61, 159-160 (Ala. Crim. App. 2010), this Court addressed this exact issue and held:

> "Although the circuit court's findings with regard to the aggravating circumstances and the mitigating circumstances are technically deficient, remand is not necessary in this case. Indeed, in several cases where the circuit court's sentencing order made specific written findings only as to the aggravating circumstances it found to exist, we held that the court's failure to make specific findings as to the aggravating

[2]Section 13A-5-47(d) was amended effective April 11, 2017. See Act No. 2017-131, Ala. Acts 2017.

> circumstances enumerated in § 13A–5–49, Ala. Code 1975, it did not find to exist constituted harmless error. See, e.g., Pilley v. State, 930 So. 2d 550, 568 (Ala. Crim. App. 2005); Gavin v. State, 891 So. 2d 907, 995 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004); Stewart v. State, 730 So. 2d 1203, 1219 (Ala. Crim. App. 1996), aff'd, 730 So.2d 1246 (Ala. 1999); Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988), aff'd, 545 So.2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).
>
> "Nothing in the record indicates that the circuit court refused or failed to consider any aggravating circumstances. Indeed, as noted above, the aggravating circumstances found to apply in this case were the two aggravating circumstances established by the jury's verdicts in the guilt phase of Reynolds's trial and the heinous, atrocious, or cruel aggravating circumstance to which the parties stipulated. Because the circuit court's findings regarding the aggravating circumstances it found to exist in this case are sufficient for this Court to carry out its appellate review, a remand for the entry of a new sentencing order is unnecessary. See Slaton v. State, 680 So.2d 879, 907 (Ala. Crim. App. 1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997)."

Here, like in Reynolds, two of the aggravating factors found to apply in this case were factors that were established by the jury's verdicts in the guilt-phase of Dearman's trial. Additionally, the especially heinous, atrocious, or cruel aggravating circumstance that the court found to apply was undisputed by Dearman, and the circuit court's findings regarding the aggravating circumstances that it found to exist are sufficient for this Court to carry out its appellate review. Therefore, a

remand for the entry of a new sentencing order on this ground is unnecessary. See Reynolds, 114 So. 3d at 159-60.

XIV.

Dearman argues that Alabama's capital-sentencing scheme and, thereby, his death sentence are unconstitutional under Hurst v. Florida, 136 S. Ct 619 (2016), and Ring v. Arizona, 536 U.S. 584 (2002). Dearman acknowledges the Alabama Supreme Court's decisions in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002). This Court recently explained:

> "The Alabama Supreme Court in Ex parte Bohannon upheld Alabama's capital-murder statute against a claim that it violated Hurst and, in Ex parte Waldrop, the Alabama Supreme Court upheld Alabama's capital-murder statute against a claim that it violated Ring. '"[T]his Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions."' Reynolds v. State, 114 So. 3d 61, 157 n.31 (Ala. Crim. App. 2010) (citing § 12-3-16, Ala. Code 1975)."

Jackson v. State, 305 So. 3d 440, 499 (Ala. Crim. App. 2019). In this case, by virtue of its guilt-phase verdicts, the jury found the existence of two aggravating circumstances beyond a reasonable doubt – that the capital offense was committed while the defendant was engaged in the commission of a burglary, and that the defendant intentionally caused

the death of two or more persons by one act or pursuant to one scheme or course of conduct. The record indicates that the jury also unanimously agreed that the State had proven beyond a reasonable doubt that the capital murders were especially heinous, atrocious, or cruel when compared to other capital offenses. Therefore, Dearman is due no relief on this claim.

To the extent that Dearman also claims that his death sentence violates Ring because the indictments against him failed to include the aggravating circumstances supporting the capital offense, this Court has held otherwise. In Lewis v. State, 24 So. 3d 480, 534 (Ala. Crim. App. 2006), this Court held that, where an indictment includes at least one aggravating circumstance that places the defendant on notice that, if convicted, he or she could be facing a potential death sentence, "it was unnecessary for the State to amend the indictment so that it included all of the aggravating circumstances the State intended to prove at trial." See also Woodward v. State, 123 So. 3d 989, 1054 (Ala. Crim. App. 2011). In the present case, the indictments charging Dearman with murder made capital because it was committed during burglary, in violation of 13A-5-40(a)(4), Ala. Code 1975, and murder made capital because the

victims were murdered by one act or pursuant to one scheme or course of conduct, in violation of § 13A-5-40(a)(10), Ala. Code 1975, included the elements of the offenses that the State was required to prove, which encompassed two of the aggravating circumstances that were found to exist. Therefore, Dearman is not entitled to relief on this claim.

XV.

Next, Dearman contends that the circuit court and the prosecutor in this case misled the jury on the importance of its role at sentencing by informing the jury that its verdict would be advisory only. However, this Court has repeatedly held that "'a trial court does not diminish the jury's role by stating that its verdict in the penalty phase is a recommendation or an advisory verdict.'" Gobble, 104 So. 3d at 977, quoting Smith v. State, 795 So. 2d 788, 837 (Ala. Crim. App. 2000). Thus, Dearman is not entitled to relief on this claim.

XVI.

Dearman claims that his death sentence constituted cruel and unusual punishment in violation of the Eighth Amendment because, he says, there was substantial evidence indicating that he suffered from "lifelong and severe mental illness," including bipolar disorder with

psychotic features, post-traumatic stress disorder, chronic depression, and neurocognitive disorder. Because this specific claim was not raised below, we will review this claim for plain error only. See Flowers v. State, 922 So. 2d 938, 958 (Ala. Crim. App. 2005)(reviewing for plain error the appellant's constitutional challenges to the death penalty because the specific claims the appellant raised on appeal were not presented to the trial court). This Court recently rejected this same argument, stating:

> "In support of that claim, Keaton cites Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) -- cases in which the United States Supreme Court respectively held that the Eighth Amendment to the United States Constitution prohibits the death penalty 'for [an intellectually disabled] criminal' and 'a prisoner who is insane.' However, Keaton does not claim that she is intellectually disabled or that she is insane, nor is there any evidence to support such conclusions. To the contrary, the court-appointed psychologist who evaluated Keaton's competency to stand trial concluded that Keaton is 'an intelligent young lady with fully reasonable judgment and insight' (R. 5387), and Keaton's own expert witness testified that Keaton has above-average intelligence (R. 5106-07), that she is not 'mentally retarded' (R. 5115), and that the witness 'didn't have anything to support that [Keaton] was legally insane.' (R. 5084.) Nevertheless, Keaton notes that there was evidence indicating that she has been diagnosed with 'bipolar disorder and post-traumatic stress disorder.' (R. 5038.) Thus, Keaton appears to suggest that Atkins and Ford encompass defendants who are diagnosed with such mental illnesses….

"To date, the United States Supreme Court has not held that either Atkins or Ford prohibits the imposition of the death penalty for defendants who, though competent, are diagnosed with bipolar disorder, post-traumatic stress disorder, or other mental illnesses. See Hicks, ––– So. 3d at ––– (noting that Atkins did not '"create[ ] a new rule of constitutional law ... making the execution of mentally ill persons unconstitutional"' (quoting In re Neville, 440 F.3d 220, 221 (5th Cir. 2006); Lindsay, ––– So. 3d at ––– (holding that Ford did not prohibit the imposition of a death sentence for a mentally ill defendant who was nevertheless competent); and State v. Dunlap, 155 Idaho 345, 380, 313 P.3d 1, 36 (Idaho 2013) (rejecting the appellant's claim that Atkins and Ford should be applied to mentally ill defendants and noting that 'every court that has considered this issue have refused to ... hold that the Eighth Amendment categorically prohibits execution of the mentally ill'), cert. denied, 574 U.S. 932, 135 S.Ct. 355, 190 L.Ed.2d 249 (2014). See also State v. Grate, 164 Ohio St. 3d 9, 55, 172 N.E.3d 8, 59 (Ohio 2020) (affirming a death sentence for a defendant who was diagnosed with 'bipolar and related disorders'); and State v. Johnson, 207 S.W.3d 24, 51 (Mo. 2006) (noting that '[b]oth federal and state courts have refused to extend Atkins to mental illness situations' and noting that the Missouri Supreme Court has affirmed a death sentence for a defendant who was diagnosed with post-traumatic stress disorder), cert. denied, 550 U.S. 971, 127 S.Ct. 2880, 167 L.Ed.2d 1156 (2007). Thus, absent clear authority from the United States Supreme Court that extends Atkins and Ford to mentally ill defendants who are nevertheless competent, we will not hold that those cases render Keaton's death sentence unconstitutional. See State v. B.T.D., 296 So. 3d 343, 361 (Ala. Crim. App. 2019) ('[S]tate courts should "be very careful when considering new constitutional interests and remain reluctant to deviate from United States Supreme Court determinations of what are, and what are not, fundamental constitutional rights.'" (quoting Morris v. Brandenburg, 356 P.3d 564, 578 (N.M. Ct.

> App. 2015))). Accordingly, Keaton is not entitled to relief on this claim."

Keaton, ___ So. 3d at ___.

Like Keaton, Dearman does not argue that he was intellectually disabled or insane; rather, he insists that he suffers from several mental illnesses, such as bipolar disorder and post-traumatic stress disorder. Dearman also relies on evidence indicating that he suffers from chronic depression and a neurocognitive disorder to support his claim. The evidence of the neurocognitive disorder that Dearman cites is contained in Dr. Ogden's mental evaluation of Dearman, in which Dr. Ogden stated that Dearman met the diagnostic criteria for a "mild neurocognitive disorder," based on the fact that his scores on "some memory-based tests" were below expectation for "someone of his intellectual capability and suggest a decline in functioning from presumed average premorbid level." (C. 310.) Dr. Ogden further stated that Dearman demonstrated "subtle difficulties with executive functioning, as evidence by impulsivity, disorganization, and perseverative tendencies on certain cognitive tasks," and that such difficulties "can be seen in [attention deficit hyperactivity disorder], but could also be a function of long term drug used prior history of multiple concussions." (C. 310.) As previously

discussed in Part I of this opinion, none of these mental illnesses render Dearman incompetent, nor does such evidence suggest that Dearman was "intellectually disabled" or "insane." Therefore, adhering to this Court's holding in Keaton, we will not hold that either Atkins or Ford prohibits the imposition of the death penalty for defendants who, though competent, are diagnosed with bipolar disorder, post-traumatic stress disorder, or other mental illnesses. Accordingly, Dearman's claim is meritless.

XVII.

Dearman claims that "pretrial death-qualification" violated his right to an impartial jury. However, "neither the federal or the state constitution prohibits the state from death-qualifying juries in capital cases." Williams v. State, 710 So. 2d 1276, 1318 (Ala. Crim. App. 1996). As we have previously recognized in this opinion, death-qualification of jurors does not deprive a defendant of an impartial jury. See Lee, 44 So. 3d at 1161-62. Thus, the circuit court committed no error, much less plain error, in allowing the jurors to be questioned about their views on capital punishment.

XVIII.

Dearman argues that four of his five convictions for capital murder violate double-jeopardy principles, which prevent a defendant from being tried and convicted on multiple counts of capital-murder under § 13A-5-40(a)(10), Ala. Code 1975, when those counts involve the murder of the same people. The State concedes that Dearman is correct and that four of his capital-murder convictions must be vacated.

Each indictment against Dearman charged him with two counts of capital murder -- one count of capital murder in violation of § 13A-5-40(a)(4) and one count of capital murder in violation of § 13A-5-40(a)(10).

In CC-17-1628, Count II of the indictment read:

> "The Grand Jury of said County charges that before the finding of this Indictment, DERRICK DEARMAN, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of another person, to-wit: ROBERT LEE BROWN, by shooting him with a gun and/or chopping him with an axe, and did intentionally cause the death of another person, to-wit: JOSEPH ADAM TURNER, by shooting him with a gun and/or chopping him with an axe AND/OR SHANNON MELISSA RANDALL, by shooting her with a gun and/or chopping her with an axe AND/OR JUSTIN KALEB REED, by shooting him with a gun and/or chopping him with an axe, AND/OR CHELSEA MARIE REED, by shooting her with a gun and/or chopping her with an axe AND/OR THE UNBORN FETUS OF CHELSEA MARIE REED, by shooting Chelsea Marie Reed with a gun and/or chopping her with an axe by one act or pursuant to one scheme or course of conduct, in violation of 13A-5-40(a)(10) of the Code of Alabama."

(C. 44.) The indictment in CC-17-1629 read, in pertinent part:

> "The Grand Jury of said County charges that before the finding of this Indictment, DERRICK DEARMAN, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of another person, to-wit: CHELSEA MARIE REED, by shooting her with a gun and/or chopping her with an axe, and did intentionally cause the death of another person, to-wit: ROBERT LEE BROWN, by shooting him with a gun and/or chopping him with an axe AND/OR JOSEPH ADAM TURNER, by shooting him with a gun and/or chopping him with an axe AND/OR SHANNON MELISSA RANDALL, by shooting her with a gun and/or chopping her with an axe, AND/OR JUSTIN KALEB REED, by shooting him with a gun and/or chopping him with an axe AND/OR THE UNBORN FETUS OF CHELSEA MARIE REED, by shooting Chelsea Marie Reed with a gun and/or chopping her with an axe by one act or pursuant to one scheme or course of conduct, in violation of 13A-5-40(a)(10) of the Code of Alabama."

(C. 41.) In CC-17-1630, Count II of the indictment read:

> "The Grand Jury of said County charges that before the finding of this Indictment, DERRICK DEARMAN, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of another person, to-wit: JUSTIN KALEB REED, by shooting him with a gun and/or chopping him with an axe, and did intentionally cause the death of another person, to-wit: ROBERT LEE BROWN, by shooting him with a gun and/or chopping him with an axe AND/OR SHANNON MELISSA RANDALL, by shooting her with a gun and/or chopping her with an axe AND/OR JOSEPH ADAM TURNER, by shooting him with a gun and/or chopping him with an axe, AND/OR CHELSEA MARIE REED, by shooting her with a gun and/or chopping her with an axe AND/OR THE UNBORN FETUS OF CHELSEA

> MARIE REED, by shooting Chelsea Marie Reed with a gun and/or chopping her with an axe by one act or pursuant to one scheme or course of conduct, in violation of 13A-5-40(a)(10) of the Code of Alabama."

(C. 38.) Count II of the indictment in CC-17-1631 read, in pertinent part:

> "The Grand Jury of said County charges that before the finding of this Indictment, DERRICK DEARMAN, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of another person, to-wit: JOSEPH ADAM TURNER, by shooting him with a gun and/or chopping him with an axe, and did intentionally cause the death of another person, to-wit: ROBERT LEE BROWN, by shooting him with a gun and/or chopping him with an axe AND/OR SHANNON MELISSA RANDALL, by shooting her with a gun and/or chopping her with an axe AND/OR JUSTIN KALEB REED, by shooting him with a gun and/or chopping him with an axe, AND/OR CHELSEA MARIE REED, by shooting her with a gun and/or chopping her with an axe AND/OR THE UNBORN FETUS OF CHELSEA MARIE REED, by shooting Chelsea Marie Reed with a gun and/or chopping her with an axe by one act or pursuant to one scheme or course of conduct, in violation of 13A-5-40(a)(10) of the Code of Alabama."

(C. 35.) Lastly, in CC-17-1632, the indictment read:

> "The Grand Jury of said County charges that before the finding of this Indictment, DERRICK DEARMAN, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of another person, to-wit: SHANNON MELISSA RANDALL, by shooting her with a gun and/or chopping her with an axe, and did intentionally cause the death of another person, to-wit: ROBERT LEE BROWN, by shooting him with a gun and/or chopping him with an axe AND/OR JOSEPH ADAM TURNER, by shooting him with a gun and/or

> chopping him with an axe AND/OR JUSTIN KALEB REED, by shooting him with a gun and/or chopping him with an axe, AND/OR CHELSEA MARIE REED, by shooting her with a gun and/or chopping her with an axe AND/OR THE UNBORN FETUS OF CHELSEA MARIE REED, by shooting Chelsea Marie Reed with a gun and/or chopping her with an axe by one act or pursuant to one scheme or course of conduct, in violation of 13A-5-40(a)(10) of the Code of Alabama."

(C. 32.)

In Shaw v. State, this Court addressed a similar situation, explaining:

> "'A defendant can be convicted of two or more capital murders for the death of one victim, so long as those convictions are in accordance with Blockburger [v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)], i.e., so long as each conviction required an element not required in the other convictions.' Heard v. State, 999 So. 2d 992, 1009 (Ala. 2007).
>
> "In this case, the only distinction in Count II of both indictments is the order of the names of the two victims. Both counts required proof of the exact same elements—the intentional murders of both Doris Gilbert and Robert Gilbert.
>
> "This Court in Yeomans v. State, 898 So. 2d 878 (Ala. Crim. App. 2004), held that the multiple convictions in that case for the capital offense of killing two or more people during one course of conduct violated the Double Jeopardy Clause. We stated:
>
> > "'The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const.,

Amend. V. The United States Supreme Court has discussed the constitutional principles regarding the prohibition against double jeopardy quite simply:

> "'"In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies. See, e.g., Brown v. Ohio, 432 U.S. 161, 168–169 [97 S.Ct. 2221, 53 L.Ed.2d 187] (1977); Blockburger v. United States, 284 U.S. 299, 304 (1932) (multiple punishment); Gavieres v. United States, 220 U.S. 338, 342 [31 S.Ct. 421, 55 L.Ed. 489] (1911) (successive prosecutions). The same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."

"'United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

> "'"The three indictments charging Yeomans with the murder of two or more persons pursuant to one scheme or course of conduct were alternative methods of charging the same offense. The only variation in the three indictments was the order in which the victims' names were listed. The same elements established each of the three

> charges; none of the three offenses contained an element not also required for the other two offenses. Therefore, convictions on these counts violated double-jeopardy principles, and the convictions on the three separate counts of capital murder pursuant to § 13A–5–40(a)(10), Ala. Code 1975, cannot stand. See Wynn v. State, 804 So.2d 1122, 1150 (Ala. Crim. App. 2000); Stewart v. State, 601 So.2d 491, 494–95 (Ala. Crim. App. 1992), aff'd in part, rev'd in part on other grounds, 659 So. 2d 122 (Ala. 1993), aff'd, 730 So. 2d 1246 (Ala. 1999).'
>
> "898 So. 2d at 890. See also Parks v. State, 989 So. 2d 626, 634 (Ala. Crim. App. 2007)('[The defendant] alleges that his constitutional protection against double jeopardy was violated when he was tried and convicted of counts one and two of his indictment for murder wherein two or more persons are murdered by one act or pursuant to one course or scheme of conduct when both counts reflect the murder of the same two people. We agree with his argument that counts one and two of his indictment represented the death of two persons committed by one act or course of conduct and merely reversed the order of the victim's names in each count.')."

207 So. 3d 79, 112-13 (Ala. Crim. App. 2014).

Like in Yeomans and Shaw, the only difference in the multiple indictments charging Dearman with multiple counts of murder made capital because the murders were committed pursuant to one scheme or course of conduct in violation of § 13A-5-40(a)(10), Ala. Code 1975, is that the victim's names are transposed and placed in varying orders in each of the indictments. Consequently, "this case is due to be remanded to the

Mobile Circuit Court for that court to set aside [four of Dearman's] capital-murder convictions and the sentence imposed" for those convictions. See Bohannon v. State, 222 So. 3d 457, 514-15 (Ala. Crim. App. 2015)(holding that remand was necessary for the court to set aside one of the defendant's convictions of capital murder in violation of § 13A-5-40(a)(10) and his resulting sentence imposed for that conviction where the only difference in the two separate indictments, each charging the defendant with the capital murder of the same two victims in violation of § 13A-5-40(a)(10), was that the victims names had been transposed).

XIX.

Lastly,

> "[p]ursuant to § 13A-5-53(a), Ala. Code 1975, this Court must review [Dearman's] death sentence to determine whether any error adversely affecting [Dearman's] rights occurred during the sentencing proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence, and whether death is the proper sentence in this case. In determining whether death is the proper sentence, this Court must determine
>
> > "'(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
> >
> > "'(2) Whether an independent weighing of the aggravating and mitigating circumstances at the

> appellate level indicates that death was the proper sentence; and
>
> "'(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'
>
> "§ 13A-5-53(b), Ala. Code 1975. The determinations required by § 13A-5-53(b) must be 'explicitly address[ed]' by this Court in all cases in which the death penalty has been imposed. § 13A-5-53(c), Ala. Code 1975."

Lane, 327 So. 3d at 777.

Our thorough review of the entirety of the penalty-phase of Dearman's trial reveals that no error occurred that adversely affected Dearman's rights and that the circuit court's findings concerning the aggravating and mitigating circumstances are supported by the evidence presented in the circuit court. Therefore, we will proceed to determine whether the death penalty was the proper sentence in this case.

First, we must consider whether Dearman's death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 13A-5-53(b)(1), Ala. Code 1975. Regarding the jury's sentencing recommendation, the circuit court noted in its order that the jurors "took their responsibilities very seriously" and that "each juror was attentive throughout the trial." (C. 488.) The circuit court also stated that none of

the jurors "exhibited an undue emotional reaction," despite the fact that "much of the evidence was very troubling." (C. 488.) The record indicates that the circuit court carefully and thoroughly weighed the aggravating circumstances and the mitigating circumstances, and there is nothing in the record or in the court's sentencing order suggesting that the court imposed Dearman's death sentence on any improper basis. Thus, we conclude that Dearman's sentence was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." See § 13A-5-53(b)(1).

Next, we must independently weigh the aggravating and mitigating circumstances to determine whether death was the proper sentence. Two of the aggravating factors – that the capital murders were committed during the course of a burglary and that the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct – were considered proven beyond a reasonable doubt by the jury's unanimous verdicts. See § 13A-5-45(e), Ala. Code 1975 (providing that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing"). The circuit

court's order establishes that the court also considered these aggravating circumstances. Additionally, the jury and the circuit court determined that the crimes were "especially heinous, atrocious, or cruel compared to other capital offenses." See § 13A-5-49(8). Although Dearman informed the jury that he was not intending to put on mitigation evidence, the circuit court reviewed the record for mitigation evidence. The court considered each statutory mitigating circumstance, finding only one to exist: that Dearman had no significant history of prior criminal activity. See § 13A-5-51, Ala. Code 1975. The court further found the following nonstatutory mitigating circumstances to exist: 1) that Dearman accepted responsibility for his conduct; and 2) that Dearman expressed regret and sympathy to the victims' families. However, the court determined, "any mitigating evidence regarding Dearman's childhood [was] outweighed by his history recorded in his mental health records," and that "no evidence of [Dearman's] record or character prior to his admissions of guilt for these crimes" constitutes a mitigating circumstance. This Court has thoroughly reviewed the evidence presented in this case and independently weighed the aggravating and mitigating circumstances presented. We agree with both the jury and the

circuit court that the aggravating circumstances outweigh the mitigating circumstances.

Finally, we must consider whether Dearman's sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 13A-5-53(b)(3), Ala. Code 1975. Dearman committed five brutal murders during a burglary and killed five different victims pursuant to one scheme or course of conduct. Thus, we conclude that Dearman's death sentence is not excessive or disproportionate compared to other similar cases. See Floyd v. State, 289 So. 3d 337, 457-58 (Ala. Crim. App. 2017) (affirming death sentence for defendant who murdered former girlfriend during burglary of girlfriend's home and citing additional cases in which murder committed during the course of a burglary has been punished by death); Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016); Mills v. State, 62 So. 3d 553 (Ala. Crim. App. 2008)(death penalty was imposed where defendant committed two murders during two robberies and killed two people pursuant to one scheme or course of conduct); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007).

Based on the foregoing, we conclude that the death penalty was the proper sentence in Dearman's case.

Conclusion

We affirm Dearman's five convictions for capital murder committed during a burglary, and one of his convictions for the murder of two or more people during one scheme or course of conduct. For the reasons stated in Part XVIII of this opinion, this case is remanded to the Mobile Circuit Court for that court to vacate four of Dearman's convictions for murder made capital murder because the victims were murdered by one act or pursuant to one scheme or course of conduct. Due return shall be filed in this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Cole and Minor, JJ., concur. Kellum, J., concurs in part and concurs in the result, with opinion.

KELLUM, Judge, concurring in part and concurring in the result.

I concur in all parts of the main opinion except Part VII, XIII, and XIV. As to those parts, I concur only in the result.