Exhibit 1: Alabama Court of Criminal Appeals Opinion

2023 WL 5316682
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Court of Criminal Appeals of Alabama.

Michael Dale IERVOLINO
v.
STATE of Alabama

CR-21-0283
|
August 18, 2023

**Synopsis**
**Background:** Defendant was convicted in the Circuit Court, St. Clair County, No. CC-20-426, of capital murder and was sentenced to death. Pursuant to statute, an automatic appeal followed.

**Holdings:** The Court of Criminal Appeals, Kellum, J., held that:

prospective juror's indication that she was the first-grade teacher of the county district attorney, who also happened to be the father of the victim, and that she had spoken to friends about the case did not warrant removing juror for cause due to impartiality concerns;

prosecution's peremptory strikes of African American prospective jurors did not constitute a *Batson* violation;

prosecution properly authenticated for its admission into evidence a copy of homeowner's surveillance video;

court reporter's failure to record 21 off-the-record bench conferences was not reversible error;

sufficient evidence supported finding that defendant had the specific intent to kill victim;

prosecutor's reference to another case during rebuttal closing argument at the guilt phase was not improper;

sentencing defendant to death based on a jury vote of 10-2 in favor of the death penalty did not violate the Sixth Amendment; and

death penalty was a proper sentence.

Affirmed.

Kellum, J., specially concurred and filed opinion.

Minor, J., recused himself.

**Procedural Posture(s):** Appellate Review; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection; Jury Selection Challenge or Motion.

**West Codenotes**

**Validity Called into Doubt**
Ala. Code § 13A-5-53(a)

**Appeal from St. Clair Circuit Court (CC-20-426)**

**Opinion**

KELLUM, Judge.

***1** The appellant, Michael Dale Iervolino, was convicted of capital murder for shooting Nicholas Sloan Harmon while Harmon was inside a vehicle. See § 13A-5-40(a)(17), Ala. Code 1975. The jury unanimously found the existence of one aggravating circumstance -- that Iervolino had previously been convicted of a crime involving the use or threat of violence, specifically, assault in the second degree, see § 13A-5-49(2), Ala. Code 1975 -- and, by a vote of 10-2, sentenced Iervolino to death.[1] This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-55, Ala. Code 1975.[2]

Facts and Procedural History

On November 5, 2019, Moody Police Officer Austin Burns was dispatched to the Valero gasoline station on Kelly Creek Road in response to a power outage. When he arrived at the scene, he observed a black four-door Mazda automobile near a power pole. The windows of the vehicle were fogged and the driver's side rear window was "busted." (R. 762.) Harmon was the sole occupant of the vehicle and was unresponsive when

Officer Burns arrived. Harmon was pronounced dead at the scene. Joshua Golden, a forensic scientist with the Center for Applied Forensics at Jacksonville State University, processed the scene, taking photographs and measurements. He found blood spatter on the driver's door and the front passenger's door, and, after Harmon's body was removed from the vehicle, he found a projectile on the driver's seat. Dr. Valerie Green, a medical examiner with the Alabama Department of Forensic Sciences ("DFS") who performed the autopsy on Harmon, testified that Harmon died from a gunshot wound to the left side of his neck that exited through his mouth. Harmon also had blunt-force injuries that were consistent with an automobile accident. Testimony indicated that Harmon had spent the evening with his girlfriend, Annabelle Hemple, at her apartment in Moody and had left Hemple's apartment around 10:50 p.m., driving his black Mazda automobile. Hemple said that the typical route Harmon would drive from her apartment to his home would take him past the Valero gas station.

***2** James Stewart testified that on the evening of November 5, 2019, he was at a friend's house when Iervolino arrived with his girlfriend, Audrey Howard, and three others -- Brent Mays, Dylan Stewart, and Kimberly Brown. Iervolino was driving a Pontiac G6 automobile that was owned by Mays. Stewart left with Iervolino and the others to go to Leeds to procure drugs from Heath Ramey. On the way, Iervolino and Howard got into an argument, and Iervolino stopped near a Wal-Mart discount store where, Stewart said, Iervolino threw Howard's "stuff out of the car and told us all to get out of the car." (R. 893.) Mays left on foot and Stewart did not see him again that night. Howard and Brown walked to a nearby Taco Bell fast-food restaurant, and Iervolino drove to the Murphy's gasoline station located in front of Wal-Mart. Stewart walked to the gas station to "calm [Iervolino] down." (R. 894.) Stewart and Iervolino then left and Iervolino stopped at a Best Western motel. According to Stewart, Iervolino parked beside a white ZA Construction work truck, got out of the vehicle and then "started getting some tools and stuff out of the back of the truck." (R. 894.) Stewart said that he (Stewart) took a set of keys from the truck's toolbox. Stewart and Iervolino then went to Ramey's house in Leeds to pick up drugs. Jacob Wilson was at Ramey's house when they arrived and Stewart saw Wilson give Iervolino a gun, specifically, a Hi-Point 9 mm.

After getting the drugs, Iervolino and Stewart left Ramey's house, picked up Howard and Brown at the Taco Bell near Wal-Mart, then went back to the Best Western motel. Iervolino left him, Howard, and Brown in the Pontiac vehicle and drove away in the white work truck. Because Brown had a curfew, Howard followed Iervolino out of the parking lot in the Pontiac to drive Brown home. On the way, as they approached the Valero gas station, Stewart saw "a flash of light across the sky." (R. 901.) After dropping Brown off at her house, Howard and Stewart drove to Howard's house. On the way, they again passed the Valero gas station, at which time Stewart saw a police vehicle and another vehicle near a power pole. Iervolino arrived at Howard's house shortly after Stewart and Howard did. Iervolino was driving the stolen white work truck, which Stewart said had damage that had not been there earlier. Stewart testified:

> "[Prosecutor]: Now did you have a conversation with [Iervolino] there at [Howard's] house?
>
> "[Stewart]: Yes, sir.
>
> "[Prosecutor]: Tell the ladies and gentlemen of the jury the conversation. Where it was and what was said.
>
> "[Stewart]: Well, I was sitting in [Howard's] house and I was coloring in the coloring book and that's when [Iervolino] came in and said we needed to go.
>
> "[Prosecutor]: The first thing he said is we needed to go?
>
> "[Stewart]: Yes, sir.
>
> "[Prosecutor]: Okay.
>
> "[Stewart]: And we walk outside -- and me and [Iervolino] walked outside while [Howard] is putting her stuff up. Well, he starts taking stuff out of the back of the Pontiac G6 and putting it into the truck. And then he shows me two guns. He shows me a Glock 9 mm and a Hi-Point 9 mm. [3]
>
> "....
>
> "[Prosecutor]: What did he say at that point?
>
> "[Stewart]: He said he had shot him, he had shot him.
>
> "[Prosecutor]: What did you say?
>
> "[Stewart]: I asked him who did he shoot.
>
> "[Prosecutor]: What did he say?
>
> "[Stewart]: He didn't say nothing.

"[Prosecutor]: Okay. So you -- he just says 'I shot him, I shot him'?

"[Stewart]: Yes, sir.

"[Prosecutor]: And you ask who and he didn't reply?

"[Stewart]: Yes, sir.

"[Prosecutor]: What happened next?

"[Stewart]: He wanted me to follow him and [Howard] in that truck to his dad's house.

"[Prosecutor]: Did you do that?

"[Stewart]: No, sir.

"[Prosecutor]: When you were leaving, did you notice anything about the truck -- you said it was damaged. Did you notice anything about the taillights on the back?

"[Stewart]: Yes, sir. The taillight was busted."

(R. 903-907.) Stewart testified that Iervolino gave him the Hi-Point 9mm gun, but instead of following Iervolino, he drove to Ramey's house, gave the gun back to Wilson, and told Wilson that Iervolino had shot someone with the gun.

Jacob Wilson testified that he saw Iervolino on the evening of November 5, 2019, when he came to Ramey's house with Stewart. Noticing that he had a gun, Iervolino asked Wilson if he could "use it." (R. 971.) Wilson let Iervolino borrow the gun. Wilson said that the gun was a Hi-Point handgun, and that it was loaded at the time he loaned it to Iervolino. Later that same night, Wilson said, Stewart returned the gun to him.

***3** Mays testified that after Iervolino made him get out of his Pontiac G6, he walked around for a while and then noticed his vehicle parked at the Best Western motel. According to Mays, when he approached Iervolino, Iervolino said, "I've got this gun and I'm about to steal this truck." (R. 556.) Mays then walked away. As he was walking away, he saw Iervolino drive a truck out of the parking lot, with his Pontiac G6 following close behind.

Cody Cox testified that at around 10:30 p.m. on the evening of November 5, 2019, he was in front of the Best Western motel with his fiancé, Stephanie Ingam, after her shift had ended at the motel, when two men approached them, one of whom he identified at trial as Iervolino. Cox testified:

"He was asking me to take him around the corner of the building, to give him a ride to go get his truck, and all that. I thought it was kind of dumb because, I mean, it's like a hundred yards to walk, so why do I need to give you a ride. So that kind of threw me off a little bit. And then he kept trying and kept trying. Well he got, like -- I don't know. I feel -- I got a bad vibe off of him in all reality. And when he kept trying to get me to go around the corner. ..."

(R. 527-28.) The two men eventually walked away, after which Cox saw a work truck leave with one person inside. Based on Iervolino's odd behavior, Ingam telephoned the police.

Iervolino's cousin, Johnny Bertram, who lived in Irondale in Jefferson County, testified that in the early morning hours of November 6, 2019, Iervolino knocked on his door. As Bertram was talking with Iervolino near the truck Iervolino had arrived in, he saw a shell casing on the driver's side floorboard. Bertram asked Iervolino if he had been firing guns in the truck, and Iervolino said, "Well, yeah." (R. 1026.) Bertram removed the casing from the truck and threw it in his front yard.

Richard Collins testified that he was a manager at ZA Construction and that each of the work trucks was equipped with a tracking system that he could monitor from his cellular telephone. He said that the system would send notifications to him when "there's a harsh event -- harsh turn or harsh brake or a speeding event." (R. 573.) On the evening of November 5, 2019, he said, he received an alert from the tracking system that one of the trucks was traveling at a very high rate of speed. (R. 574.) After contacting several employees, he determined that the truck had been stolen, and he contacted the police. He accessed the data from the global positioning system ("GPS") on the truck, which showed the location of the truck over the previous 24 hours as well as its current location. The tracking system showed that the truck's ignition had started at 10:47 p.m., and that the truck had traveled down Village Drive and then turned onto Carl Jones Road at approximately 10:49 p.m., where it increased speed to 78 miles per hour. It was at that point that Collins received the first alert from the tracking system. From Carl Jones Road, the truck turned onto Park Avenue at 10.54 p.m. and then onto Kelly Creek Road, where

the Valero gas station was located, at 10:55 p.m. Testimony indicated that the Valero gas station was 1.41 miles from the intersection of Carl Jones Road and Park Avenue, and that the power outage at the Valero gas station occurred at 10:56 p.m. when "a vehicle struck a guy wire." (R. 754.) Testimony also indicated that the stolen truck and Harmon's Mazda were both "on Park Avenue from the Carl Jones intersection to the Kelly Creek intersection" at the same time. (R. 1158.) Over the next several hours, Collins kept law enforcement informed about the location of the truck.

***4** Sergeant Brian Hassett, with the Irondale Police Department, testified that on November 5, 2019, he received a call from the dispatcher about a stolen truck. The dispatcher told him that the vehicle had been stolen from a motel parking lot in Moody and that the owner was tracking the truck via GPS. Three Irondale police officers were dispatched to the residence where the GPS indicated the truck was located, but "[a]fter learning of the circumstances of the goings-on in Moody currently," they decided that "it was a better option to just keep eyes on the vehicle and not attempt to make contact." (R. 606.) When the stolen truck left the residence at around 2 a.m. on November 6, 2019, however, officers attempted to stop the vehicle, which resulted in a high-speed chase, with speeds reaching around 100 miles per hour. Irondale police officers pursued the truck into Leeds and into St. Clair County, where additional officers joined the chase. When other officers put spike strips on the road, the truck avoided them by going through a ditch. The officers in pursuit lost the truck, but between 15 and 30 minutes later, Sgt. Hassett said, he received a call from a fellow police officer telling him that the truck had been located.

The truck was found stuck in a ditch in a wooded area near a mobile home on Cline Road in St. Clair County. Officers with the St. Clair County Sheriff's Department and the Moody Police Department responded to the scene. Because there was a steep incline, they had to park and proceed on foot. When the first officers arrived, they heard an engine "revving" and walked toward the sound. (R. 655.) As two officers approached the truck on foot, several gunshots were fired from an unknown location. As additional officers arrived, more gunshots were fired. The special weapons and tactics ("SWAT") team of the St. Clair County Sheriff's Department was called to the scene. At around 7 a.m. the morning of November 6, 2019, the SWAT team deployed gas into the mobile home where they believed the suspect was located and then entered the mobile home, but the mobile home was empty. As Deputy Patrick Adams was leaving the mobile home, he heard a cough. He examined the outside of the trailer and "could see that part of the underpinning for the trailer was missing. So [he] came around the corner with [his] gun drawn and [his] weapon light on, and [he] could see [Iervolino] underneath the trailer." (R. 666.) Iervolino was taken into custody.

The Glock 9 mm handgun was found under the mobile home where Iervolino had been found and the Hi-Point 9 mm handgun was found at Ramey's residence in Leeds. Four shell casings were found in the stolen truck and one was found in Bertram's front yard. Nicholas Drake, a firearms and toolmark examiner with DFS, determined that all five shell casings had been fired from the Hi-Point 9mm. In addition, he said that the projectile found in the driver's seat of Harmon's vehicle had been fired from a Hi-Point firearm, but he could not say conclusively that it had been fired from the gun that had been submitted for comparison.

For his actions the night of November 5, 2019, Iervolino was indicted for two counts of capital murder -- shooting into a vehicle from inside another vehicle and causing the death of Harmon, see §§ 13A-5-40(a)(17) and 13A-5-40(a)(18), Ala. Code 1975 (case no. CC-2020-426) -- as well as one count of theft of property in the first degree, see § 13A-8-3(b), Ala. Code 1975 (case no. CC-2020-427), and one count of unlawful breaking and entering a motor vehicle, see § 13A-8-11(b), Ala. Code 1975 (case no. CC-2020-428). Immediately before trial began, Iervolino pleaded guilty to the theft charge and to the breaking-and-entering charge and, at the sentencing hearing after trial, the trial court sentenced him, as a habitual felony offender, to 20 years' imprisonment for each conviction. Iervolino does not appeal those convictions and sentences. A jury found Iervolino guilty of both counts of capital murder as charged in the indictment and, as noted above, sentenced Iervolino to death, but the trial court set aside the second capital-murder count, specifically, the count charging Iervolino with shooting from inside a vehicle under § 13A-5-40(a)(18).

## Standard of Review

***5** Rule 45A, Ala. R. App. P., as amended effective January 12, 2023, provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals may, but shall not be obligated to, 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."

Before the January 12, 2023, amendment to Rule 45A, the rules of preservation did not apply in cases in which the death penalty had been imposed, and this Court was required to review the entire record for plain error. With the amendment to Rule 45A, the rules of preservation now apply in cases in which the death penalty has been imposed and plain-error review is discretionary with this Court. [4]

This Court chooses to exercise its discretion and to continue to review the entire record for plain error in all cases in which the death penalty has been imposed. Although this Court will continue to review the entire record for plain error in all cases in which the death penalty has been imposed, that does not mean we will address in our opinions those issues a defendant raises that have not been properly preserved for review and are subject only to plain-error review. When plain-error review was mandatory, this Court addressed in its opinion the merits of every issue raised by the defendant in his or her brief on appeal, regardless of whether the issue had been properly preserved for appellate review, oftentimes engaging in extensive and lengthy analyses of even those issues that were reviewed only for plain error. Because plain-error review is now discretionary, it is no longer necessary for this Court to address in its opinions every issue that is subject only to plain-error review and, even if we choose to address those issues, we are not required to engage in the type of in-depth analyses as we have in the past.

That being said, this Court has explained the plain-error standard of review as follows:

> " 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Plain error is 'error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997), modified on other grounds, Ex parte Wood, 715 So. 2d 819 (Ala. 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.' Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So. 2d 237 (Ala. 2000). 'The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant.' Ex parte Trawick, 698 So. 2d at 167. '[P]lain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error.' Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007). Thus, '[u]nder the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial.' Wilson v. State, 142 So. 3d 732, 751 (Ala. Crim. App. 2010). '[T]he plain error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982))."

***6** DeBlase v. State, 294 So. 3d 154, 182-83 (Ala. Crim. App. 2018).

## Analysis

### I.

Iervolino contends that the trial court erred in requiring him to wear a stun belt during his trial because, he says, "to wear a stun belt without subjecting this decision to any scrutiny violated Mr. Iervolino's rights to fully participate in his trial and communicate with his lawyers, as well as his rights to due process, a fair trial, and a reliable conviction and sentence." (Iervolino's brief at p. 46.) The State asserts that Iervolino did not object to the stun belt and that the trial court's requiring him to wear the belt did not rise to the level of plain error. [5] We agree with the State. Because there was no objection to the use of a stun belt, this issue was not properly preserved for review and is subject only to plain-error review.

We find no plain error in the use of the stun belt. See Floyd v. State, 289 So. 3d 337, 369-71 (Ala. Crim. App. 2017); Reynolds v. State, 114 So. 3d 61, 81-82 (Ala. Crim. App.

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2010); McMillan v. State, 139 So. 3d 184, 228-29 (Ala. Crim. App. 2010); Belisle v. State, 11 So. 3d 256, 281-82 (Ala. Crim. App. 2007), aff'd, 11 So. 3d 323 (Ala. 2008); and Hyde v. State, 13 So. 3d 997, 1005-07 (Ala. Crim. App. 2007).

II.

Iervolino contends that the trial court erred in denying his motion for a change of venue because, he says, Harmon's relationship to the St. Clair County District Attorney resulted in widespread and prejudicial media coverage of the case, rendering it impossible for him to receive a fair trial in St. Clair County.

In March 2021 Iervolino filed a motion for a change of venue, arguing that he could not obtain a fair trial in either St. Clair County "or counties in proximity to St. Clair" because Harmon was the son of the St. Clair County District Attorney and because, he said, there had been extensive media coverage and "public expression" about the case. (C. 93-4.) He asserted:

> "[Iervolino] avers that the news coverage and social media coverage of this killing, investigation and murder was extensive, and pervasively saturated the area of St. Clair County and counties in proximity thereto. Further, the news media's use of the relationship of the victim to the District Attorney as a main focus of coverage was sensational and was intended to affect the reader's interest in the story with a fact not relevant to the crime but intended to peak the emotion and sympathy of the reader or viewer to an extent and in a way not normally found in criminal cases."

(C. 95.)

At a pretrial hearing in August 2021, defense counsel presented to the trial court numerous news articles involving the case. The following occurred:

> "THE COURT: The issue of pretrial publicity here, is it based on any evidence-based analysis or investigation that has taken place by an investigator in essence this, we have newspaper articles -- we're going to have newspaper articles anywhere in the State of Alabama. For instance -- and I went through exhaustively -- Trussville's in Jefferson County; Anniston is Calhoun County; St. Clair Times is St. Clair; Al.com is statewide; Gadsden, Etowah; WBRC, North Central. And you can go on and on. If it's limited to the pretrial publicity alone prong that I'm reviewing -- if it's limited to pretrial publicity alone, regardless of the relationship of the young man and what his father does for a living, then I think you have to go a little further and say we've reached out to people in the community, people in the community have indicated they have heard of the case, people in the community have indicated they could not be fair or unbiased. Not that that is a necessary component of a change of venue, but do we have anything being asserted in that respect?
>
> ***7** "[Defense counsel]: Your Honor, we have no evidence to offer of that. And I would just say quickly that the decision you have to make in something like that is if the trial is ultimately here, those kind of -- that kind of polling is difficult sometimes to pull off without becoming a part of the problem yourself is -- to get anything that's statistically significant. So, no we have not done that. And that was a long answer to tell you that no, we don't have any more evidence from that question that you just asked.
>
> "....
>
> "[Prosecutor]: Just looking at what was submitted today -- and, like I said, I've seen that before. But what was submitted today is a total of 17 articles. Eleven of them were before [Iervolino] was even charged with the murder of Nicholas Harmon. And in none of these articles -- they were all factual. None of them state that [Iervolino] was guilty of any crime. None of them will state or -- basically what should happen, what the paper thinks ought to happen. None of them state that because [the victim is] the DA's son, he ought to be convicted. None of them state because he's the DA's son should -- that anything should happen or he be treated any way.
>
> "There's two ways you prove this. I haven't heard either one proved and it's [Iervolino's] burden to prove to the Court that there's actual prejudice -- there's absolutely zero proof of actual prejudice -- or that when the presumed prejudice resulting from community saturation with which such prejudicial proof of pretrial publicity that no impartial jury can be selected.
>
> > "Now if we want to talk about saturated, I think we'd all agree the Coronavirus is saturated. That's what saturation is, all day every day they're talking about the Harmon family and their loss. That just hasn't happened

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here, and it's been factual if it was reported."

(Supp. R. 168-75.) The prosecutor then asserted that the prudent thing to do would be to empanel a sufficient number of jurors and question them concerning their knowledge of the case. A lengthy discussion between the trial court and the parties ensued. The trial court issued a five-page order denying the motion for a change of venue, in which it stated that it intended to conduct a "thorough voir dire examination of the prospective jurors." (C. 134.)

The record reflects that there were 70 prospective jurors on the venire. Only 18 of those prospective jurors indicated that they had heard about the case. Those 18 prospective jurors were questioned individually. The trial court removed six of those prospective jurors for cause based on their knowledge of the case and one because, the trial court said, she appeared to be "breaking down emotionally." (R. 413-15.)

> " 'When requesting a change of venue, "[t]he burden of proof is on the defendant to "show to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried.' " ' Jackson v. State, 791 So. 2d 979, 995 (Ala. Crim. App. 2000) (quoting Hardy v. State, 804 So. 2d 247, 293 (Ala. Crim. App. 1999), aff'd, 804 So. 2d 298 (Ala. 2000), quoting in turn Rule 10.1(b), Ala. R. Crim. P.).
>
> " '[T]he determination of whether or not to grant a motion for change of venue is generally left to the sound discretion of the trial judge because he has the best opportunity to assess any prejudicial publicity against the defendant and any prejudicial feeling against the defendant in the community which would make it difficult for the defendant to receive a fair and impartial trial.' " Nelson v. State, 440 So. 2d 1130, 1132 (Ala. Crim. App. 1983). Therefore, '[a] trial court's ruling on a motion for a change of venue is reviewed for an abuse of discretion.' Woodward v. State, 123 So. 3d 989, 1049 (Ala. Crim. App. 2011).
>
> ***8** " 'In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated "actual prejudice" against him on the part of the jurors; 2) when there is "presumed prejudice" resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected.'
>
> "Hunt v. State, 642 So. 2d 999, 1042-43 (Ala. Crim. App. 1993), aff'd, 642 So. 2d 1060 (Ala. 1994).
>
> "....
>
> " 'Actual prejudice exists when one or more jurors indicated before trial that they believed the defendant was guilty, and they could not set aside their opinions and decide the case based on the evidence presented at trial.' Hosch v. State, 155 So. 3d 1048, 1118 (Ala. Crim. App. 2013). 'The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved.' Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985). ' "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court...." ' Id. (quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)).
>
> "....
>
> "Prejudice is presumed ' "when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." ' Hunt[ v. State], 642 So. 2d [999,] 1043 [(Ala. Crim. App. 1993)] (emphasis omitted) (quoting Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)). ' "To justify a presumption of prejudice under this standard, the publicity must be both extensive and sensational in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice." ' Jones v. State, 43 So. 3d 1258, 1267 (Ala. Crim. App. 2007) (quoting United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990)). 'In order to show community saturation, the appellant must show more than the fact "that a case generates even widespread publicity." ' Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993) (quoting Thompson v. State, 581 So. 2d 1216, 1233 (Ala. Crim. App. 1991)). Only when 'the pretrial publicity has so "pervasively saturated" the community as to make the "court proceedings nothing more than a 'hollow formality' " ' will presume prejudice be found to exist. Oryang, 642 So.2d at 983 (quoting Hart v. State, 612 So. 2d 520, 526-27 (Ala. Crim. App.), aff'd, 612 So. 2d 536 (Ala.

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1992), quoting in turn, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)). 'This require[s] a showing that a feeling of deep and bitter prejudice exists in [the county] as a result of the publicity.' Ex parte Fowler, 574 So. 2d 745, 747 (Ala. 1990).

"In determining whether presumed prejudice exists, we look at the totality of the circumstances, including the size and characteristics of the community where the offense occurred; the content of the media coverage; the timing of the media coverage in relation to the trial; the extent of the media coverage; and the media interference with the trial or its influence on the verdict. See, e.g., Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), and Luong v. State, 199 So. 3d 139, 146 (Ala. 2014). '[T]he "presumptive prejudice" standard is " 'rarely' applicable, and is reserved for only 'extreme situations.' " ' Whitehead v. State, 777 So. 2d 781, 801 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 854 (Ala. 2000) (quoting Hunt, 642 So. 2d at 1043, quoting in turn, Coleman, 778 F.2d at 1537)."

***9** Floyd v. State, 289 So. 3d 337, 372-74 (Ala. Crim. App. 2017).

"[T]he Alabama Supreme Court in Luong v. State, 199 So. 3d 139 (Ala. 2014), recognized the difficulty of establishing that a motion for a change of venue is warranted based on a claim of prejudicial pretrial publicity." Thompson v. State, 310 So. 3d 850, 865 (Ala. Crim. App. 2018). In Luong, the defendant was convicted of killing his four children by throwing them off a bridge. The Alabama Supreme Court, in declining to find that the extensive media coverage of the case warranted a change of venue, stated:

" 'If, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished. The law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system.' "

Luong, 199 So. 3d at 150 (quoting Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975)).

The media coverage in this case was not as extensive as the coverage in Luong, and this case is not one of those rare cases where a change of venue was warranted. As the State asserted at the pretrial hearing, the majority of the articles that defense counsel presented were written before an arrest had been made in the case. The articles were factual accounts of the murder and the subsequent investigation of that murder by law enforcement. As stated above, out of 70 prospective jurors, only 18 had heard about the case, and only 6 of those were removed for cause because of their knowledge of the case. There is no indication in the record that the remaining 12 prospective jurors who had heard about the case had any preconceived view of the case based on their exposure to any type of media coverage. Iervolino failed to meet his burden of establishing that he could not receive a fair and impartial trial in St. Clair County. Therefore, the trial court properly denied Iervolino's motion for a change of venue.

III.

Iervolino contends that the trial court's voir dire process violated state and federal law because, he says, it was inadequate. He asserts that voir dire took less than one day and that "the entire extent of the trial court's voir dire on the threat of impartiality due to the victim's identity and pretrial publicity was asking each panel leading questions about whether anyone knew anything about the case or had been exposed to any coverage of the case." (Iervolino's brief at p. 56.) Iervolino did not object to the trial court's method of conducting voir dire; therefore, this issue was not properly preserved for review, and it is subject only to plain-error review.

" 'A trial court is vested with great discretion in determining how voir dire examination will be conducted, and that court's decision on how extensive a voir dire examination is required will not be overturned except for an abuse of that discretion.' Ex parte Land, 678 So. 2d 224, 242 (Ala.), cert. denied, 519 U.S. 933, 117 S.Ct. 308, 136 L.Ed.2d 224 (1996)."

***10** Whitehead v. State, 777 So. 2d 781, 798 (Ala. Crim. App. 1999). "The trial court controls the scope of the voir dire examination." King v. State, 790 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 2001). "The scope of the voir dire examination of veniremembers is left largely to the discretion of the trial court and will not be disturbed on appeal on the ground

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that voir dire examination was limited absent an abuse of that discretion." Smith v. State, 698 So. 2d 189, 198 (Ala. Crim. App. 1996). "We give the trial court broad discretion in determining the scope and the form in which the voir dire questions are propounded, and the length of an inquiry, alone, does not satisfy the high bar necessary to show an abuse of discretion." Thomas v. State, 454 Md. 495, 508-09, 165 A. 3d 368, 376 (2017).

As stated previously, after various prospective jurors were excused for hardship or illness, the remaining 70 prospective jurors were subject to voir dire examination. The prospective jurors were questioned in a group concerning their general qualifications and were then split into panels. They were questioned about their knowledge of the case by the trial court and by both the prosecutor and defense counsel. Follow-up questions were asked of those prospective jurors who answered that they had heard about the case and those prospective jurors that said they would have difficulties voting for a sentence of death. There is no indication that voir dire was inadequate or insufficient to disclose any prejudice that a prospective juror may have had. The trial court did not prevent either party from questioning the prospective jurors on any matter and did not restrict the time either party had to question prospective jurors. See Broadnax v. State, 825 So. 2d 134, 162 (Ala. Crim. App. 2000) ("A complete review of the voir dire indicates that the method of the examination and the precautions taken by the trial court 'provided reasonable assurance that prejudice would have been discovered if present.' Haney v. State, 603 So. 2d [368] at 402 [(Ala. Crim. App. 1991)]."). We find no error, much less plain error, in the trial court's method of voir dire.

IV.

Iervolino contends that the trial court erred in death-qualifying prospective jurors because, he says, death-qualified juries are "significantly more prone to convict than ordinary ones." (Iervolino's brief at p. 92.) However, " '[a]ppellate courts in Alabama have repeatedly held that there is no violation of state or federal law in death-qualifying prospective jurors in a capital case, even if it results in a more conviction-prone jury.' " Smith v. State, [Ms. CR-17-1014, September 2, 2022] ––– So. 3d ––––, –––– (Ala. Crim. App. 2022) (quoting Jackson v. State, 305 So. 3d 440, 465 (Ala. Crim. App. 2019)). Therefore, this claim is meritless.

V.

Iervolino contends that the trial court erred in not removing for cause prospective jurors J.A., Mi.B., B.S., R.H., and De.C. because, he says, they were unable to be impartial. Iervolino removed all five prospective jurors using peremptory strikes. [6] Iervolino challenged De.C. for cause, and the trial court denied the challenge, but he did not challenge for cause J.A., Mi.B., B.S., or R.H. Therefore, with respect to J.A., Mi.B., B.S., and R.H., this issue was not properly preserved for review and is subject only to plain-error review.

> " 'To justify a challenge of a juror for cause there must be a statutory ground (Ala. Code Section 12-16-150 (1975)), or some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.' Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App.), aff'd, 435 So. 2d 151 (Ala. 1983). Section 12-16-150 sets out the grounds for removal of veniremembers for cause in criminal cases .... In addition to the statutory grounds, there are other common-law grounds for challenging veniremembers for cause where those grounds are not inconsistent with the statute. Smith v. State, [213 So. 3d 108 (Ala. Crim. App. 2000)], aff'd in pertinent part, rev'd in part, [213 So. 3d 214] (Ala. 2003); Kinder v. State, 515 So. 2d 55, 60 (Ala. Crim. App. 1986). Here, we are dealing with the common-law ground for challenge of suspicion of bias or partiality. See discussion of the common-law grounds for challenge in Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002), remanded for resentencing, 909 So. 2d 283 (Ala. 2003). Ultimately, the test to be applied is whether the veniremember can set aside his or her opinions, prejudices, or biases, and try the case fairly and impartially, according to the law and the evidence. Smith v. State, supra. This determination of a veniremember's absolute bias or favor is based on the veniremember's answers and demeanor and is within the discretion of the trial court; however, that discretion is not unlimited. Rule 18.4(e), Ala. R. Crim. P., provides, in part: 'When a prospective juror is subject to challenge for cause or it reasonably appears that the prospective juror cannot or will not render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse that juror from service in the case.' Even proof that a veniremember has a bias or fixed opinion is insufficient to support a challenge for cause. A prospective juror should

not be disqualified for prejudice or bias if it appears from his or her answers and demeanor that the influence of that prejudice or bias can be eliminated and that, if chosen as a juror, the veniremember would render a verdict according to the law and the evidence. Mann v. State, 581 So. 2d 22, 25 (Ala. Crim. App. 1991); Minshew v. State, 542 So. 2d 307 (Ala. Crim. App. 1988)."

***11** McGowan v. State, 990 So. 2d 931, 951 (Ala. Crim. App. 2003).

"A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' [Wainwright v.] Witt, 469 U.S. [412] at 429, 105 S.Ct. [844] at 855, 83 L.Ed.2d 841 [ (1985)]. That finding must be accorded proper deference on appeal. Id. 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' Nobis v. State, 401 So. 2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So. 2d 204 (Ala. 1981)."

Martin v. State, 548 So. 2d 488, 490-91 (Ala. Crim. App. 1988).

A.

Iervolino argues that the trial court should have removed J.A. and Mi.B. for cause because, he says, they both stated during voir dire that they would give added weight to the testimony of police officers. During voir dire examination by defense counsel, both J.A. and Mi.B. answered in the affirmative when asked if they would "put more stock, generally speaking, in a witness who is law enforcement" and "give a little more weight" to law-enforcement witnesses "as opposed to a layperson." (R. 347.) Defense counsel asked no follow-up questions.

"Alabama law has long held that the mere fact that a prospective juror expresses an opinion that law-enforcement officials would be more likely to tell the truth when compared to other witnesses does not constitute a sufficient reason for granting a challenge for cause, so long as the juror can set aside his opinion and decide the case based solely on the law and the evidence presented at trial. See, e.g., Ex parte Myers, 699 So. 2d 1285, 1290 (Ala. 1997); Knotts v. State, 686 So. 2d 431, 477 (Ala. Crim. App.), opinion after remand, 686 So. 2d 484 (Ala. Crim. App. 1995), aff'd, 686 So.2d 486 (Ala.1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997); Grimsley v. State, 678 So. 2d 1197, 1210 (Ala. Crim. App. 1996); Stephens v. State, 675 So. 2d 73, 76 (Ala. Crim. App. 1995); McCray v. State, 629 So. 2d 729, 733 (Ala. Crim. App. 1993); Perryman v. State, 558 So. 2d 972, 977 (Ala. Crim. App. 1989). It is only where the potential juror would ' "unquestioningly credit the testimony of law enforcement officers over that of defense witnesses," ' that would render a prospective juror incompetent to serve. Uptain v. State, 534 So. 2d [686,] 687 [(Ala. Crim. App. 1988)], abrogated on other grounds, Bethea v. Springhill Memorial Hospital, 833 So. 2d 1, 6-7 (Ala. 2002) (quoting State v. Davenport, 445 So. 2d 1190, 1193-94 (La. 1984))."

Duke v. State, 889 So. 2d 1, 23 (Ala. Crim. App. 2002), judgment vacated on other grounds by Duke v. Alabama, 544 U.S. 901, 125 S.Ct. 1588, 161 L.Ed.2d 270 (2005). Neither J.A. nor Mi.B. indicated that they would "unquestioningly credit the testimony of law enforcement officers over that of defense witnesses."

In Graham v. State, 299 So. 3d 273, 295 (Ala. Crim. App. 2019), this Court held that the trial court should have removed for cause a prospective juror who had indicated that she would credit the testimony of a law-enforcement officer more than the testimony of lay witnesses because no follow-up questions were asked of the prospective juror and she was not rehabilitated. However, in Graham, the defendant had not only preserved the issue for appellate review by challenging the prospective juror for cause, but the prospective juror personally knew one of the law-enforcement officers who testified at trial and had stated that she would trust that officer above others because of her personal relationship which him. In this case, Iervolino did not challenge J.A. and Mi.B. for cause, and J.A. and Mi.B. were asked only whether they would give more credit to law-enforcement witnesses generally, not whether they would give more credit to a specific law-enforcement officer's testimony.

***12** "[I]t will be a rare case in which plain error is found based on a trial court's failure to strike a juror sua sponte." State v. Pike, 614 S.W.3d 651, 656-57 (Mo. App. W.D. 2021).

"A majority of the federal circuit courts of appeals will not consider a biased-juror argument if the appellant did

> not object to the allegedly biased juror during the jury-selection process. See United States v. Johnson, 688 F.3d 494, 500-01 (8th Cir. 2012); Dawson v. Wal–Mart Stores, Inc., 978 F.2d 205, 210 (5th Cir. 1992); United States v. Joshi, 896 F.2d 1303, 1307–08 (11th Cir. 1990); United States v. Reis, 788 F.2d 54, 59 (1st Cir. 1986); United States v. Diaz–Albertini, 772 F.2d 654, 657 (10th Cir. 1985); United States v. Harris, 530 F.2d 576, 579–80 (4th Cir. 1976); United States v. Ragland, 375 F.2d 471, 475 (2d Cir. 1967).

State v. Geleneau, 873 N.W.3d 373, 380-81 (Minn. App. 2015).

> "[I]f a trial court strikes a juror sua sponte and the defendant is convicted, the defendant later could challenge his conviction on the ground that the trial court erred in striking the juror. As the Missouri Court of Appeals observed in holding that a trial court did not commit plain error in failing to sua sponte strike a questionable juror: ' "[t]he rule requiring contemporaneous objections to the qualifications of jurors is well founded. It serves to minimize the incentive to sandbag in the hope of acquittal and, if unsuccessful, mount a postconviction attack on the jury selection process." ' State v. Wright, 30 S.W.3d 906, 914 (Mo. Ct. App. 2000), quoting State v. Hadley, 815 S.W.2d 422, 423 (Mo. 1991)."

People v. Metcalfe, 202 Ill. 2d 544, 556, 270 Ill. Dec. 69, 77, 782 N.E.2d 263, 271 (2002). " 'Counsel with knowledge of a disqualification of a juror may not remain silent and gamble on a favorable verdict and if unfavorable, raise the matter in a motion for new trial.' " Fisher v. State, 587 So. 2d 1027, 1035 (Ala. Crim. App. 1991) (quoting Daniels v. State, 49 Ala. App. 654, 275 So. 2d 169, 172-73 (1973)). We find no plain error in the trial court's not sua sponte removing for cause prospective jurors J.A. and Mi.B.

B.

Iervolino argues that the trial court should have removed prospective jurors B.S. and R.H. for cause because B.S. indicated that his brother and sister-in-law had been murdered and R.H. indicated that he had been the victim of an act of road rage. However, neither B.S. nor R.H. indicated any type of bias against Iervolino. Therefore, we find no plain error in the trial court's not sua sponte removing B.S. and R.H. for cause.

C.

Iervolino argues that the trial court erred in denying his challenge for cause as to prospective juror De.C. because, he says, De.C. indicated that she had taught Harmon's father, the St. Clair County District Attorney, in elementary school and that she had spoken to friends about the case.

De.C. volunteered that she had taught the District Attorney when he was in the first grade. When asked follow-up questions, De.C. said that she "could make a judgment" and be fair. (R. 211.) Later during voir dire, De.C. indicated that she had heard about the case, but she said that she could put that aside and base her decision strictly on the evidence in the case.

> ***13** " '[T]he mere fact that a prospective juror is personally acquainted with the victim [or his family] does not automatically disqualify a person from sitting on a criminal jury.' Brownlee v. State, 545 So. 2d 151, 164 (Ala. Cr. App. 1988), affirmed, 545 So. 2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).... Instead, the test is 'whether the [prospective] juror's acquaintance with [the victim] or relative is such that it would result in probable prejudice.' Vaughn v. Griffith, 565 So. 2d 75, 77 (Ala. 1990), cert. denied, 498 U.S. 1097, 111 S.Ct. 987, 112 L.Ed.2d 1072 (1991)."

Morrison v. State, 601 So. 2d 165, 168 (Ala. Crim. App. 1992).

Here, De.C.'s responses do not indicate that she was biased against Iervolino in any way, and she made it clear that she could be fair and base her decision solely on the evidence. Therefore, the trial court did not err in denying Iervolino's challenge for cause as to De.C.

VI.

Iervolino contends that the trial court erred in denying his motion made pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), because, he

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says, the State exercised its peremptory strikes in a racially discriminatory manner.

"In evaluating a Batson claim, a three-step process must be followed. See Foster v. Chatman, 578 U.S. [488], 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016); Snyder v. Louisiana, 552 U.S. 472, 476-77, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); and Batson, 476 U.S. at 96-98, 106 S.Ct. 1712.

" 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson,] 476 U.S. at 96-97[, 106 S.Ct. 1712]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98[, 106 S.Ct. 1712]. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98[, 106 S.Ct. 1712].'

"Miller-El, 537 U.S. at 328-29, 123 S.Ct. 1029.

"When a trial court does not make an express finding that the defendant has established a prima facie case of discrimination under the first step of the process but the prosecution nonetheless provides reasons for its strikes under the second step of the process, 'this Court will review the reasons given and the trial court's ultimate decision on the Batson motion without any determination of whether the moving party met its burden of proving a prima facie case of discrimination.' Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997). ...

" 'Within the context of Batson, a "race-neutral" explanation "means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991).'

"Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994) (emphasis added). 'The second step of this process does not demand an explanation that is persuasive, or even plausible.' Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). ...

" 'Once the prosecutor has articulated a nondiscriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. [People v.] Wheeler, 22 Cal.3d [258] at 282, 583 P.2d [748] at 763-64, 148 Cal.Rptr. [890] at 906 [(1978)]. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:

***14** " '1. The reasons given are not related to the facts of the case.

" '2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.

" '3. Disparate treatment -- persons with the same or similar characteristics as the challenged juror were not struck....

" '4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors....

" '5. The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire....

" '6. "[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically." Slappy [v. State], 503 So. 2d [350] at 355 [(Fla. Dist. Ct. App. 1987)]. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror.'

"Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). ' "The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and as well, in light

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of the strength of the prima facie case." ' Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991) (quoting Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987)). In other words, all relevant circumstances must be considered in determining whether purposeful discrimination has been shown. See Snyder, 552 U.S. at 478, 128 S.Ct. 1203 ('[I]n reviewing a ruling claimed to be a Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.').

" '[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." ' Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (quoting Purkett, 514 U.S. at 768, 115 S.Ct. 1769). Because ' "[t]he trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses," ' Harris v. State, 2 So. 3d 880, 899 (Ala. Crim. App. 2007) (quoting Heard v. State, 584 So. 2d 556, 561 (Ala. Crim. App. 1991)), an appellate court must give deference to a trial court's findings and ' "reverse the circuit court's ruling on the Batson motion only if it is 'clearly erroneous.' " 'Johnson v. State, 43 So. 3d 7, 12 (Ala. Crim. App. 2009) (quoting Cooper v. State, 611 So. 2d 460, 463 (Ala. Crim. App. 1992), quoting in turn Jackson v. State, 549 So. 2d 616, 619 (Ala. Crim. App. 1989))."

DeBlase v. State, 294 So. 3d 154, 201-02 (Ala. Crim. App. 2018).

After challenges for cause, 56 prospective jurors remained on the venire, 5 of whom were black. Each party had 22 peremptory strikes, with the last 3 strikes serving as alternates, and the State struck all 5 black prospective jurors, using its 5th, 8th, 12th, 16th, and 18th strikes to strike black prospective jurors Y.C., S.J., J.M., J.T., and H.B. At the conclusion of the striking process, Iervolino argued that the State had violated Batson by removing all black prospective jurors from the venire. Although the trial court did not make a finding that Iervolino had established a prima facie case of discrimination, it requested that the State give its reasons for striking the black jurors. Therefore, we review the State's reasons without determining whether there was a prima facie case of discrimination. The State indicated that it struck Y.C. because Y.C. has an "extensive speeding" record and had "held himself out as a mental health professional." (R. 423.) According to the State, it had "information from the defense that they may call a mental health professional and [defense counsel] been seeking mental health records of the defendant, and we do not want to have a mental health professional on the jury." (R. 423.) The State struck S.J. because "[s]he has an extensive speeding history and an extensive involvement with law enforcement in speeds over 25 miles an hour" (R. 422), and because she was wearing a mask. (R. 424.) The State struck J.M. because, based on the past and current lawsuits J.M. had in Talladega County, it had a good faith belief that J.M. may not have been a resident of St. Clair County:

***15** "[J.M.] has had contacts with Talladega County. His family is from Talladega County. We've prosecuted many [relatives of J.M.] in Talladega County. He also shows civil lawsuits that are pending in Talladega County within the last six months, so that would show that he has some contact with Talladega County. I wonder if he's even qualified, but you did qualify him as a juror. But out of an abundance of caution, we didn't want to get into the fact of whether he's lived here for six months or nine months or how many months."

(R. 422.) The State struck J.T. because

"[J.T.] has an extensive speeding history. He has [an] expired tag. He's been speeding over -- in excess of 85 miles an hour, which in this case we intend to show that the stolen truck that [Iervolino] stole went in excess of over 85 miles an hour and we intend to make a big deal out of the fact that someone was speeding 80 miles an hour going down -- downtown Leeds; and if he thinks that that's okay and has done such himself, then he needs to be struck."

(R. 423.) Finally, the State struck H.B. because H.B. was wearing a mask. Upon questioning by the trial court, the State indicated that it had stricken every prospective juror who was wearing a mask and every prospective juror who had an extensive history of speeding.

In response to the State's striking prospective jurors with a history of speeding, defense counsel stated that he did not "know what records the [prosecutor] has investigated," that defense counsel did not have "access to those traffic offenses for all of the jurors" and that the information was "not what we learned from the jury." (R. 424-25.) The State then

asserted that defense counsel "may have access to AlaCourt [the Alabama judicial electronic filing system] as do we, which would be a source and our source for speeding." (R. 425.) Defense counsel had no response to the State's striking prospective jurors for wearing a mask or for striking J.M. because he had past and current lawsuits in Talladega County and may not have been a resident of St. Clair County. Defense counsel agreed that Y.C. had indicated that he had experience in the mental-health field. The trial court denied the Batson motion, finding that the State's strikes were not racially motivated, after which the court recessed for the evening.

The following morning, the trial court revisited the Batson motion after noting that one of the 15 empaneled jurors was wearing a mask. The State again indicated that it had stricken all prospective jurors wearing masks, including the empaneled juror who was wearing a mask, who the record reflects was the State's last strike and was an alternate juror. The State then explained further why it had stricken all prospective jurors who wore masks:

> "When I saw those jurors and those had [masks] on, it concerned me that they might hold it against us somehow or if I'm up here near the rail talking, they may back up, they may be concerned, they may be immunocompromised, they may be concerned about the flu. But that's my reasoning is I didn't want them distracted from this -- the facts of this case by 'Am I going to be endangered by the witness who is up there started coughing on the witness stand.' That is a race-neutral reason."

(R. 441-42.)

On appeal, Iervolino does not argue that the State's reasons for its strikes of black prospective jurors were not race-neutral. Rather, he makes several arguments regarding why he believes the State's reasons were pretextual. None of the arguments Iervolino makes on appeal, however, were presented to the trial court. Therefore, they were not properly preserved for review and are subject only to plain-error review. Suffice it to say, we have thoroughly reviewed the record, and we find that the State's reasons for the strikes were not pretextual and that there was no error, much less plain error, in the trial court's denial of Iervolino's Batson motion. We note that with respect to the State's striking prospective jurors with a history of speeding, Iervolino relies, in part, on records from Alacourt that, he says, show that the State did not strike several white jurors who had a history of speeding. However, the records from Alacourt are not in the record on appeal and " '[t]his Court is bound by the record on appeal and cannot consider facts not contained in the record.' " McCary v. State, 93 So. 3d 1002, 1008 (Ala. Crim. App. 2011) (quoting Morrow v. State, 928 So. 2d 315, 320 n.5 (Ala. Crim. App. 2004)). In addition, the records from Alacourt were not presented to the trial court. We will not find error on the part of the trial court in denying a Batson motion based on evidence that was not presented to it.

VII.

***16** Iervolino contends that the trial court erred in admitting into evidence two surveillance videos because, he says, the State failed to present sufficient evidence to authenticate the videos. Specifically, he challenges the admission of a surveillance video from Bertram's home-surveillance system depicting Iervolino at Bertram's house in the early morning hours of November 6, 2019. He also challenges the admission of a surveillance video of the night of November 5, 2019, from a Comfort Inn motel next door to the Best Western motel where the ZA construction work truck was stolen. Iervolino did not object to the admission of either surveillance video. Therefore, this issue was not properly preserved for review and is subject only to plain-error review.

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

would have sensed what the photograph, etc., records. Wigmore, supra, § 790, and McCormick, supra, § 214.

"…. The proper foundation required for admission into evidence of a sound recording or other medium by which a scene or event is recorded (e.g., a photograph, motion picture, videotape, etc.) depends upon the particular circumstances. If there is no qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the 'silent witness' foundation must be laid. Under the 'silent witness' theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability.

"….

"On the other hand, when a qualified and competent witness can testify that the sound recording or other medium accurately and reliably represents what the witness sensed at the time in question, then the foundation required is that for the 'pictorial communication' theory. Under this theory, the party offering the item must present sufficient evidence to meet the 'reliable representation' standard, that is, the witness must testify that the witness has sufficient personal knowledge of the scene or events pictured or the sounds recorded and that the item offered accurately and reliably represents the actual scene or sounds."

Ex parte Fuller, 620 So. 2d 675, 678 (Ala. 1993).

With respect to the surveillance video from Bertram's house, the record reflects that Moody Police Officer Christopher Benninger viewed the video and recorded it using his cellular telephone. Officer Benninger testified:

"[Prosecutor]: When you saw that on the video footage, what did you do?

"[Off. Benninger]: He had no way of downloading it or anything, so I got my work iPhone out and I video-recorded it with the iPhone.

***17** "[Prosecutor]: So you took your personal -- not your personal, but your work iPhone video mechanism is recording [sic], right?

"[Off. Benninger]: Yes, ma'am.

"[Prosecutor]: And is that a phone that you use in the ordinary course of policing?

"[Off. Benninger]: Yes, ma'am.

"[Prosecutor]: And you're familiar with how that works?

"[Off. Benninger]: Yes, ma'am.

"[Prosecutor]: And you're familiar with how that records and how it downloads and saves? "[Off. Benninger]: Yes, ma'am.

"[Prosecutor]: So you pulled out your iPhone and you actually recorded what you are seeing with your own eyes at that residence?

"[Off. Benninger]: Yes, ma'am."

(R. 722-723.) Officer Benninger testified that the video he made with his phone was an accurate copy of what he saw on Bertram's surveillance system. In addition, Bertram testified about Iervolino and Iervolino's girlfriend coming to his house on November 5, 2019, at around midnight. During his testimony, the prosecutor played the video for Bertram and asked Bertram questions about the video and what it depicted. Bertram's testimony, in essence, verified the content of the video that Officer Benninger had made from Bertram's surveillance system.

With respect to the surveillance video from the Comfort Inn, Vallabhbhai "Peter" Patel testified that he was the owner and operator of the Comfort Inn in November 2019. He said that, at that time, the motel had a surveillance system, that the system had five or six cameras, that the cameras recorded the outside of the motel, and that the motel had had the system for approximately six years. According to Patel, he gave agents with the Federal Bureau of Investigation ("FBI") access to the system and they downloaded footage from the night of November 5, 2019. Patel testified that he watched the video that had been downloaded and that it "accurately reflect[ed]

the hotel landscape." (R. 511.) Patel also testified that the surveillance system worked accurately and had not had any malfunctions. In addition, the video was played during the testimony of Cody Cox, who was at the Best Western motel the night of November 5, 2019, and he verified the contents of the video based on what he observed that night.

Based on the testimony above, we conclude that the State properly authenticated both surveillance videos. Therefore, we find no error, much less plain error, in the admission of the videos.

VIII.

Iervolino contends that the trial court erred in admitting photographs of Harmon's injuries and of the crime scene. Specifically, he argues that the photographs were cumulative, irrelevant, inflammatory, and had "little to no probative value." (Iervolino's brief at p. 86.) In his brief, Iervolino cites to pages 287-369 and 537-50 in the clerk's record,[7] but he specifically challenges only the "42 autopsy photographs ...and several additional photographs of the deceased victim at the scene," the "six nearly identical photographs" showing blood on Harmon's hands, photographs showing redness on Harmon's back, and photographs showing a metal dowel running through Harmon's head depicting the trajectory of the bullet. (Iervolino's brief at p. 86.)

> ***18** " '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). 'Photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome.' Williams v. State, 506 So. 2d 368, 371 (Ala. Crim. App. 1986) (citations omitted). In addition, 'photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.' Ex parte Siebert, 555 So. 2d 780, 784 (Ala. 1989). 'This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries.' Ferguson v. State, 814 So. 2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001). ' "[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter." ' Jackson v. State, 791 So. 2d 979, 1016 (Ala. Crim. App. 2000), quoting Perkins v. State, 808 So. 2d 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), on remand to, 851 So. 2d 453 (Ala. 2002)."

Brooks v. State, 973 So. 2d 380, 393 (Ala. Crim. App. 2007). This Court has also held that photographs of probes through a body that show the trajectory of a bullet are admissible. See McMillan v. State, 139 So. 3d 184, 254 (Ala. Crim. App. 2010) ("[T]he probes showed the trajectories of the bullets through the victim's body, which are particularly relevant in this case because McMillan argued that the victim was not in the truck when he was shot.")

We have reviewed all the photographs that were admitted into evidence and conclude that the trial court did not err in admitting the photographs into evidence, even though some were cumulative or gruesome.

IX.

Iervolino contends that the St. Clair District Attorney's Office was improperly involved in his prosecution even after it had recused itself. Specifically, he argues that the St. Clair District Attorney's Office offered State's witness Kimberly Brown a plea bargain for several felony charges against her in St. Clair County in exchange for her testifying against Iervolino. Iervolino did not raise this issue in the trial court; therefore, it was not properly preserved for review and is subject only to plain-error review.

***19** On cross-examination, in response to leading questions by defense counsel, Brown indicated that she had an "understanding with the State about [her] testimony" and that she had been promised "leniency" on her pending felony charges in exchange for her testimony. (R. 1001.) On redirect examination, however, the following occurred:

"[Prosecutor]: Where are those charges? Where are those charges pending that you just told him about?

"[Brown]: St. Clair.

"[Prosecutor]: Okay. And am I prosecuting you for that?

"[Brown]: No, ma'am.

"[Prosecutor]: Is Mr. Giddens prosecuting you for that?

"[Brown]: No, ma'am.

"[Prosecutor]: And have Mr. Giddens and I ever spoken with you about your charges and any promises or any benefit you would get from coming in and telling these ladies and gentlemen some version?

"[Brown]: No, ma'am.

"[Prosecutor]: What did we tell you to tell?

"[Brown]: The truth.

"[Prosecutor]: That's what we told you to tell; isn't it?

"[Brown]: Yes, sir.

"[Prosecutor]: Did we make you --

"[Brown]: Yes, ma'am.

"[Prosecutor]: -- any promise that you would get some kind of benefit for coming in and telling them some story or some version?

"[Brown]: No, ma'am.

"[Prosecutor]: And, so, if [defense counsel] is asking you about a benefit or something that you've gotten from testifying, what do you mean? You haven't gotten anything from us.

"[Brown]: No, ma'am. I misunderstood. I'm sorry."

(R. 1003-04.) On recross-examination, defense counsel asked Brown if Guinn Conley was the person prosecuting her and Brown said that she did not know. Brown denied ever having a conversion with Conley about her testimony at Iervolino's trial. On redirect examination, Brown stated that she had been subpoenaed to testify at Iervolino's trial and that she did appear of her own accord.

The record does not support Iervolino's assertions that the St. Clair County District Attorney's Office remained involved in his prosecution after it had recused itself by offering Brown a plea bargain in exchange for her testimony at Iervolino's trial. Therefore, we find no error, much less plain error, as to this claim.

X.

Iervolino contends that the trial court erred in allowing victim-impact evidence during the guilt phase of his trial. Specifically, he argues that, during opening statements, the prosecutor told the jury that Harmon was the son of the St. Clair County District Attorney, that Harmon was called "Boo," and that he dreamed of being a pilot, as well as subsequently eliciting other personal information from Harmon's girlfriend. In one sentence in this section of his brief, Iervolino also asserts: "In rebuttal closing arguments, the prosecution expressly invoked the impact the crime had on the victim's family and asked the jury to return a guilty verdict for the victim's family. (R. 1274-76.)" (Iervolino's brief at p. 89.) Iervolino did not object to any of the now challenged victim-impact evidence. Therefore, he failed to preserve this issue for review and it is subject only to plain-error review. We have reviewed the record and find no plain error.

XI.

Iervolino contends that there are "substantial omissions" in the record on appeal that, he says, violate his constitutional rights and hinder this Court's ability to review the claims he presents on appeal and to review the record for plain error. (Iervolino's brief at p. 80.) Before trial, Iervolino filed a motion requesting that a court reporter record "any and all proceedings before the Court," which the trial court granted. (C. 71.)

***20** "As we stated in Wynn v. State, 804 So. 2d 1122, 1143-44 (Ala. Crim. App.), cert. denied, 804 So. 2d 1152 (Ala. 2001):

" '[I]t should have been apparent to the defense during the trial that the court reporter was not recording certain sidebars.... Defense counsel could have easily

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> reminded the trial court that it had granted his motion for full recordation of the proceedings and remedied the omissions at that time. Therefore, this error was invited by the appellant."

"Moreover, in determining whether there is reversible error based on an omission in the transcript we use the standard discussed in Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999), aff'd, 779 So. 2d 1283 (Ala. 2000), cert. denied, 531 U.S. 1193, 121 S.Ct. 1194, 149 L.Ed.2d 109 (2001). In Ingram, we stated:

> " 'Where the transcript or record is incomplete, two rules have evolved. The first applies to the situation where the appellant is represented on appeal by the same counsel that represented him at trial. In that case, the failure to supply a complete record is not error per se and will not work a reversal absent a specific showing of prejudice. In other words, in such a case, the appellant must show that failure to record and preserve the specific portion of the trial proceedings complained of visits a hardship upon him and prejudices his appeal. The second applies to the situation where the appellant is represented by new counsel on appeal. When he is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to warrant reversal.'

"779 So. 2d at 1280-81."

Calhoun v. State, 932 So. 2d 923, 941-42 (Ala. Crim. App. 2005).

> " 'We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions of the transcript. When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed...' "

Ex parte Godbolt, 546 So. 2d 991, 997 (Ala. 1987) (quoting United States v. Selva, 559 F.2d 1303, 1305-06 (5th Cir. 1977)).

This Court found reversible error based on substantial omissions in the record in Green v. State, 796 So. 2d 438 (Ala. Crim. App. 2001), where both a sentencing hearing and a hearing on the trustworthiness of a witness were omitted from the record, and in Hammond v. State, 665 So. 2d 970, 972-73 (Ala. Crim. App. 1995), where a large portion of voir dire examination was missing, including the State's challenges to six prospective jurors. However, in Ex parte Harris, 632 So. 2d 543, 546 (Ala. 1993), the Alabama Supreme Court found that the failure to transcribe a portion of voir dire examination and several bench conferences was not reversible error. The Court explained:

> ***21** "We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether 'a substantial and significant portion of the record' is missing and to determine whether we could 'conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript.' [Ex parte Godbolt, 546 So. 2d 991 (Ala. 1987)].
>
> "From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute 'a substantial and significant portion of the record' and we have 'conclud[ed] affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript.' Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless."

632 So. 2d at 546.

In his brief, Iervolino cites 21 off-the-record bench conferences that were not recorded and included in the record on appeal, and he argues that the missing bench conferences are "substantial." (Iervolino's brief at p. 79.) However, we have reviewed the entire record, paying particular attention to each page cited by Iervolino and the surrounding pages,

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and we conclude that, in many of the instances, the trial court indicated that it needed to discuss scheduling or procedural matters with the attorneys. And the only reference in Iervolino's brief to a specific bench-conference is the following:

> "For example, the trial court referenced an 'off the record' discussion of [Iervolino's] guilty pleas to theft and breaking and entering, including 'what, if any, limiting instruction would be given and what would be subject to comment of counsel.' The court then revealed that 'the Court was requested to give a limited charge as to what evidence could be or not [be] used.' There is no such discussion or request in the record, which hinders this Court's consideration of claims presented on appeal and plain error review."

(Iervolino's brief at p. 80.) Although Iervolino appears to argue that the discussion concerning a limiting instruction on the use of the convictions was not part of the record, the record refutes this assertion. There was a discussion concerning this instruction during the charge conference, and defense counsel indicated he was satisfied with the instruction the trial court indicated it was going to give to the jury. (R. 1210-14.) We conclude that the untranscribed portions of the proceedings did not constitute a substantial and significant portion of the record, and we are confident that "no substantial rights of [Iervolino] have been adversely affected by the omissions from the transcript." Ex parte Harris, 632 So. 2d at 546. Indeed, the trial court took every precaution to ensure that the record was complete for appeal and that its rulings, and the rationale for those rulings, were contained in the record that was certified to this Court. Therefore, Iervolino is due no relief on this claim.

XII.

***22** Iervolino contends that the evidence was insufficient to sustain his conviction for capital murder because, he says, the State failed to prove that he had the specific intent to kill. Iervolino challenged the sufficiency of the evidence in his motion for a judgment of acquittal, made at the close of the State's case, and in his postjudgment motion for a judgment of acquittal and/or motion for a new trial.

> " ' "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)."

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003).

> " '[T]he element of intent, being a state of mind or mental purpose, is usually incapable of direct proof, [and] it may be inferred from the character of the assault, the use of a deadly weapon and other attendant circumstances.' Johnson v. State, 390 So. 2d 1160, 1167 (Ala. Cr. App.), cert. denied, 390 So. 2d 1168 (Ala. 1980). Accord Fears v. State, 451 So. 2d 385, 387 (Ala. Cr. App. 1984); Young v. State, 428 So. 2d 155, 158 (Ala. Cr. App. 1982)."

Jones v. State, 591 So. 2d 569, 574 (Ala. Crim. App. 1991). Moreover:

> "[C]ircumstantial evidence alone may be sufficient in conjunction with other facts and circumstances which tend to connect the accused with the commission of the crime to sustain a conviction. Dolvin v. State, 391 So. 2d 133 (Ala. 1980) and cases there; Cumbo v. State, 368 So. 2d 871 (Ala. Crim. App. 1979), cert. denied, 368 So. 2d 877 (Ala. 1979)."

Scanland v. State, 473 So. 2d 1182, 1185 (Ala. Crim. App. 1985).

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As explained earlier in this opinion, the evidence at trial established that, while Iervolino was speeding away from the Best Western motel in a stolen truck, he was armed with a gun that he fired several times. Iervolino admitted to Stewart that he had shot someone and there were numerous witnesses who testified concerning Iervolino's state of mind on the night of the murder and how angry and aggressive he was acting. In addition, the evidence established that Harmon was found dead inside his vehicle after the vehicle had crashed and that Harmon and Iervolino had been on the same road at the same time. Viewed in a light most favorable to the State, the evidence was more than sufficient to establish that Iervolino had the specific intent to kill Harmon.

XIII.

***23** Iervolino contends that the prosecutor engaged in misconduct during closing arguments at both the guilt phase and penalty phase of his trial.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. Whitlow v. State, 509 So. 2d 252, 256 (Ala. Cr. App. 1987); Wysinger v. State, 448 So. 2d 435, 438 (Ala. Cr. App. 1983); Carpenter v. State, 404 So. 2d 89, 97 (Ala. Cr. App. 1980), cert. denied, 404 So. 2d 100 (Ala. 1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. Orr v. State, 462 So. 2d 1013, 1016 (Ala. Cr. App. 1984); Sanders v. State, 426 So. 2d 497, 509 (Ala. Cr. App. 1982)."

Bankhead v. State, 585 So. 2d 97, 106–07 (Ala. Crim. App. 1989).

> " 'The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.' 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). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So. 2d 360, 364 (Ala. Cr. App. 1990), aff'd, 590 So.2d 369 (Ala. 1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). 'Prosecutorial misconduct is subject to a harmless error analysis.' Bush v. State, 695 So. 2d at 131 (citations omitted); Smith v. State, 698 So. 2d at 203 (citations omitted)."

Simmons v. State, 797 So. 2d 1134, 1162 (Ala. Crim. App. 1999). "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). "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.

Iervolino did not object to many of the remarks by the prosecutor that he now challenges on appeal. Those remarks that were not objected to in the trial court were not properly preserved for review and are subject only to plain-error review. " 'This court has concluded that the failure to object to improper prosecutorial arguments, ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' " Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), quoting Johnson v. Wainwright, 778 F.2d 623, 629 n.6 (11th Cir. 1985). "Prosecutorial misconduct during closing arguments rarely constitutes plain error that requires reversal." People v. Walters, 148 P. 3d 331, 335 (Colo. App. 2006). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting ex mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it.' State v. Johnson, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)." State v. Gregory, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995).

A.

***24** Iervolino argues that the prosecutor improperly referenced another case during rebuttal closing argument at the guilt phase of the trial. The following occurred:

"[Prosecutor]: You know, I've been doing this a long time. ... I never, ever am ceased to be amazed when I hear a defense argument and I wonder if he's been watching the same trial I watched.... It's an alternative world is what that was. I haven't heard any theory on why did [Harmon] stop? If he's just going home and that he just happened to meet up with this killer over here, he just happened to meet up -- nothing going on between these two and he took that yield and he's headed home. Why did he stop? Why did he stop and give this person -- get this, now, I'm on the side of the road with a gun, I'm waiting. I'm waiting here because I'm going to execute him, as he said. I need him to stop here. Well, aren't I lucky because he did. And then I don't just step out and blast away through the window. I walk around behind the car and come around and get the exact angle shot that he did. Does that sound like it was concocted based on that interview he had with him? The investigator. Because you've got -- all of that has to fall into play for that to be true. And it's ridiculous is what it is. You've got all of this evidence. You know, I told you I was the DA -- I've been a DA in Talladega and as I'm sitting there listening to this, a case I had come to mind. We had a little -- pretty little six-year-old girl who had disclosed somebody in the house, a male, had done something inappropriate. And me and Mrs. Kilgore were talking to her and Mrs. Kilgore posed the question to her, this beautiful little girl -- and she had this wonderful little southern drawl. And she posed the question, well, what if he said --

"[Defense counsel]: Objection --

"[Prosecutor]: -- he didn't do it?

"[Defense counsel]: -- if the Court please. We have no evidence in this case about a six-year-old girl or inference from it.

"THE COURT: Overruled. I'll let him get where he's going.

"[Prosecutor]: [Defense counsel] referred to a movie.

"THE COURT: I understand.

"[Prosecutor]: I didn't hear any evidence of a Demi Moore movie in the trial.

"THE COURT: I was here. Proceed.

"[Defense counsel]: Touche'.

> "[Prosecutor]: Anyway, when she posed the question, well, what if he said he didn't do it? In that beautiful little drawl, she said, well, he did. And I'm sitting there thinking those three words sum up this case. Well, he did. You can offer all of the alternative realities you want to and it can't change the facts of this case."

(R. 1269-70.) (emphasis on portion complained of by Iervolino).

When viewed in context, it is clear that the prosecutor's reference to another case was part of a proper comment on the weakness of the defense's alternative theories of the crime.

> " 'One of the most prevalent arguments to a jury is that the position and argument of the adversary is unwarranted, silly, fanciful or illogical.' Crook v. State, 276 Ala. 268, 270, 160 So. 2d 896, 897 (1963). '[A] prosecutor's remarks during closing argument pointing out the flaws in the defense's theory of the case do not constitute improper argument.' Reeves v. State, 807 So. 2d 18, 45 (Ala. Crim. App. 2000)."

***25** Minor v. State, 914 So. 2d 372, 423-24 (Ala. Crim. App. 2004). There was no error in the prosecutor's comment.

B.

Iervolino argues that the prosecutor twice misstated the law during closing arguments at the guilt phase.

First, Iervolino asserts that the prosecutor incorrectly stated the law regarding the specific intent to kill. Iervolino did not object to the comment he now challenges on appeal and, after reviewing the record, we conclude that, in context, the prosecutor's argument on the intent to kill was not error, much less plain error.

Second, during the prosecutor's rebuttal closing argument, the following occurred:

"[Prosecutor]: You know, the law is not just in some law book. The law is not just what judges say it is. The law is not just what lawyers say it is or prosecutors. The law is what you say it is. The law is what you say it is --

"[Defense counsel]: Objection, if the --

"[Prosecutor]: -- in your county --

"[Defense counsel]: -- please. A misstatement of the law.

"THE COURT: What's the objection?

"[Defense counsel]: He told the jury that the law wasn't what you said, the law is what they find. I suspect in your charge you're going to tell the ladies and gentlemen of the jury that you will charge them with the law.

"THE COURT: Ladies and gentlemen of the jury, you are the decider of the facts. I will tell you what the law is to apply that law to the facts as you hear them. [Prosecutor] you can proceed.

"[Prosecutor]: Thank you. If I could finish. The law, based on your verdict, is what you want the law to be in your county. Your verdict tells us what you want the law to be about somebody who -- by all evidence in this case, ... Harmon did nothing wrong to anybody. That somebody would take a gun and shoot him. We'll know what you think the law is."

(R. 1277-78.)

The prosecutor misstated the law when he said that the jury determined what the law was. However, after Iervolino's objection, the trial court immediately instructed the jury that the jury would decide the facts and that the trial court would instruct the jury as to what the law was. "[T]he trial court acted immediately to ... instruct the jury, these actions of the trial court erased any possible prejudicial effect to the appellant. ..." Glenn v. State, 395 So. 2d 102, 109 (Ala. Crim. App. 1980).

C.

Iervolino argues that, during the guilt phase closing argument, the prosecutor improperly "sought to bolster the reliability of key witnesses by making explicit assurances of their veracity and indicating that information the jury did not have supported their testimony." (Iervolino's brief at p. 69.) Specifically, he argues that the prosecutor stated several times that certain witnesses had no reason to lie and were telling the truth. Iervolino did not object to any of the prosecutor's comments in this regard and, after reviewing the record, we find no error, much less plain error, in the prosecutor's comments. In this regard, we note that, although " 'prosecutors must avoid making personal guarantees as to the credibility of the state's witnesses,' " DeBruce v. State, 651 So. 2d 599, 611 (Ala. Crim. App. 1993) (quoting Ex parte Parker, 610 So. 2d 1181, 1187 (Ala. 1992)), "[a] distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial." DeBruce, 651 So. 2d at 610.

***26** "It is not improper for a prosecutor to ask the jury to draw inferences and to exercise common sense. State v. Fauci, 282 Conn. [23,] 37, 917 A.2d 978[, 988 (2007)]. A prosecutor may urge the jury to find for stated reasons that a witness was truthful or untruthful. See State v. Stevenson, 269 Conn. 563, 585, 849 A.2d 626 (2004). A prosecutor may also 'remark on the motives that a witness may have to lie, or not to lie, as the case may be.' (Internal quotation marks omitted.) Id."

State v. Felix, 111 Conn. App. 801, 811-12, 961 A.2d 458, 467 (2008). In this case, the prosecutor was not personally vouching for the credibility of witnesses.

D.

Iervolino argues that, during rebuttal closing argument at the guilt phase of the trial, the prosecutor improperly commented on his right against self-incrimination by stating:

"[A] stolen truck that they pled guilty to Monday. Do you think that's not a trial strategy? Because what did Mrs. Manning say? He could have pled guilty any time

in the last two years and he waited until Monday so these lawyers could get up here and argue he's this great and wonderful man, he's owned up to what he did. Monday. Not at arraignment. Not two years ago. Not a year ago. Not six months. That ain't got nothing to do with this case."

(R. 1273-74.) Iervolino did not object to this comment.

During closing argument, defense counsel stated the following:

"Now you've heard an awful lot of evidence about the fact that a truck was taken from the Best Western. We've pled to that and we did that. That truck was burglarized and it was. Mr. Iervolino did that. He's pled to that. He didn't shoot anyone."

(R. 1261.)

"It is well settled that 'a] prosecutor has the right to "reply in kind" to statements made by defense counsel in the defense's closing argument.' Newton v. State, [78 So. 3d 458, 478] (Ala. Crim. App. 2009) (citations and quotations omitted). ' "When the door is opened by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will suddenly be subject to reply." ' Davis v. State, 494 So. 2d 851, 855 (Ala. Crim. App. 1986) (quoting DeFoor, Prosecutorial Misconduct in Closing Argument, 7 Nova L.J. 443, 469-70 (1982-83)). Further, a prosecutor's rebuttal argument is 'viewed as having been made in the heat of the debate, and such a remark is usually valued by the jury at its true worth and not expected to become a factor in the formulation of the verdict.' McGowan v. State, 990 So. 2d 931, 974 (Ala. Crim. App. 2003)."

Vanpelt v. State, 74 So. 3d 32, 82 (Ala. Crim. App. 2009). "Closing arguments are rarely scripted with precision." People v. Tillery, 231 P.3d 36, 44 (Colo. App. 2009). "Prosecutors have latitude to respond in rebuttal closing to arguments raised by defense counsel in their closing." State v. Mars, 116 Hawaii 125, 142, 170 P.3d 861, 878 (2007). "[A] prosecutor is allowed to respond to defense arguments with logical force and vigor." Commonwealth v. Chmiel, 585 Pa. 547, 889 A. 2d 501, 544 (2005).

After reviewing the record, we find no error, much less plain error, in the prosecutor's argument. The prosecutor had the right to reply in kind to defense counsel's attempt to paint Iervolino in a good light for accepting responsibility for the stolen work truck by pointing out to the jury that Iervolino had waited to do so until just before the capital-murder trial started. The above argument was not an improper comment on Iervolino's right against self-incrimination.

E.

***27** Iervolino argues that, during rebuttal closing argument at the penalty phase of the trial, the prosecutor improperly commented on his failure to testify when the prosecutor said that Harmon was unable to testify because he was dead. Iervolino did not object to the comment he now challenges on appeal.

The record reflects that defense counsel stated the following during closing argument at the penalty phase:

"[I]f I've said or done anything so far to insinuate that this is some sort of balancing act between the defendant's hard life and Nicholas Sloan Harmon's good life -- that's not it at all. I would never do that. This is a tragedy what has happened in this case and I know nothing but good about the victim, but that's not the purpose of this, so it's not about that."

(R. 1446.) Defense counsel further stated that the penalty phase of the trial had "nothing to do with the victim. Nothing to do with your verdict." (R. 1449.) In rebuttal, the prosecutor stated:

"But he mentioned the victim a couple of times and I'm going to say one thing -- last thing and I'm going to sit down. The State is always one witness short in a murder case because the defendant has killed the witness. I speak for Sloan Harmon because he can't. We're always one witness short and it's always the same reasons, the defendant kills him."

(R. 1453.)

In addressing a prosecutor's comment on a defendant's failure to testify, the Alabama Supreme Court has stated:

"Alabama law distinguishes direct comments from indirect comments and establishes that a direct comment on the defendant's failure to testify mandates the reversal of the defendant's conviction, if the trial court failed to promptly cure that comment. Whitt v. State, [370 So. 2d 736 (Ala. 1979)]; Ex parte Yarber, [375 So. 2d 1231 (Ala.

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1979)]; Ex parte Williams, [461 So. 2d 852 (Ala. 1984)]; Ex parte Wilson, [571 So. 2d 1251 (Ala. 1990)]. On the other hand, 'covert,' or indirect, comments are construed against the defendant, based upon the literal construction of Ala. Code 1975, § 12-21-220, which created the 'virtual identification doctrine.' Ex parte Yarber, 375 So. 2d at 1234. Thus, in a case in which there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute reversible error, there must have been a virtual identification of the defendant as the person who did not become a witness. Ex parte Yarber, 375 So. 2d at 1234; Ex parte Williams, supra; Ex parte Wilson, supra; Ex parte Purser, [607 So. 2d 301 (Ala. 1992)]. A virtual identification will not exist where the prosecutor's comments were directed toward the fact that the State's evidence was uncontradicted, or had not been denied. See Beecher v. State, 294 Ala. 674, 682, 320 So. 2d 727, 734 (1975); Ex parte Williams, supra; Ex parte Purser, supra. Yet, in such circumstances, it becomes important to know whether the defendant alone could have provided the missing evidence.

> "A challenged comment of a prosecutor made during closing arguments must be viewed in the context of the evidence presented in the case and the entire closing arguments made to the jury -- both defense counsel's and the prosecutor's. Ex parte Land, [678 So. 2d 224 (Ala. 1996)]; Windsor v. State, 683 So. 2d 1021, 1023 (Ala. 1994); Ex parte Musgrove, 638 So. 2d 1360, 1368 (Ala. 1993), cert. denied, 513 U.S. 845, 115 S.Ct. 136, 130 L.Ed.2d 78 (1994)."

***28** Ex parte Brooks, 695 So. 2d 184, 188-89 (Ala. 1997).

In Wiggins v. State, 193 So. 3d 765 (Ala. Crim. App. 2014), this Court found no error in a similar comment by the prosecutor that, because the victim could not speak for himself, the prosecutor had to speak for him. We stated:

> "This Court has upheld a prosecutor's comment in closing that he speaks for the victim's family. '[W]e find no reversible error in a brief statement suggesting that the prosecutory attorney speaks for the victim's family.' Henderson v. State, 583 So. 2d 276, 286 (Ala. Crim. App. 1990). See also Sanchez v. State, 41 P. 3d 531, 535 (Wyo. 2002) ('The prosecutor merely told the jury that it had the opportunity to speak for the victim. We do not perceive the comment as being an improper community outrage appeal or that it prejudiced [the defendant] unfairly.'); State v. Braxton, 352 N.C. 158, 204, 531 S.E.2d 428, 455 (2000) ('This Court has previously found no gross impropriety requiring intervention ex mero motu when a prosecutor has argued that he speaks for the victim.')."

193 So. 3d at 809.

Here, the prosecutor's comment was neither a direct nor an indirect comment on Iervolino's failure to testify and did not constitute error, much less plain error.

F.

Iervolino argues that, during closing argument at the penalty phase of the trial, the prosecutor "improperly denigrated the mitigation expert" and "misstate[d] the law" when he "implied that the jury should not consider evidence presented by the mitigation expert because her personal beliefs about the death penalty would disqualify her from serving on a capital jury." (Iervolino's brief at pp. 72-73.) Iervolino also argues that the prosecutor improperly compared the victim's rights to his rights and "improperly 'impl[ied] that the system coddles criminals by providing them with more procedural protections than their victims' " by "characteriz[ing] the jury potentially finding a mitigating circumstance as 'punishing' the victim." (Iervolino's brief at pp. 72-74.) Iervolino did not object to the prosecutor's comments in this regard, and we find no error, much less plain error.

In closing argument, the prosecutor discussed and disputed the evidence the mitigation expert had detailed in her testimony. The prosecutor stated, in relevant part:

> "And you've heard evidence from the mitigation expert about a bad childhood and all of the things that go into

> that and the drug use and all the things. And that's just simply for the nonstatutory aggravating circumstance[s] ... And also a circumstance of -- based on -- I guess based on all of this bad childhood that you -- that he could not appreciate the criminal conduct or conform that to the law. Now I thought about it during lunch. Now what I heard in that was -- yesterday, you heard [the other prosecutor's] theme of the argument was that two people -- two men, one doing everything right and one doing everything wrong -- is that Nicholas Sloan Harmon appeared to be doing everything right while the defendant appeared to be doing everything wrong. But by finding that mitigating factor, it's almost to me as if you are punishing Sloan Harmon twice. He's punished with death by the defendant, but now we're going to punish him again and the defendant not get the appropriate punishment because he had a bad childhood and [Harmon] had a good one. ...
>
> ***29** "And what really bothered me was this: [The mitigation expert] doesn't believe in the death penalty. And that's fine. If you do, fine. If you don't, fine. Those are personal decisions. But if she does not, she's not qualified to be a juror in the case like you are, but she's up here telling you -- not qualified to be a juror -- what a juror ought to do and that just bothered me. It just does. I think you know what to do. That's why I just said common sense. Your common sense is going to tell you what to do."

(R. 1442-43.)

Contrary to Iervolino's belief, the prosecutor's argument did not imply that the jury should not consider his mitigating evidence, nor did it improperly compare his rights to the victim's rights. Rather, when viewed in context, the prosecutor's argument was that the evidence presented by Iervolino was not mitigating or, if it was, that it should be given little weight. "A prosecutor has the right to argue the weight of the evidence presented and to impeach the defense's evidence." Maples v. State, 758 So. 2d 1, 54 (Ala. Crim. App. 1999).

> "It is well settled that the 'State is not required to agree with the defendant that the evidence offered during the penalty phase is sufficiently mitigating to preclude imposition of the death sentence[, and] the State is free to argue that the evidence is not mitigating at all.' State v. Storey, 40 S.W.3d 898, 910-11 (Mo. 2001). Thus, ' "[a] prosecutor may present an argument to the jury regarding the appropriate weight to afford the mitigating factors offered by the defendant." ' Vanpelt [v. State], 74 So. 3d [32,] 90 [(Ala. Crim. App. 2009)] (quoting Malicoat v. Mullin, 426 F.3d 1241, 1257 (10th Cir. 2005)). That is, 'the prosecutor, as an advocate, may argue to the jury that it should give the defendant's mitigating evidence little or no weight.' Mitchell v. State, 84 So. 3d 968, 1001 (Ala. Crim. App. 2010) (citing Storey, 40 S.W.3d at 910–11)."

Wimbley v. State, 191 So. 3d 176, 240 (Ala. Crim. App. 2014), judgment vacated on other grounds by Wimbley v. Alabama, 578 U.S. 1009, 136 S.Ct. 2387, 195 L.Ed.2d 760 (2016).

Moreover, "[a] prosecutor may argue in closing any evidence that was presented at trial." Williams v. State, 627 So. 2d 994, 996 (Ala. Crim. App. 1992). On cross-examination, Iervolino's mitigation expert testified, without objection, that she did not believe in the death penalty under any circumstances, and this testimony was a proper subject of comment by the prosecutor.

XIV.

Iervolino also raises several challenges to the trial court's jury instructions at both the guilt phase and penalty phase of his trial.

> " 'A trial court has broad discretion in formulating its jury instructions, provided those instructions accurately reflect the law and the facts of the case.' Pressley v. State, 770 So. 2d 115, 139 (Ala. Crim. App. 1999), aff'd, 770 So. 2d 143 (Ala. 2000). A 'jury charge must be construed as a whole and the language must be construed reasonably.' Ingram v. State, 779 So. 2d 1225, 1258 (Ala. Crim. App. 1999), aff'd, 779 So. 2d 1283 (Ala. 2000). ' "Hypercriticism should not be indulged in construing

charges of the court ...; nor fanciful theories based on the vagaries of the imagination advanced in the construction of the court's charge." ' Pressley, 770 So. 2d at 139 (quoting Addington v. State, 16 Ala. App. 10, 19, 74 So. 846 (1916)). '[W]e must evaluate instructions like a reasonable juror may have interpreted them.' Ingram, 779 So. 2d at 1258. A court's charge 'must be given a reasonable -- not a strained -- construction,' Williams v. State, 710 So. 2d 1276, 1305 (Ala. Crim. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), and ' "must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together." ' Self v. State, 620 So. 2d 110, 113 (Ala. Crim. App. 1992) (quoting Porter v. State, 520 So. 2d 235, 237 (Ala. Crim. App. 1987)). 'When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them.' Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000), aff'd, 820 So. 2d 883 (Ala. 2001). Moreover, plain error in jury instructions ' "occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner." ' Williams, 710 So. 2d at 1306 (quoting United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993))."

***30** Floyd v. State, 289 So. 3d 337, 439 (Ala. Crim. App. 2017).

A.

Iervolino argues that the trial court erred in not giving a limiting instruction to the jury regarding his convictions for theft and unlawful breaking and entering a vehicle in relation to the stolen work truck. Iervolino did not object on this ground at trial and, in fact, he twice indicated -- once during the charge conference and again at the conclusion of the trial court's oral charge to the jury at the guilt phase of the trial -- that he was satisfied with the instruction the trial court gave, which reads:

"You've heard evidence that the defendant entered a plea of guilty to the charges or to the charged offenses, unlawful breaking and entering a vehicle and theft of property first degree. These criminal charges, like all criminal charges, have their own individual elements independent of each other and independent of any other case. What relevance and weight you give that evidence in this case is solely to your good discretion."

(R. 1295-96.) Because Iervolino did not object to the trial court's instruction, this issue was not properly preserved for review and is subject only to plain-error review. We find no plain error.

In his brief, Iervolino does not identify exactly what type of limiting instruction he believes the trial court should have given, and he cites two separate lines of cases involving limiting instructions. First, Iervolino cites Ex parte Minor, 780 So. 2d 796, 803 (Ala. 2000), and its progeny. In Ex parte Minor, the Alabama Supreme Court held that it was plain error not to give a limiting instruction to the jury that a defendant's prior convictions could not be considered as substantive evidence of the defendant's guilt when the prosecutor had used those convictions to impeach the defendant's credibility during his testimony at trial. However, as explained in our statement of facts at the beginning of this opinion, Iervolino engaged in a crime spree that started with breaking and entering a vehicle, continued to stealing that vehicle, murdering Harmon, and then firing a weapon at law enforcement. Iervolino's actions in relation to the stolen work truck, and his subsequent guilty-plea convictions for theft and unlawful breaking and entering a vehicle, were part of the res gestae of the capital murder and were admissible as substantive evidence of Iervolino's guilt. Therefore, Ex parte Minor and its progeny do not apply here. As the Alabama Supreme Court recognized in Johnson v. State, 120 So. 3d 119 (Ala. 2006):

"It is contradictory and inconsistent to allow, on the one hand, evidence of Johnson's prior bigamy conviction and prior bad acts as substantive evidence of the offense with which she was charged [capital murder of a witness who was going to testify before a grand jury in the bigamy prosecution against Johnson], yet, on the other hand, to require a limiting instruction instructing the jury that it cannot consider the evidence as substantive evidence that Johnson committed the charged offense. Other jurisdictions that have considered this issue have concluded that a limiting instruction is not required when evidence of other crimes or prior bad acts is properly admitted as part of the res gestae of the crime with which the defendant is charged. See People v. Coney, 98 P.3d 930 (Colo. Ct. App. 2004) (holding that evidence of other offenses or acts that are part and parcel of the charged offense is admissible as res gestae and may be admitted

without a limiting instruction); State v. Long, 173 N.J. 138, 171, 801 A.2d 221, 242 (2002) (evidence of the defendant's actions 'served to paint a complete picture of the relevant criminal transaction' and therefore was admissible, and a limiting instruction was unnecessary because the evidence was admitted under the res gestae exception); and Camacho v. State, 864 S.W.2d 524, 535 (Tex. Crim. App. 1993) (holding the evidence of the extraneous offenses showed the context in which the criminal act occurred, i.e., the res gestae, and was therefore admissible and not subject to the requirement of a limiting instruction)."

***31** Johnson v. State, 120 So. 3d 1119, 1129-30 (Ala. 2006).

Second, Iervolino cites Huddleston v. United States, 485 U.S. 681 691-92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988), and Ex parte Billups, 86 So. 3d 1079, 1085-86 (Ala. 2010), and its progeny. In Ex parte Billups, the Alabama Supreme Court, relying on Huddleston, held that it was plain error for the trial court to instruct the jury that it could consider evidence of collateral acts for all the purposes in Rule 404(b), Ala. R. Evid., including those purposes that were implausible or not at issue in the case. However, the Alabama Supreme Court "expressly limited the holding in that case to the 'particular circumstances of [that] case,' " which, it said, were "extreme." R.C.W. v. State, 168 So. 3d 102, 117-19 (Ala. 2014) (quoting Ex parte Billups, 86 So. 3d at 1086). Those same extreme circumstances are not present here. Moreover, this Court has refused to apply Ex parte Billups outside its specific facts. See Russell v. State, 272 So. 3d 1134, 1186-88 (Ala. Crim. App. 2017), and Boyle v. State, 154 So. 3d 171, 211-12 (Ala. Crim. App. 2013) (both holding that there was no error on the part of the trial court in not instructing the jury that it could consider evidence of collateral crimes only as evidence of intent and motive).

B.

Iervolino argues that the trial court's jury instruction during the guilt phase of the trial on reasonable doubt was flawed because, he says, it lessened the State's burden of proof and violated the United States Supreme Court's holding in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Specifically, he argues that the instruction contained the terms "mere guess or opinion" and "a mere fanciful, vague, conjectural, or speculative doubt." (Iervolino's brief at p. 93, 111 S.Ct. 328.) Iervolino did not object to the court's jury instruction on reasonable doubt. Therefore, this issue was not properly preserved for review and is subject only to plain-error review. We find no error, much less plain error, in the trial court's reasonable-doubt instruction. As the State correctly argues in its brief, this Court has previously upheld virtually identical instructions. See Albarran v. State, 96 So. 3d 131, 191 (Ala. Crim. App. 2011); Lewis v. State, 24 So. 3d 480, 517-19 (Ala. Crim. App. 2006).

C.

Iervolino argues that the trial court erred in instructing the jury during the penalty phase of the trial that, "[i]f you believe that the State's offered evidence outweighs or is more convincing than the mitigating evidence offered by [Iervolino], then that mitigating evidence should not be considered in sentencing." (R. 1460.) According to Iervolino, this instruction "precluded the jury from giving full effect to the mitigating evidence in violation of clear Supreme Court precedent." (Iervolino's brief at p. 84.) Because Iervolino did not object to the instruction, this issue was not properly preserved for review and is subject only to plain-error review. We find no error, much less plain error, in this instruction.

The trial court's instructions during the penalty phase of the trial were thorough and exhaustive. In context, the trial court stated, in relevant part:

> ***32** "[T]he burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstances to be considered by you in determining what the punishment is in this case. This means that before you can reach a verdict that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one of the aggravating circumstances exist. If you are not unanimously convinced that one and the same aggravating circumstance exists beyond a reasonable doubt based on the evidence, then you must return a verdict sentencing the defendant to life

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imprisonment without the possibility of parole regardless of whether there are any mitigating circumstances. ...

"In the event you do not find that any aggravating circumstance has been proven by the State, you need not concern yourself with the mitigating circumstances in this case. If you find beyond a reasonable doubt that the aggravating circumstance on which I instructed you does exist in this case, then you must proceed to consider the mitigating circumstances.

"....

"The laws of this state further provide that mitigating circumstances shall not be limited to those I just listed but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers in support for a sentence of life imprisonment without parole. If the factual existence of any evidence offered by the defendant in mitigation is in dispute, the State shall have the burden of disproving the factual existence of the disputed mitigating evidence by a preponderance of the evidence. The preponderance of the evidence standard requires the State, in order to negate the existence of disputed mitigating evidence, to offer evidence of greater weight or evidence that is more convincing than that offered by the defendant. <u>If you believe that the State's offered evidence outweighs or is more convincing than the mitigating evidence offered by the defendant, then that mitigating evidence should not be considered in sentencing.</u> On the other hand, if you believe that the State's offered evidence is of less or equal weight or is less convincing than the mitigating evidence offered by the defendant, then that mitigating evidence should be considered in sentencing.

"....

".... The process of weighing the aggravating circumstances and the mitigating circumstances against each other in order to determine the proper punishment is not a mathematical process. In other words, you should not merely total the number of aggravating circumstances and compare that number to the total number of mitigating circumstances. The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances.

"The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might not outweigh one or more few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all other circumstances in the case."

(R. 1456-63; emphasis on portion complained of by Iervolino.)

The trial court's instructions mirror the Alabama Pattern Jury Instructions: Criminal Proceedings, Capital Murder, Penalty Phase Capital 18+, effective after passage of Act No. 2017-131, Ala. Acts 2017 (adopted September 27, 2018) (as found at http://judicial.alabama.gov/library/juryinstructions as of the date of this opinion). And, contrary to Iervolino's belief, the single statement about which he complains did not unconstitutionally preclude the jury from considering mitigating evidence he presented. Rather, the trial court properly instructed the jury to consider the mitigating evidence and to determine whether the State had disproved the mitigating evidence. The complained-of statement properly informed the jury that if, and only if, the State disproved a mitigating circumstance by a preponderance of the evidence should the jury then not consider that mitigating circumstance in determining sentence. This is a correct statement of the law regarding the State's burden of disproving a mitigating circumstance and it is not constitutionally unsound.

D.

***33** Iervolino argues that the trial court erred in instructing the jury at the penalty phase of the trial on only one statutory mitigating circumstance, specifically, the capacity of the defendant to appreciate the criminality of his conduct or

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to conform his conduct to the requirements of law was substantially impaired, § 13A-5-51(6), Ala. Code 1975. He argues that the trial court should have also instructed the jury on the mitigating circumstance that "the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 13A-5-51(2), Ala. Code 1975.

The record reflects that Iervolino requested that the trial court instruct the jury on § 13A-5-51(6), but that he did not request that the court instruct the jury on § 13A-5-51(2). Indeed, when asked during the charge conference if § 13A-5-51(6) was the only statutory mitigating circumstance on which Iervolino wanted an instruction, defense counsel stated that they had "discussed that with Iervolino and he's prepared to go on the record to say that's consistent with what his wishes would be." (R. 1433.) Also, during closing argument at the penalty phase, defense counsel mentioned only the mitigating circumstance in § 13A-5-51(6), Ala. Code 1975. Although counsel argued in closing that Iervolino had had problems as a child and had PTSD due to the loss of a leg, counsel made no argument that, at the time of the crime, Iervolino was under the inf luence of extreme mental or emotional disturbance.

> " 'Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.' Phillips v. State, 527 So. 2d 154, 156 (Ala. 1988). 'The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error.' Snyder v. State, 893 So. 2d 488, 518 (Ala. Crim. App. 2003)."

Robitaille v. State, 971 So. 2d 43, 59 (Ala. Crim. App. 2005).

Moreover, "[t]he trial judge had no burden to recognize a statutory mitigating circumstance not presented by the proffer to the jury." Pressley v. State, 770 So. 2d 115, 141-42 (Ala. Crim. App. 1999). "We have previously held that the trial court did not commit plain error when it did not sua sponte instruct the jury on a statutory mitigating circumstance the appellant had not offered." Hosch v. State, 155 So. 3d 1048, 1086 (Ala. Crim. App. 2013). We find no error, much less plain error, in the trial court's not instructing the jury on the mitigating circumstance in § 13A-5-51(2), Ala. Code 1975.

E.

Iervolino argues that the trial court erred in instructing the jury during the penalty phase of the trial that his prior conviction for assault in the second degree was a violent felony for purposes of the aggravating circumstance in § 13A-5-49(2), Ala. Code 1975, that the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence. Specifically, he argues that it was up to the jury to determine whether the prior conviction was a violent felony and that the trial court's instruction preempted the jury's factfinding role in violation of the United States Supreme Court's holdings in Hurst v. Florida, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Because Iervolino did not object to the instruction, this issue was not properly preserved for review and is subject only to plain-error review. We find no error, much less plain error, in the court's instruction.

As the State correctly argues, there is no scenario under which Iervolino's prior conviction was not a violent felony. Iervolino was charged and convicted of second-degree assault under § 13A-6-21(a)(4), Ala. Code 1975, which requires physical injury to the victim. As this Court explained in rejecting a similar claim in Jackson v. State, 305 So. 3d 440 (Ala. Crim. App. 2019):

> ***34** "Jackson argues that the trial court erred in instructing the jury 'that the crime of robbery in the first degree is a felony involving the use or threat of violence to the person.' (R. 2194.) Specifically, he argues that, pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Hurst v. Florida, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), it was for the jury to determine whether his prior conviction for first-degree robbery was a felony involving the use or threat of violence and, thus, whether the aggravating circumstance that he had previously been convicted of a felony involving the use or threat of violence existed. Jackson did not raise this issue in the trial court. Therefore, we review this c l aim for plain error. See Rule 45A, Ala. R. App. P.
>
> > " ' "In setting out the standard for plain error review of jury instructions, the court in United States v. Chandler, 996 F.2d 1073, 1085, 1097 (11th Cir. 1993), cited Boyde v. California, 494 U.S. 370, 380, 110

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S.Ct. 1190, 108 L.Ed.2d 316 (1990), for the proposition that 'an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner.' Williams v. State, 710 So. 2d 1276, 1306 (Ala. Cr. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998)." '

"Broadnax v. State, 825 So. 2d 134, 196 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001) (quoting Pilley v. State, 789 So. 2d 870, 882-83 (Ala. Crim. App. 1998), rev'd on other grounds, 789 So. 2d 888 (Ala. 2000)). Moreover, '[t]he absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the defendant's failure to object does weigh against his claim of prejudice.' Ex parte Boyd, 715 So. 2d 852, 855 (Ala. 1998).

"As the State correctly argues, there is no scenario where the crime of robbery in the first degree is not a felony involving the use or threat of violence.

"....

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

Jackson, 305 So. 3d at 497-98.

XV.

Iervolino contends that the jury's death verdict violates the United States Supreme Court's decision in Ramos v. Louisiana, 590 U.S. ——, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020), because it was not unanimous.

The United States Supreme Court in Ramos v. Louisiana considered a Louisiana law that allowed for a verdict of guilt without a unanimous finding. Ramos had been convicted of second-degree murder based on a verdict where two jurors had voted not guilty. The Court held that, under the Sixth Amendment to the United States Constitution, "[a] jury must reach a unanimous verdict in order to convict." 590 U.S. at ——, 140 S.Ct. at 1395. The Court further held:

"There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."

***35** Ramos, 590 U.S. at ——, 140 S.Ct. at 1397 (footnotes omitted). The issue in Ramos was whether a jury could convict a defendant of a crime with a nonunanimous verdict, not whether a jury could sentence a defendant with a nonunanimous verdict. Indeed, the Court recognized in Ramos that "only two States are potentially affected by our judgment," specifically Louisiana and Oregon, because those were the only two states that permitted a <u>conviction</u> with a nonunanimous jury verdict. 590 U.S. at ——, 140 S.Ct. at 1406.

As the United States Court of Appeals for the Fifth Circuit has noted:

"The Supreme Court recently held 'the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.' Ramos v. Louisiana, —— U.S. ——, 140 S. Ct. 1390, 1397, 206 L.Ed.2d 583 (2020). But 'the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a <u>conviction</u>,' not a sentence. Id. (emphasis added). In other words, a jury must be unanimous on the <u>factfinding</u> underlying a sentence, but not on the sentence actually imposed. See Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (finding a jury vote required for the 'factfinding necessary' for a sentence but not the sentence itself). Here, Ruiz's jury was unanimous on the factfinding underlying

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his conviction and sentence, including the special fact issues at the sentencing phase. Because Ruiz's conviction meets the Sixth Amendment's unanimity requirement, Ramos is of no moment."

Ruiz v. Davis, 819 F.App'x 238, 246 n.9 (5th Cir. 2020)(not selected for publication in the Federal Reporter). Alabama's capital statute requires the jury to unanimously find the existence of an aggravating circumstance before a capital defendant is eligible for the death penalty. In other words, jury unanimity on the factfinding underlying a death sentence is required, which complies with Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and its progeny. Jury unanimity as to the sentence actually imposed is not required. Therefore, the jury's nonunanimous 10-2 verdict sentencing Iervolino to death does not violate Ramos.

XVI.

Although no longer required by Rule 45A, Ala. R. App. P., we have nonetheless reviewed the record in this case and we find no plain error or defect in the guilt phase of the trial.

Section 13A-5-53, Ala. Code 1975, provides, in relevant part:

"(a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

***36** "(b) In determining whether death was the proper sentence in the case the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall 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.

"(c) The Court of Criminal Appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed."

Section 13A-5-53(a) requires this Court to determine "whether any error adversely affecting the rights of the defendant was made in the sentence proceedings." In effect, this Court is required by § 13A-5-53(a) to review the penalty phase of the trial for plain error. It is unclear whether the amendment to Rule 45A making plain-error review discretionary with this Court supersedes the mandatory plain-error review required by § 13A-5-53(a). However, it is not necessary for us to make that determination because, as explained earlier in this opinion, this Court chooses to exercise its discretion and to review the entire record for plain error in all cases in which the death penalty has been imposed. We have reviewed the record, and we find no plain error defect in the penalty phase of the trial.

Section 13A-5-53(a) also requires this Court to determine "whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence." When the legislature removed the final sentencing decision from the trial court and placed it in the hands of the jury by Act No. 2017-131, Ala. Acts 2017, it amended § 13A-5-47, Ala. Code 1975, to remove subsection (d),

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which required the trial court to make specific findings of fact regarding the existence or nonexistence of each aggravating circumstance in § 13A-5-49, Ala. Code 1975, each mitigating circumstance in § 13A-5-51, Ala. Code 1975, and any additional mitigating circumstances offered by the defendant pursuant to § 13A-5-52, Ala. Code 1975. Now, § 13A-5-47(b), Ala. Code 1975, requires the trial court to make specific findings of fact regarding the existence or nonexistence of aggravating circumstances and mitigating circumstances only in cases in which jury sentencing is waived. Because jury sentencing was not waived in this case, the trial court was not required to make specific findings of fact regarding aggravating circumstances and mitigating circumstances. In addition, Alabama's capital-sentencing statutes do not require the jury to render verdicts on the mitigating circumstances it found to exist and the jury did not return special verdicts regarding mitigating circumstances. Because we do not know which mitigating circumstances, if any, the jury found to exist, this Court cannot determine whether those circumstances were supported by the evidence. However, the jury did render a unanimous verdict finding one aggravating circumstance -- that Iervolino had previously been convicted of a crime involving the use or threat of violence, specifically, assault in the second degree, see § 13A-5-49(2), Ala. Code 1975 -- and that aggravating circumstance is supported by the evidence.

***37** Finally, § 13A-5-53(a) requires this Court to determine "whether death was the proper sentence in the case" and § 13A-5-53(b) sets out three questions this Court must answer to make that determination. Section 13A-5-53(b)(1) requires this Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." We have thoroughly reviewed the record and we find that Iervolino's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Section 13A-5-53(b)(2) requires this Court to determine "[w]hether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence." This section has been interpreted as requiring this Court to " 'reweigh the aggravating and mitigating circumstances as found by the trial court.' " Ex parte Lewis, 24 So. 3d 540, 546 (Ala. 2009) (quoting Roberts v. State, 735 So. 2d 1244, 1269 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala. 1999)). As already explained, the trial court was not required to make specific findings of fact regarding the existence or nonexistence of aggravating circumstances and mitigating circumstances in this case, and Alabama's capital-sentencing statutes do not require the jury to render verdicts regarding mitigating circumstances. Without knowing which mitigating circumstances were found by the jury to exist, it is impossible for this Court to perform this part of our mandatory review of the death sentence in this case.

Finally, § 13A-5-53(b)(3) requires this Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Iervolino was convicted of capital murder for shooting Harmon while Harmon was inside a vehicle. See § 13A5-40(17), Ala. Code 1975. Similar crimes have been punished capitally throughout Alabama. See, e.g., Young v. State, [Ms. CR-17-0595, August 6, 2021] ––– So. 3d ––– (Ala. Crim. App. 2021); Capote v. State, 323 So. 3d 104 (Ala. Crim. App. 2020); Dotch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010); and Irvin v. State, 940 So. 2d 331 (Ala. Crim. App. 2005).

After thoroughly reviewing the record, we conclude that death was the proper sentence in this case.

Based on the foregoing, we affirm Iervolino's capital-murder conviction and his sentence of death.

AFFIRMED.

Windom, P.J., and McCool and Cole, JJ., concur. Kellum, J., concurs specially, with opinion. Minor, J., recuses himself.

KELLUM, Judge, concurring specially.
Although I authored the main opinion for this Court, I write specially for two reasons.

First, I agree with both Justice Shaw and Justice Wise in their opinions dissenting from the amendment to the plain-error rule in Rule 45A, Ala. R. App. P. As former members of this Court for many years, both Justice Shaw and Justice Wise are well acquainted with the plain-error rule and its importance in death-penalty appeals. As Justice Shaw explained in his opinion dissenting from the amendment to Rule 45A:

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> "I see no compelling reason to repeal the mandatory plain-error review provided under Rule 45A, Ala. R. App. P. The Alabama Court of Criminal Appeals is well-suited to conduct such a review on direct appeal, and if there is reversible error in a case in which the death penalty has been imposed, it should be detected and resolved sooner rather than later. If such error is detected in subsequent state or federal postconviction litigation and relief is granted, which can occur many, many years after trial, the State, because of the passage of time and its effect on the evidence and witnesses, may be substantially hindered in prosecuting a new trial and obtaining another sentence of death. Further, because of the limitations of postconviction proceedings, including those involving ineffective-assistance-of-counsel claims, such proceedings may provide a defendant less effective remedies than plain-error review on direct appeal: ineffective-assistance-of-counsel claims have unique restrictions, and constitutional violations are barred from review in Rule 32, Ala. R. Crim. P., proceedings if they could have been, but were not, raised at trial or on direct appeal. Rule 32.2(a)(3) & (5), Ala. R. Crim. P.
>
> > ***38** "I have personally conducted many plain-error reviews of records in death-penalty cases, and it concerns me that no longer will the fact that a plain-error review occurred on direct appeal add to the confidence in a capital conviction and sentence of death. In my view, a thorough plain-error review of a death-penalty case on direct appeal serves the interests of both the State and the defendant. Mandatory plain-error review under Rule 45A has existed for 44 years; I see no need for its unsolicited demise."

See pages CT.R-9 to CT.R-14 in that volume of the Alabama Reporter containing opinions from 350-352 So. 3d for the order amending Rule 45A, Ala. R. App. P., and the special writings to that order.

I, too, see no reason to depart from the long-standing practice of conducting plain-error review of the entire record in cases in which the death penalty has been imposed. I agree that plain-error review not only serves the interests of both the State and the defendant and ensures confidence in the capital-murder conviction and death sentence, but it is vital for detecting and resolving errors at the earliest possible time in what is often a many years-long process as the conviction and sentence make their way through both state and federal courts. Although as Justice Wise noted in her opinion dissenting from the amendment to Rule 45A, "plain-error review on direct appeal places a burden on the Court of Criminal Appeals and requires the use of judicial resources," I believe it is important for this Court to continue to shoulder the burden of reviewing the entire record for plain error in order to ensure confidence in the outcome of cases in which the death penalty is imposed. After all, as Justice Wise recognized, "in these cases, the defendants' very lives are at stake, and ... such cases are entitled to heightened review on direct appeal." For the reasons expressed by Justice Shaw and Justice Wise in their opinions dissenting from the amendment to Rule 45A, I agree with this Court's decision to continue reviewing the entire record for plain error in cases in which the death penalty is imposed despite the fact that plain-error review is now discretionary.

Second, as explained in the main opinion, now that Alabama's capital-sentencing statutes have been amended to make the jury the sentencer (unless jury sentencing is waived), it is impossible for this Court to reweigh the aggravating circumstances and the mitigating circumstances as part of our statutorily mandated review of the death penalty. The jury is not required to render verdicts regarding which mitigating circumstances it found to exist and, in fact, it would be impossible to impose such a requirement because jury unanimity is not required with respect to mitigating circumstances. Therefore, I encourage the legislature to amend § 13A-5-53, Ala. Code 1975, to remove from this Court's review of a death sentence the requirement that this Court reweigh the aggravating circumstances and the mitigating circumstances.

**All Citations**

--- So.3d ----, 2023 WL 5316682

## Footnotes

1 Iervolino was charged with capital murder after April 11, 2017, the effective date of Act No. 2017-131, Ala. Acts 2017, which amended §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, to, among other things, remove the trial court's authority to override a jury's sentencing verdict, thereby making the jury the final sentencing authority.

2 We point out that Harmon is the son of St. Clair County District Attorney Lyle Harmon. Therefore, the St. Clair County District Attorney's Office recused itself from prosecuting the case against Iervolino, and all the judges in St. Clair County recused themselves from presiding over the case. Pursuant to Art. VI, Section 149, Ala. Const. 1901, and § 12-1-14, Ala. Code 1975, the Chief Justice of the Alabama Supreme Court appointed a special judge, Talladega County Presiding Circuit Judge Chad E. Woodruff, to preside over the case, and the Talladega County District Attorney's Office prosecuted the case in St. Clair County.

3 The employee of ZA construction who was assigned to the stolen truck testified that a handgun that belonged to him, a Glock 9 mm, was in the truck when it was stolen.

4 As explained later in this opinion, the amendment to Rule 45A does not relieve this Court of its duty to review the propriety of the death sentence in accordance with § 13A-5-53(b), Ala. Code 1975.

5 The State filed its brief in this case before the amendment to Rule 45A, Ala. R. App. P.

6 R.H. ultimately served as an alternate juror.

7 The photographs contained on pages 287-369 show the following: State's Exhibit 1 is an autopsy photograph of Harmon that shows a close up of his face; State's Exhibits 2-4 show Harmon's covered body on a gurney; State's Exhibits 5 through 19 are photographs of Harmon's body before the autopsy; State's Exhibits 20 through 26 are photographs of the clothing that Harmon was wearing when he was shot; State's Exhibit 30 is a photograph of evidence collected at autopsy; State's Exhibit 31 is a photograph of a fingerprint card made at the autopsy; State's Exhibits 32 and 33 are photographs of blood evidence collected at the autopsy; State's Exhibit 34 is a photograph of a palm print made at the autopsy; State's Exhibits 35 and 36 are photographs of blood samples collected at the autopsy; State's Exhibits 37 through 48 are photographs showing various injuries to Harmon's body; State's Exhibit 49 is a photograph showing a probe of the path of the bullet; State's Exhibits 50 and 51 are photographs showing injuries to Harmon's body. The photographs on pages C. 537-50 show the following: State's Exhibit number 157 is a photograph of the inside of Harmon's car; State's Exhibits 158 and 159 are photographs of Harmon's body in his vehicle; State's Exhibit 160 is a photograph of blood splatter on a car window; State's Exhibits 161 and 162 are photographs showing Harmon inside his vehicle; State's Exhibit 163 is a photograph of Harmon after his body was taken out of his vehicle.

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Exhibit 2: Denial of Application for Rehearing

# ALABAMA COURT OF CRIMINAL APPEALS

October 27, 2023

**CR-21-0283**
Michael Dale Iervolino v. State of Alabama (Appeal from St. Clair Circuit Court: CC-20-426)

## NOTICE

You are hereby notified that on October 27, 2023, the following action was taken in the above-reference cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk

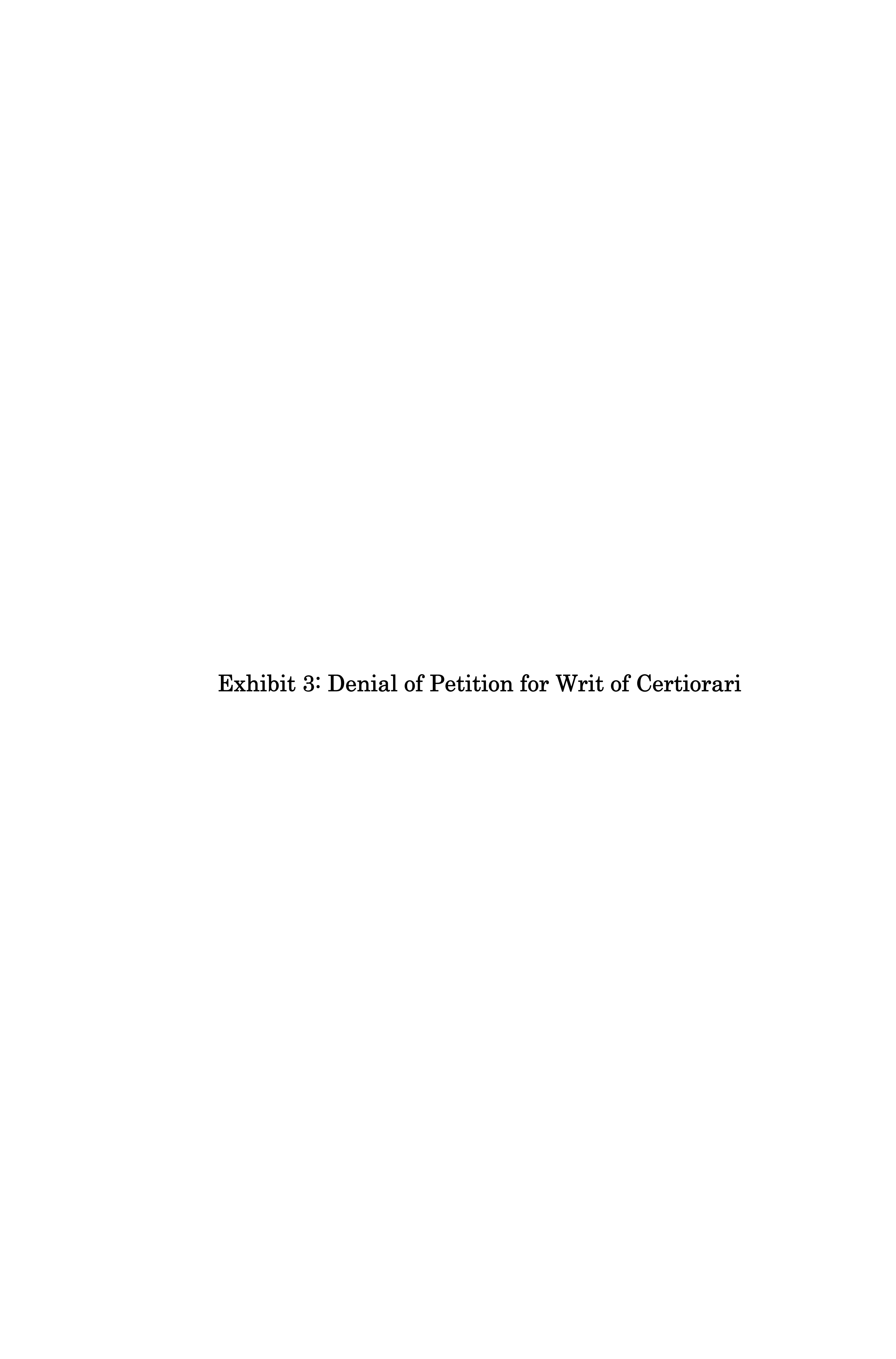

Exhibit 3: Denial of Petition for Writ of Certiorari

# IN THE SUPREME COURT OF ALABAMA

April 19, 2024

**SC-2023-0827**

Ex parte Michael Dale Iervolino. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael Dale Iervolino v. State of Alabama) (St. Clair Circuit Court: CC-20-426; Criminal Appeals: CR-21-0283).

**CERTIFICATE OF JUDGMENT**

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 19, 2024:

**Writ Denied. No Opinion.** Bryan, J. -- Parker, C.J., and Shaw, Wise, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

**I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.**

Megan B. Rhodebeck

**Clerk, Supreme Court of Alabama**