No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

AUBREY SHAW, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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August 22, 2016

CAPITAL CASE

QUESTION PRESENTED

1. Should this Court grant this certiorari petition, vacate the judgment below, and remand this case for further consideration in light of this Court's recent decision in Foster v. Chatman, 136 S. Ct. 1737 (2016)?

2. Should this Court grant this certiorari petition, vacate the judgment below, and remand this case for further consideration in light of this Court's recent decision in Hurst v. Florida, 136 S. Ct. 616 (2016)?

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PETITION FOR WRIT OF CERTIORARI

Aubrey Shaw respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Shaw's conviction and sentence, Shaw v. State, ___ So. 3d ___, No. CR-10-1502, 2014 WL 3559389 (Ala. Crim. App. Aprn 17, 2015), is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Shaw's petition for a writ of certiorari, Ex parte Shaw, No. 1141089 (Ala. Apr. 22, 2016), is unreported and attached at Appendix B.

JURISDICTION

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Shaw's conviction was issued on April 17, 2015, Shaw v. State, ___ So. 3d ___, No. CR-10-1502, 2014 WL 3559389 (Ala. Crim. App. Apr. 17, 2015). The Court of Criminal Appeals denied rehearing on July 2, 2015. On April 22, 2016, the Alabama Supreme Court denied Mr. Shaw's petition for a writ of certiorari. Ex parte Shaw, No. 1141089 (Ala. Apr. 22, 2016). On July 14, 2016, Justice Thomas extended the time for filing this petition for a writ of certiorari to and including August 22, 2016. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama's capital sentencing statute, Ala. Code § 13A-5-47(e), reads:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

A. Statement of Facts

Aubrey Shaw was indicted on four counts of capital murder: two counts of pursuant

to Alabama Code Section 13A-5-40(a)(4) for murder-burglary and two counts pursuant to Alabama Code Section 13A-5-40(a)(10) for causing the death of two or more persons by one act or pursuant to one scheme or course of conduct. (C. 116, 123.)[1] This indictment arose from the murders of Robert and Doris Gilbert on the night of August 19, 2007.

In selecting the jury in this case, the prosecution struck 11 of 14, or 79 percent of qualified African American veniremembers.[2] After the jury was struck, defense counsel made a Batson motion. (R. 906.) The trial court noted that "there's certainly a high percentage of African Americans struck" and observed that the prosecution "may have been focusing a little bit on the African American jurors in terms of maybe a more intensive examination . . . ." (R. 908.)[3] The court found a prima facie case of discrimination by the State in its jury

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[1]"C." denotes the clerk's record, "R." refers to the reporter's transcript, "S." refers to the supplemental record, "S1" refers to the first supplemental record, "S2" refers to the second supplemental record, "S3" refers to the third supplemental record.

[2]There were a total of 48 people on the jury venire after strikes for cause. Of those 48 veniremembers, only 14 were African American. The trial court relied on the district attorney's assertion that there were 15 qualified African Americans (See R. 907) and the Court of Criminal Appeals relied on that number as well. See Shaw, 2014 WL 3559389, at *8. However, the strike list makes clear that there were 14 qualified African Americans. (S2 123-29.) The District Attorney used peremptory strikes to remove 11 African Americans. Of the 12 people on Mr. Shaw's jury, 3 were African American. African Americans constitute 34.6 percent of the population of Mobile County. http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (last visited Aug. 22, 2016.)

[3]The trial court later stated that it had reviewed its notes and found that, while the observation that the State "more vigorously questioned some of the African American voir dire members" was "probably accurate," the court found that the jurors that were questioned more intensively were those who indicated that they were opposed to the death penalty on their questionnaire. (R. 946-947.) However, this later characterization is undercut by the trial

selection and required the prosecution to provide reasons for striking the 11 African American veniremembers. (R. 908-09.) After the Batson hearing, the trial judge found that all of the State's strikes were race neutral and left the jury constituted as struck. (R. 936.)

The prosecution's theory at trial was that on the night of the murder, Mr. Shaw was at Gilbert Stables looking for drugs or money to buy drugs, (R. 964), and that he stabbed the victims and then stole two guns from them, which he then tried to sell. (R. 1254.) The defense theory was that Mr. Shaw was highly intoxicated on the night of the offense and that the State failed to prove its case beyond a reasonable doubt. (R. 976-78.) After the State rested its case, the defense made a motion for judgment of acquittal on both counts of the indictments and claimed the State's evidence was insufficient. (R. 1239.) The court denied the defense's motion, (R. 1240), and the defense rested its case as well without presenting any evidence or testimony. (R. 1241.) The jury found Mr. Shaw guilty of all four counts of capital murder. (R. 1332.)

In the penalty phase, the State argued six aggravating circumstances: 1) that the offense was committed by a person under sentence of imprisonment; 2) that Mr. Shaw was previously convicted of a felony involving the use or threat of violence to the person; 3) that the offense was committed while Mr. Shaw was engaged in the commission of, or an attempt

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court's initial observation, during the individual voir dire of African American veniremember Francine Craig, that the State was more rigorously questioning African American veniremembers *on topics outside of the death penalty.* (R. 754.) This is consistent with the trial court's comment during the State's voir dire of Ms. Craig about her son being in the Secret Service, that "[w]e're way off the individual questioning." (R. 746.)

to commit, burglary; 4) that the offense was committed while Mr. Shaw was engaged in the commission of, or an attempt to commit, robbery; 5) that the offense was especially heinous, atrocious and cruel and; 6) that Mr. Shaw intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct. (R. 1359-61; 1558-61.)

The defense argued three statutory mitigating circumstances: 1) that the offense was committed while Mr. Shaw was under the influence of extreme mental or emotional disturbance; 2) that Mr. Shaw acted under extreme duress or under the substantial domination of another person and; 3) that the capacity of Mr. Shaw to appreciate the criminality of his conduct to the requirements of the law was substantially impaired. (R. 1349.) The defense presented evidence of Mr. Shaw's history of drug and alcohol abuse, his learning disabilities, and his history of depression through the testimony of Dr. Thomas S. Bennett, a clinical psychologist. (R. 1448-51.) Dr. Bennett testified that Mr. Shaw endured a lack of nurturing as a child, that his father was absent, that a car accident his mother was in left her incapable of caring for him, and that his grandmother was emotionally unavailable and was emotionally, physically, and sexually abusive. (R. 1451.) Dr. Bennett testified that Mr. Shaw suffered from a history of depression, which stemmed from a family history of depression, the failure of his caretakers to meet his basic needs when he was a child, and his social alienation as a teenager. (R. 1450-51.)

The evidence also showed that Mr. Shaw suffers from a long history of drug abuse that defense counsel asserted began when older family members would blow marijuana

smoke in his face as a young boy to stop him from crying. (R. 971, 1364.) Dr. Bennett testified that Mr. Shaw was given alcohol around age ten and was permitted to drink on a daily basis by age sixteen. (R. 1449.) He was given marijuana at age thirteen, (id.), and became addicted to crack cocaine by his late teens, an addiction which continued until the time of the crime. (Id.)

The defense presented evidence from family members about Mr. Shaw's childhood marked by abuse. His family members testified that Mr. Shaw and his mother Joanne moved in with Joanne's mother, Helen Gilbert, and her husband Tommy, after Joanne was in a near-fatal car accident that left her with permanent brain damage when Aubrey was a child. (R. 1416, 1447.) Even before the car accident, Joanne took little interest in Aubrey or his siblings. Ms. Morgan testified that Aubrey's mother "just didn't want" the responsibility. (R. 1414-15.) Joanne Shaw "just wanted to party, and she was wild." (R. 1414.)

After Joanne's accident, Aubrey was primarily raised by his grandmother Helen. (R. 1447.) Mr. Shaw suffered from neglect throughout his childhood and was severely physically and sexually abused at the hands of Helen. Mr. Shaw's aunt Carol Morgan testified to the environment that Mr. Shaw grew up in, including that his mother was mentally unstable and unable to care for him and that his grandmother did "inappropriate" things to Mr. Shaw, as well as Ms. Morgan's own experiences of physical and emotional abuse by Helen Gilbert. (R. 1405-07, 1411-12, 1414-18.) His family members testified that Helen was "obsessed" with Aubrey, so much so that she beat him with a belt buckle because she was jealous of his

girlfriend when he was eleven or twelve. (R. 1412, 1497.) Mr. Shaw's cousin, Christy Wynn, testified the physical and sexual abuse Mr. Shaw endured. She testified that her bedroom at her grandmother's adjoined Aubrey's and she could hear his grandmother sexually abusing him. (R. 1497.) Christy further testified that Mr. Shaw was molested by at least one man from the Navy that their grandmother would let stay in their house. (R. 1499.) He would stay in Aubrey's room and Christy would hear "things that [she] didn't want to hear." (Id.) She testified that Mr. Shaw tried to commit suicide at age eighteen by hanging himself in the barn and was nearly lifeless when he was found. (R. 1507.)

Mr. Shaw's wife, Heather, testified that despite his upbringing and battle with drug addiction, he was a good husband and father. (R. 1473-74.) Mr. Shaw and Heather have three children together and Mr. Shaw has three older children from prior relationships. (S1 152; R. 1469-70.)

The jury returned a 10-2 recommendation for death. (C. 121-22, 128-29; R. 1601-02.) The trial court found all of the aggravating factors except that the offense was committed during a robbery. (C. 99-103.) The court found none of the statutory mitigating circumstances to exist, (C. 103-109), but found that Mr. Shaw's lack of a stable and nurturing environment, his drug abuse, his mental status, his capacity to love and care, his capacity to conform in a prison environment, and mercy to be non-statutory mitigating factors. (C. 109-12.) The trial court independently found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Shaw to death. (C. 112-13.)

B. State Court Rulings on Review

On appeal, the Alabama Court of Criminal Appeals rejected Mr. Shaw's Batson claim. That court found that there was no evidence of disparate treatment in the record and, where the State struck jurors for multiple reasons, "[i]t is well settled that as long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made." Shaw, 2014 WL 3559389, at *11 (citation and quotation marks omitted). The Court of Criminal Appeals also held that Mr. Shaw was entitled to no relief on his claim that his death sentence was imposed in violation of Ring v. Arizona, 536 U.S. 584 (2002) because the Alabama Supreme Court decision in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002) was controlling. Shaw, 2014 WL 3559389, at *41-42. The Alabama Supreme Court denied certiorari. This Court's decision in Foster v. Chatman, 136 S. Ct. 1737 (2016) and Hurst v. Florida, 136 S. Ct. 616 (2016) were decided after Mr. Shaw's petition for certiorari was filed at the Alabama Supreme Court.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI, VACATE THE JUDGEMENT BELOW, AND REMAND THIS CASE TO THE COURT OF CRIMINAL APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF FOSTER V. CHAPMAN.

In Foster v. Chatman, this Court reaffirmed the principle that when courts are reviewing a claim of racially discriminatory jury selection, "all of the circumstances that bear upon the issue of racial animosity must be consulted." 136 S. Ct. 1737, 1748 (2016) (quoting

Snyder v. Louisiana, 552 U.S. 472, 478 (2008)); see also Miller-El v. Dretke, 545 U.S. 231, 251-52 (2005) (emphasis added) ("Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."); Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("[T]he trial court should consider all relevant circumstances."); Adkins v. Warden, Holman CF, 710 F.3d 1241, 1255 (11th Cir. 2013) ("We emphasize that our conclusion is not based upon any one particular fact, but the totality of relevant circumstances in this case."). Foster was decided after the Alabama Supreme Court denied certiorari in this case.

In Mr. Shaw's case, there is significant evidence in the record that the prosecution in this case exercised its peremptory strikes in a discriminatory manner in violation of Batson, 476 U.S. 79. The Mobile County District attorney's office, which has a history of striking a high percentage of African American jurors, struck 11 of 14, or 79 percent, qualified African Americans. (R. 906.) In other words, in a county that had an African American population of 34.6 percent in 2010, around the time of Mr. Shaw's trial,[4] the State used 61 percent, or 11 of 18, of its peremptory strikes against qualified African Americans. This striking pattern is consistent with the strong evidence of a pattern of discrimination by the Mobile County District Attorney's office, which has struck an average of 74.25 percent of the African Americans qualified for jury service in the several Mobile County death penalty

[4]Mobile County Quickfacts from the US Census Bureau, https://www.census.gov/quickfacts/table/RHI125215/01097,00 (last visited August 2, 2016).

cases in recent years.[5] "Happenstance is unlikely to produce this disparity." Miller-El, 545 U.S. at 241 (internal citation and quotation marks omitted); see also Jones v. Davis, 906 F.2d 552, 554 (11th Cir. 1990) (finding Mobile County District Attorney's office had engaged in "systematic exclusion" of African Americans from jury service, in violation of Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965)).

Upon examination of the record, the State's purported justifications for the challenged peremptory strikes do not rebut the inference of discrimination. Instead, many of the State's alleged reasons for striking African American veniremembers applied equally to white jurors who sat on Mr. Shaw's jury. Further, the State's purported reasons mischaracterized or

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[5]In addition to striking 11 of 14 qualified African Americans in Mr. Shaw's case, in the Derek Horton case, the Mobile County District Attorney struck 7 of 8, or 88 percent, qualified African American jurors, Horton v. State, CR-12-0381, 2016 WL 1084721 (Ala. Crim. App. March 18, 2016) (reversing on other grounds); in the Derrick Penn case, the Mobile County District Attorney's office struck 9 out of 12, or 75 percent of qualified African Americans, Penn v. State, CR-10-1133, 2014 WL 2677589 (Ala. Crim. App. June 13, 2014) (reversing on other grounds); in the Michael Woolf case, 11 out of 17, or 65 percent of, qualified African Americans were struck by the State, Woolf v. State, No. CR-10-1082, 2014 WL 1744102, at *14 (Ala. Crim. App. May 2, 2014); in the Lam Luong case, 20 out of 34, or 59 percent of, qualified nonwhite jurors were struck by Mobile County prosecutors, Luong v. State, No. CR-08-1219, 2013 WL 598119 (Ala. Crim. App. Feb. 15, 2013) (reversing on other grounds), rev'd, No. 1121097, 2014 WL 983288 (Ala. Mar. 14, 2014); in the Donald Whatley case, Whatley v. State, 146 So. 3d 437, 453 (Ala. Crim. App. 2011), Mobile County prosecutors struck 17 out of 22, or 77 percent of qualified African Americans; in the Thomas Lane case, Lane v. State, 80 So. 3d 280 (Ala. Crim. App. 2010)(reversing on other grounds), the Mobile County District Attorney's office struck 8 of 10, or 80 percent of, the eligible African Americans; and in the Garrett Dotch case, Dotch v. State, 67 So. 3d 936 (Ala. Crim. App. 2010,) Mobile County prosecutors struck 10 out of 14, or 71 percent of the eligible black veniremembers.

overstated the African American veniremembers' testimony, were demeanor-based and therefore suspect, or were allegedly related to questionnaire answers that the State failed to ask the veniremember about on individual voir dire. Finally, some of the State's asserted bases for strikes were given after the defense had rebutted the State's initial reasons and therefore cannot be credited.

However, contrary to this Court's precedent, which requires an evaluation of all of the circumstances bearing on the question of race discrimination, see Foster, 136 S. Ct. 1748, the Alabama Court of Criminal Appeals ignored substantial evidence of racial discrimination in the State's jury selection present in the record and relied on the proposition that "[a]s long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made," Shaw, 2014 WL 3559389, at *11 (internal citation and quotation marks omitted), in finding no Batson violation in this case. The Court of Criminal Appeals's limited analysis and its failure to consider all the relevant evidence conflicts with precedent from this Court that mandates that individual reasons given for particular jurors cannot be considered in isolation. Foster, 136 S. Ct. at 1748; Snyder, 552 U.S. at 478 ("all of the circumstances that bear upon the issue of racial animosity must be consulted").

In Foster, the prosecution "articulated a laundry list of reasons" for striking two black veniremembers. 136 S. Ct. at 1748. This Court's examination of those reasons revealed evidence of disparate treatment, "shifting explanations [by the prosecution],

misrepresentations of the record, and the persistent focus on race in the prosecution's files." Id. at 1754. In light of all of this evidence, this Court held the strikes of at least two of the black veniremembers "were 'motivated in substantial part by discriminatory intent.'" Id. at 1754 (quoting Snyder, 136 S. Ct. at 1748). Similarly here, the State gave numerous reasons for striking each of the eleven black jurors. (See R. 911-36.) And, as in Foster, many of the States purported reason are contradicted by the record or apply equally to white veniremembers who served on Mr. Shaw's jury.

A. Examination of the State's Reasons for Striking Jurors in Mr. Shaw's Case Reveals Evidence of Race Discrimination in Jury Selection.

The clearest examples of race-based jury striking by the State in Mr. Shaw's case are the strikes of African American veniremembers Sondra McGhee[6] and Mary Rivers. Initially, the State claimed that it struck Ms. McGhee because she allegedly waffled on and had a "lack of commitment to," the death penalty, which the State asserted was demonstrated by the fact that she circled two answers to the question on the questionnaire about her ability to impose the death penalty.[7] (R. 911-12, 932.) However, white veniremember Debra Reach, who served on Mr. Shaw's jury, also circled two answers ***to the exact same question*** on the

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[6]Ms. McGhee was the State's last peremptory strike and sat as an alternate juror. Therefore, "this Court must evaluate the State's explanation for striking [Ms. McGhee]." Ex parte Bankhead, 625 So. 2d 1146, 1147 (Ala. 1993).

[7]On Question 36 of the questionnaire, Ms. McGhee circled both answer 2, "I believe the death penalty is appropriate in some capital murder cases, and I could return a verdict resulting in death in a proper case" and answer 3, "Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under a proper set of circumstances." (S3 164.)

questionnaire.[8] When both African American veniremember McGhee and white juror Reach were asked about the discrepancy, they provided nearly identical answers, both stating that they had circled two answers by mistake and that they were in favor of and could impose the death penalty. (R. 269-70, 279.) When the defense counsel stated that all of Ms. McGhee's initial answers indicated that she favored the death penalty, the trial court stated that it also had not noted anything in particular about Ms. McGhee. (R. 932.) When the trial court asked the State to remind the court of its reasons for striking Ms. McGhee, the State then provided additional reasons that it did not initially assert. (R. 932-33.) The State claimed that it struck Ms. McGhee because she "exhibit[ed] confusion in regards to her view on the death penalty," "look[ed] put-out to be here" and because "[s]he said her daughter had a friend that had been killed." (Id.)

Like the first reason provided by the State, these additional reasons do not hold up under scrutiny. As this Court stated in Miller-El, reasons provided after defense counsel has rebutted the State's first reason, "reek[] of afterthought." 545 U.S. at 246. Therefore, the demeanor based reason cited by the State after defense counsel rebutted the State's initial reason is "difficult to credit." Id.; see also Snyder, 552 U.S. at 479 (where trial court did not make specific finding on demeanor, no presumption trial court credited prosecutor's reason).

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[8]On Question 36 of the questionnaire, Ms. Reach circled both answer 2, "I believe the death penalty is appropriate in some capital murder cases, and I could return a verdict resulting in death in a proper case" and answer 4, "I believe that the death penalty is appropriate is some capital murder cases, but I could never return a verdict which assessed the death penalty." (S3 175.)

The State's third reason–that Ms. McGhee's daughter's friend had been killed– was likewise provided after defense counsel refuted the State's first reason and is similarly suspect. Miller-El, 545 U.S. at 246. Additionally, this information was elicited during voir dire when the State extensively questioned Ms. McGhee about her statement on her questionnaire that it is "sad when you have to use drugs or alcohol to the extreme." (S3 164; R. 272-75.) Ms. McGhee responded that she had provided that answer because her daughter's friend was killed by someone "full of alcohol and drugs." (R. 272.) It is unclear how the death of Ms. McGhee's daughter's friend made her an undesirable juror for the State, particularly where Mr. Shaw was alleged to have killed the victims while intoxicated on drugs.Additionally, the State asked Ms. McGhee about this response on her questionnaire is suspect because the State asked no questions about the similar answer to the same question provided by white juror Sandra Bush, who stated that she thought alcohol and/or drug abuse "is a sad waste of one's life." (R. 868-69; S3 916). Miller-El, 545 U.S. at 255 ("[E]vidence that the State was trying to avoid black jurors" can be found in "the contrasting voir dire questions posed respectively to black and nonblack panel members"). That the State failed to question white juror Bush about a questionnaire answer that was nearly identical to an answer provided by struck African American venirember McGhee indicates that the State was not actually concerned about the substance of Ms. McGhee's questionnaire response but was instead trying to "elicit plausibly neutral grounds for a peremptory strike of a potential juror." Id.

Similarly, the State's reasons for striking African American Mary Rivers do not hold up upon examination of the record. At first, the State asserted that it struck Ms. Rivers' because she had "convictions [for disorderly conduct and failure to obey] that she did not list that involved direct interaction with law enforcement," because Ms. Rivers had "a friend who is in prison for attempted murder," and she "has a son who has some issues that . . . got her involved in the – offenses."[9] (R. 913-14.) However, the State's reasons for striking Ms. Rivers' related to her convictions applied equally to white jurors who served on Mr. Shaw's jury. Several white jurors had friends or family with criminal convictions. Similarly, several white jurors also had criminal records themselves. White juror Thomas Purvis had a 2002 DUI conviction and was ordered to attend AA and NA as a result of that conviction, (S3 381, 384; R. 449-50) and white juror Charles Holberg had a shoplifting conviction. (S3 358; R. 421.) Furthermore, white juror Brendan Weishaar had a prior arrest for underage drinking that, like Ms. Rivers, he failed to disclose on his questionnaire. (R. 398.) Likewise, several white jurors had friends and family who had criminal convictions. White juror Margaret Haig had two sons with criminal histories; one was charged with harassment and one was arrested for failing to pay fines. (S3 215-16.) White juror Carrin LeGros reported that she had two nephews with drug related convictions. (S3 733; R. 477-78.) White juror Jeffrey Murdock's

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[9]It is unclear what exactly the prosecutor meant by this reason. Ms. Rivers testified in voir dire that she got a call from her son's college because he was involved in some phone harassment. She went to the college to pick him up and while she was there, a police officer told her to move her car, said she did not move fast enough and she was charged with disorderly conduct and disobeying an officer. (R. 390-91.)

friend served time in prison for forgery conviction. (R. 768-69.) That the State asserted that it struck African American veniremember Ms. Rivers based on her conviction and a family member's conviction but failed to strike similarly situated white jurors is evidence of race based striking under this Court's precedent. See Foster, 136 S. Ct. at 1754 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.") (quoting Miller-El, 545 U.S. at 241).

Additionally, the State's assertion that Ms. Rivers had a friend with an attempted murder conviction is contradicted by the record. Contrary to the State's assertion, Ms. Rivers testified that the person she indicated that she knew who was in prison was a former neighbor whose name she could not remember. (S3 315; R. 389-90.) That the State's reason does not accurately reflect the record is further evidence of discrimination. See Foster, 136 S. Ct. at 1749 (evidence of discrimination where this Court's "independent examination of the record . . . reveals that much of the reasoning provided by [the prosecutor] has no grounding in fact").

After defense counsel argued that Ms. Rivers was in favor of the death penalty and that she had said her arrest was a learning experience, (R. 929), the State responded with additional reasons for striking her. The State asserted that they also struck Ms. Rivers because the prosecution was "concerned about her answers on the death penalty and because she said "she couldn't judge whether drugs and alcohol was right or wrong." (R. 930.)

Again, these reasons strain credulity upon examinination the record. All of Ms. Rivers answers on her questionnaire indicate that she was in favor of the death penalty. She wrote that she believed that "[i]n some cases the death penalty should be imposed, especially murder." (S3 at 318.) In fact, the State did not ask Ms. Rivers a single question about her view on the death penalty during voir dire. (R. 386-93.)

Additionally, the State mischaracterized Ms. Rivers' response on her questionnaire to the question about her "general feelings about alcohol and/or drugs." (S3 318.) Ms. Rivers stated, "I don't drink so I can't really judge whether its right or wrong. But I feel if you drink/use drugs . . . I don't think innocent people should die for your habit." (S3 318.) Again, how this belief, in the context of this case where Mr. Shaw was accused of killing the victims while intoxicated, made Ms. Rivers objectionable to the State is unclear.

The State's purported reasons for striking Ms. McGhee and Ms. Rivers provide evidence of race-based peremptory strikes by the prosecution in this case. The State's multiple justifications for these two strikes applied equally to white jurors who served on Mr. Shaw's jury, were not supported by the record, revealed disparate questioning, and shifted over time, all of which this Court has found to be evidence that the prosecutor's reasons were pretextual. Foster, 136 S. Ct. at 1754.

B. There Was Evidence of Disparate Treatment Throughout the Record.

This Court has made clear that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve,

that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El, 545 U.S. at 241. In Foster, this Court reaffirmed this well-established principle, stating that lower courts simply cannot "blind [them]selves to the[] existence" of evidence of discrimination by accepting explanations for striking black jurors where a prosecutor has "willingly accepted white jurors with the same traits that supposedly rendered [a black juror] an unattractive juror." Foster, 136 S. Ct. at 1748, 1750. However, contrary to this Court's precedent, in rejecting Mr. Shaw's Batson claim, the Alabama Court of Criminal Appeals ignored evidence of disparate treatment and instead reasoned that "[t]he fact that jurors remaining on the panel possess one or more of the same characteristics as a juror that was stricken, does not establish disparate treatment." Shaw, 2014 WL 3559389, at *11 (quoting Barnes v. State, 855 S.W.2d 173, 174 (Tex. App. 1993)).

In finding that there was no evidence of disparate treatment, the state court engaged in an analysis of limited evidence that did not comport with this Court's precedent which requires making a determination in light of the totality of the circumstances. Foster, 136 S. Ct. at 1748 ("We have 'made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'") (quoting Snyder, 552 U.S. at 478); Miller-El, 545 U.S. at 252 (Batson claim be evaluated "in light of all evidence with a bearing on it."). For example, the lower court compared the first four of the eighteen strikes exercised by the prosecution, three of whom were white and one of whom was African American and all of whom the prosecutor

asserted that she struck because of their views on the death penalty. The Court found that because the white and black prospective jurors in this limited sampling were struck for the same reason,"the prosecutor's striking process shows no evidence of disparate treatment," Shaw, 2014 WL 3559389, at *11, and ignored the fact that the next five peremptory strikes by the State were used to remove African American veniremembers from the jury. (S2 123-29; R. 01-02.) The Court of Appeals' limited review of the record does not comport with this Court's precedent.

C. Conclusion

The prosecution's peremptory strikes "correlate with no fact as well as they correlate with race." Miller-El, 545 U.S. at 266. The Alabama Court of Criminal Appeals failed to consider all of the evidence bearing on Mr. Shaw's claim that the prosecution was exercising its peremptory strikes in a discriminatory manner. Where the State struck 11 of 14 qualified African Americans and engaged in disparate questioning of prospective African American jurors, where the Mobile County District Attorney's office has a pattern of striking a high percentage of African American jurors, and given the evidence of discrimination exhibited in the prosecutor's explanations for her strikes, the lower court erred in failing to find a Batson violation. This failure to consider all the evidence conflicts with precedent from this Court, which has made it clear that individual reasons given for particular jurors cannot be considered in isolation but instead requires courts evaluating a Batson claim to consider the totality of the evidence bearing on discrimination. Foster, 136 S.Ct. at 1748; see also Snyder,

552 U.S. at 478 ("all of the circumstances that bear upon the issue of racial animosity must be consulted"); Miller-El, 545 U.S. at 251-52; Batson, 476 U.S. at 96 ("[T]he trial court should consider all relevant circumstances."). The Foster opinion was announced on May 23, 2016, after the Alabama Supreme Court denied certiorari in this case. This Court should grant certiorari and vacate Mr. Shaw's conviction of capital murder in light of Foster.

II. THIS COURT SHOULD GRANT CERTIORARI AND VACATE MR. SHAW'S DEATH SENTENCE BECAUSE, ALABAMA'S DEATH PENALTY SCHEME, LIKE THAT INVALIDATED BY THIS COURT IN HURST V. FLORIDA, REQUIRES A JUDGE TO INDEPENDENTLY DETERMINE WHETHER AGGRAVATING CIRCUMSTANCES EXIST AND WHETHER THEY OUTWEIGH MITIGATING CIRCUMSTANCES.

Capital defendants have a Sixth Amendment right to "a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring v. Arizona, 536 U.S. 584, 589 (2002). In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court applied the Ring decision to Florida's capital punishment statute and invalidated it, holding that the Sixth Amendment requires "Florida to base [the imposition of a] death sentence on a jury's verdict, not a judge's fact finding." 136 S. Ct. at 624. Alabama's current death penalty statute, under which Mr. Shaw was sentenced, is virtually identical to the Florida statute that was struck down in Hurst. See Harris v. Alabama, 513 U.S. 504, 508 (1995) ("Alabama's death penalty statute is based on Florida's sentencing scheme . . . ."). Like Florida law, Alabama law allows a jury to reach a non-binding advisory sentencing recommendation but requires a judge to independently make "the critical findings necessary to impose the death penalty." Hurst, 136 S. Ct. at 622 (2016); Ring, 536 U.S. at 608 n.6 (both

Florida and Alabama have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"); Fla. Stat. § 921.141(3); Ala. Code §13A-5-46, 13A-5-47. Alabama's death penalty scheme, therefore, is in direct conflict with this Court's Hurst finding that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst, 136 S. Ct. at 619. Given that Mr. Shaw's sentence was handed down by a judge rather than a jury, it should be vacated in light of Hurst.

Mr. Shaw was found guilty of two counts of murder in the course of a burglary and one count of murder of two or more people.[10] At the sentencing phase of Mr. Shaw's trial, the State sought to prove six aggravating circumstances: 1) that Mr. Shaw committed murder in the course of a burglary; 2) that Mr. Shaw was committed murder of two or more people pursuant to one scheme or course of conduct; 3) that a capital murder was committed by a person under a sentence of imprisonment; 4) that Mr. Shaw was previously convicted of a felony involving the use or threat of violence; 5) that the capital murder was committed in the course of a robbery; and 6) that the offense was heinous, atrocious and cruel. (R. 1583-

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[10]Mr. Shaw was initially convicted of two counts of murder of two or more persons pursuant to one scheme or course of conduct. The Alabama Court of Criminal Appeals vacated one of those convictions because the only variation in the indictments for those two charges were the order of the names of victims. Because both charges required proving the same elements, the court held it was a violation of the Double Jeopardy clause for Mr. Shaw to be convicted of both counts. (Shaw, 2014 WL 3559389, at *30-31.) The Court of Appeals Mr. Shaw's case remanded to the trial court for the court to reweigh the aggravating and mitigating factors because the trial court referenced four convictions for capital murder in its sentencing order. Id. at *48. On remand, the trial court resentenced Mr. Shaw to death. Id. at *50-51.

88.) Thus, at a minimum, the State in the penalty phase sought to prove four aggravating circumstances that were not proven in the guilt phase of the case.

The jury recommended by a vote of 10 to 2 that Mr. Shaw be sentenced to death on each count, but did not enumerate which aggravating factor or factors it found unanimously. (C. 121-22; 128-29.) This advisory recommendation was "not binding upon the court." Ala. Code §13A–5–47(e). Mr. Shaw could only be sentenced to death after the trial judge found the existence of the statutory aggravating circumstance arguably at issue here and determined that the weight of that circumstance was greater than that of any mitigating circumstances. Id. However, Alabama's requirement of a judge-made determination of facts necessary to impose a sentence of death runs a foul of the Sixth Amendment's requirement that a jury must find each fact necessary to impose a death sentence. Hurst, 136 S. Ct. at 619.

Additionally, in Mr. Shaw's case, the jury was repeatedly instructed that their verdict played a merely advisory function in the determination of the defendant's sentence in violation of the Eighth Amendment. See (R. 1358 ("[I]t will be your duty to provide a recommendation to the Court as to what punishment should be imposed upon the defendant for the crime of capital murder with the only two choices being life imprisonment without the possibility of parole or death."); see also R. 1583-85, 1588, 1592-93). Such instructions led the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," and as such it cannot produce findings or a verdict sufficiently reliable to support a sentence of death. Caldwell v. Mississippi, 472 U.S. 320,

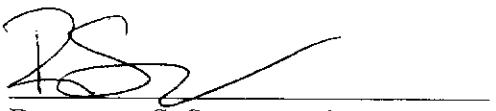
328-29 (1985).

Citing Hurst, this Court recently has vacated several Alabama death sentences because the same flaws that existed in the Florida sentencing scheme still are present in the Alabama statute. Wimbley v. Alabama, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016) (mem.), Johnson v. Alabama, No. 15–7091, 2016 WL 1723290 (U.S. May 2, 2016) (mem.), and Kirksey v. Alabama, No. 15-7912, 2016 WL 378578 (U.S. June 6, 2016) (mem.). The Hurst opinion was announced on January 12, 2016, after Mr. Shaw filed his petition for certiorari at the Alabama Supreme Court. As it did in the prior cases listed above, this Court should grant certiorari, vacate Mr. Shaw's death sentence and remand for further consideration in light of Hurst

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,



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August 22, 2016

APPENDIX A

2014 WL 3559389
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Aubrey Lynn SHAW
v.
STATE of Alabama.

CR-10-1502.
|
July 18, 2014.
|
Opinion on Return to Remand April 17, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Mobile County, Nos. CC-08-1209 and CC-08-1210, Michael A. Youngpeter, J., of four counts of capital murder, and sentenced to death. He appealed.

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

[1] defendant's statements to police were voluntary;

[2] trial court conducted a reasonable investigation into allegations of juror misconduct;

[3] state did not commit *Batson* violation in striking black jurors;

[4] admission of video recording of defendant's interview with police did not violate presumption of innocence;

[5] state sufficiently established chain of custody of evidence;

[6] convictions of four counts for death of two victims violated prohibition on double jeopardy;

[7] evidence was sufficient to show that murders were especially heinous, atrocious, or cruel; and, on return to remand,

[8] death sentence was warranted.

Affirmed.

Windom, P.J., filed an opinion that concurred in part and dissented in part, in which Welch, J., joined, and concurred in result on return to remand.

West Headnotes (48)

[1] **Criminal Law**
⚖ Necessity of Objections in General

The plain error exception to the contemporaneous objection rule for preservation of error on appeal is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

Cases that cite this headnote

[2] **Criminal Law**
⚖ Particular Cases

Criminal Law
⚖ Deception

Police officer did not make misrepresentations or use coercion in obtaining defendant's statements during murder investigation, and thus defendant made the statements voluntarily, as required for statements to be admissible at guilt phase of capital murder trial, where officer told defendant, "we're detectives and we're going to ask you these questions and that's why we read you" the *Miranda* waiver form; defendant made statements after being informed of his *Miranda* rights and being told he did not have to waive his rights, and defendant indicated he understood his rights and that he wanted to talk to police. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[3] **Jury**
⚖ Trial and Determination

Trial court conducted a reasonable investigation into allegations of juror misconduct during voir dire at guilt phase of capital murder trial; after prospective juror complained that she had overheard another prospective juror stating that defendant was "obviously guilty," trial court questioned complaining juror and third juror, complaining juror indicated that improper statement was made by juror at end of row at back of courtroom, and there was no indication that improper statement had been heard by other prospective jurors.

Cases that cite this headnote

[4] **Constitutional Law**
New Trial

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation; however, the trial judge has a duty to conduct a reasonable investigation of irregularities claimed to have been committed before he concludes that the rights of the accused have not been compromised. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[5] **Criminal Law**
Objections and Disposition Thereof

What constitutes a reasonable investigation of juror misconduct will necessarily differ in each case; a significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.

Cases that cite this headnote

[6] **Criminal Law**
Discretion of Court

The discretion of the trial court to grant a mistrial includes the discretion to determine the extent and type of investigation requisite to a ruling on the motion.

Cases that cite this headnote

[7] **Criminal Law**
Objections and Disposition Thereof

In order to conduct a reasonable investigation of alleged juror misconduct, a full evidentiary hearing at which witnesses and jurors can be examined and cross examined is not required; the trial judge need not examine the juror to determine if that juror admits to being prejudiced before granting a mistrial.

Cases that cite this headnote

[8] **Criminal Law**
Objections and Disposition Thereof

In investigating alleged juror misconduct, as long as the trial court makes an inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry.

Cases that cite this headnote

[9] **Criminal Law**
Issues Related to Jury Trial

The trial court's decision as to how to proceed in response to allegations of juror misconduct or bias will not be reversed on appeal absent an abuse of discretion.

Cases that cite this headnote

[10] **Criminal Law**
Objections and Disposition Thereof

It is within the trial court's discretion to determine what constitutes an adequate inquiry into juror misconduct.

Cases that cite this headnote

[11] **Jury**
Peremptory Challenges

State did not commit *Batson* violation, at guilt phase of capital murder trial of white defendant, by making peremptory strikes of 11 out of 15 black prospective jurors; state struck both white and black jurors who

expressed opposition to the death penalty, and other black jurors were struck for sufficiently race-neutral reasons, including having had relatives or friends with prior criminal histories, having prior convictions, being a correctional officer with potential for direct contact with defendant, and having a sister who was a police officer. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[12] **Jury**
Peremptory Challenges

After a prima facie case of a *Batson* equal protection violation is established by showing that state used peremptory strikes to remove black jurors, there is a presumption that peremptory challenges were used to discriminate against black jurors; the state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory, but this showing need not rise to the level of a challenge for cause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[13] **Jury**
Peremptory Challenges

A juror's opposition to capital punishment is a sufficiently race-neutral reason under *Batson* to strike a juror. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Jury**
Peremptory Challenges

As long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, *Batson* does not require a determination concerning any other reason given. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[15] **Jury**
Peremptory Challenges

Where a prosecutor gives a reason which may be a pretext, but also gives valid additional grounds for the strike, the race-neutral reasons will support the strike under *Batson*. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[16] **Criminal Law**
Sound Recordings

Criminal Law
Custody and Restraint of Accused

Trial court did not violate defendant's Fourteenth Amendment right to presumption of innocence at guilt phase of capital murder trial by admitting video recording of defendant's statement to police, in which defendant was shown handcuffed and wearing a white jumpsuit; in most of 12-minute recording, handcuffs were not visible, and jumpsuit had no writing on it or any other indication that it was a jail uniform. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[17] **Criminal Law**
Innocence

The presumption of innocence, although not articulated in the constitution, is a basic component of the system of criminal justice.

Cases that cite this headnote

[18] **Criminal Law**
Civilian or Prison Clothing

Compelling an accused to stand trial before a jury in prison clothes violates the Fourteenth Amendment and the presumption of innocence; however, the failure to make a contemporaneous objection to the defendant's appearance negates the presence of compulsion necessary to establish a constitutional violation. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[19] **Criminal Law**
Evidence as to Information Acted On

Testimony of victims' neighbor, that defendant's mother came to her house and told her that something horrible had happened and that defendant needed to talk to somebody, was admissible, at guilt phase of capital murder trial, for non-hearsay purpose of showing why neighbor went to mother's house to speak to defendant. Rules of Evid., Rule 801(c).

Cases that cite this headnote

[20] **Criminal Law**
Evidence as to Fact of Making Declarations and Not as to Subject-Matter

A statement offered for some purpose other than to prove the truth of its factual assertions is not hearsay; thus, utterances offered for some purpose other than to prove the truth of the out of court declaration fall outside the hearsay rule. Rules of Evid., Rule 801(c).

Cases that cite this headnote

[21] **Criminal Law**
Evidence as to Information Acted On

A out-of-court statement may be considered to be non-hearsay and thus admissible where it is not offered to prove the truth of whatever facts might be stated, but rather to establish the reason for action or conduct by the witness. Rules of Evid., Rule 801(c).

Cases that cite this headnote

[22] **Criminal Law**
Exhibition of Person or Body Parts; Samples

State sufficiently established chain of custody of blood-identification cards relating to victims, as required for cards to be admissible at guilt phase of capital murder trial; medical examiner who performed the autopsies on the two victims, testified that he created the cards using victims' blood, state forensic scientist testified that he processed the samples on the cards that had been collected at autopsies and that he obtained DNA for both victims from those cards, which were marked exhibits that contained examiner's initials, and there was no indication from scientist's testimony that the cards had been altered or tampered with in any way. Code 1975, § 12–21–13.

Cases that cite this headnote

[23] **Criminal Law**
Clothing

State sufficiently established chain of custody of blood-stained shoes, as required for shoes to be admissible at guilt phase of capital murder trial; police officer described shoes, testified that he had found the shoed in defendant's bedroom and placed them in an evidence bag and secured the bag, state forensic scientist testified that the shoes were given an identification number when they arrived at state laboratory, that he tested the substances on the shoes, and that he found victim's blood on one of the shoes, and there was no suggestion that the shoes had been tampered with or altered in any way. Code 1975, § 12–21–13.

Cases that cite this headnote

[24] **Criminal Law**
Clothing

State sufficiently established chain of custody of blood-stained socks, as required for results of DNA testing conducted on the socks to be admissible at guilt phase of capital murder trial; police officer testified that he collected the clothing defendant was wearing at time of arrest and placed the clothing in a sealed bag, identified certain state's exhibit as bag used to collect the clothing, state forensic scientist testified that he tested the socks that he received from the Department of Forensic Sciences and that he found victim's blood on the socks. Code 1975, § 12–21–13.

Cases that cite this headnote

[25] **Criminal Law**
⇐ Objects Used for Identification

State sufficiently established chain of custody of swabs that were collected from the knife recovered near the murder scene, as required for swabs to be admissible at guilt phase of capital murder trial; police officer testified that he collected a knife near murder scene, that he placed knife in evidence bag, and that he gave the bag and knife to lead crime-scene investigator, who testified that he swabbed blade for the presence of blood and placed swabs into sealed envelope, and state forensic scientist testified that he received the swabs and tested them and found the presence of victim's blood. Code 1975, § 12–21–13.

Cases that cite this headnote

[26] **Criminal Law**
⇐ Foundation or Authentication

Criminal Law
⇐ Chain of Custody

Circumstantial evidence is generally sufficient to authenticate an item sought to be entered into evidence, except when there appears to be evidence that the item of evidence was tampered with or that a substitution was made while the item was in the custody of the link who has failed to appear and testify.

Cases that cite this headnote

[27] **Criminal Law**
⇐ Clothing

State sufficiently established chain of custody of blood-stained shirt, as required for shirt to be admissible at guilt phase of capital murder trial; police officer testified that he recovered shirt north of victims' residence, identified certain state's exhibit as the shirt that he had collected near the murder scene and said that it was in substantially the same condition as when he had collected it, and state forensic scientist testified that the blood on the shirt matched victim's DNA profile. Code 1975, § 12–21–13.

Cases that cite this headnote

[28] **Criminal Law**
⇐ Weapons and Related Objects

State sufficiently established chain of custody of two guns, as required for guns to be admissible at guilt phase of capital murder trial; police officer testified that he had recovered one gun near victims' home, that he had recovered second gun the day after the murders in a tall grassy area near victims' house, photographs showed the guns in the locations where they had been discovered, and officer identified the guns admitted at trial as the guns he had collected near the scene of the murders. Code 1975, § 12–21–13.

Cases that cite this headnote

[29] **Criminal Law**
⇐ In Particular Prosecutions

Prosecutor's comments during closing at guilt phase at capital murder trial, that defendant's behavior during videotaped police interview were inconsistent with his defense that at time of murders he was under the influence of drugs to such an extent that he could not have formed the specific intent to kill, were not an improper comment on defendant's exercise of his privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[30] **Criminal Law**
⇐ Failure to Instruct in General

Trial court did not commit plain error, at guilt phase of capital murder trial arising from defendant's alleged killing of victims during a robbery, by failing to instruct jury on definition of theft to satisfy the burglary element of the capital-murder offense, since term "theft" was a term of sufficient common understanding. Code 1975, § 13A–7–5.

Cases that cite this headnote

[31] **Double Jeopardy**
⇐ Homicide

Conviction of defendant for four counts of capital murder for killing two victims during one course of conduct violated prohibition on double jeopardy, since the only distinction in second count of two indictments was the order of the names of the two victims; both counts required proof of the exact same elements, the intentional murders of two victims. U.S.C.A. Const.Amend. 5; Code 1975, § 13A–5–40(a)(10).

Cases that cite this headnote

[32] **Double Jeopardy**
⇐ Homicide

A defendant can be convicted of two or more capital murders for the death of one victim, without violating the prohibition on double jeopardy, as long as each conviction required an element not required in the other convictions. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[33] **Sentencing and Punishment**
⇐ Evidence in Mitigation in General

Trial court did not interfere with defendant's right to counsel by allowing defendant to waive, against defense counsel's advice, presentation of mitigation evidence, at penalty phase of capital murder trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[34] **Sentencing and Punishment**
⇐ Evidence in Mitigation in General

Trial court was not required to conduct an in-depth colloquy with defendant before allowing defendant to waive presentation of certain mitigation evidence at penalty phase of capital murder trial, since defendant did not waive presentation of all mitigation evidence; detailed mitigation testimony was given by clinical psychologist, defendant's aunt, and defendant's wife.

Cases that cite this headnote

[35] **Sentencing and Punishment**
⇐ Other Offenses, Charges, or Misconduct

At penalty phase of capital murder trial, state could elicit testimony in cross-examination of defendant's aunt that defendant had been accused of sexually abusing a relative, since defendant had opened door to testimony by eliciting testimony in direct examination that defendant had been sexually abused in the household where he had been raised. Code 1975, § 13A–5–45(d).

Cases that cite this headnote

[36] **Witnesses**
⇐ Scope and Extent of Cross-Examination in General

The scope of cross-examination of witnesses is quite broad.

Cases that cite this headnote

[37] **Witnesses**
⇐ Right to Cross-Examine and Re-Examine in General

Witnesses
⇐ Scope and Extent of Cross-Examination in General

Witnesses
⇐ Cross-Examination to Discredit Witness or Disparage Testimony in General

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested; subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach or discredit the witness.

Cases that cite this headnote

[38] **Criminal Law**
Scope of Evidence in Rebuttal

Evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant; this is true even if a defendant admits evidence during cross-examination of a state's witness, prompting the state to introduce otherwise inadmissible evidence in rebuttal.

Cases that cite this headnote

[39] **Criminal Law**
Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

Where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the state's rebuttal or explanatory evidence about the matter.

Cases that cite this headnote

[40] **Criminal Law**
Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

Where one party has opened the door on an issue, the opposing party may introduce evidence to negate any false impressions created.

Cases that cite this headnote

[41] **Sentencing and Punishment**
Other Offenses, Charges, or Misconduct

Testimony that defendant had beaten and stolen from his step-grandfather was admissible aggravating evidence at penalty phase of capital murder trial. Code 1975, § 13A–5–45(d).

Cases that cite this headnote

[42] **Sentencing and Punishment**
Other Offenses, Charges, or Misconduct

Proof that defendant had previously been convicted of third degree robbery was sufficient to show that defendant had previously been convicted of a crime of violence, as an aggravating factor at penalty phase of capital murder trial, since robbery in the third degree, by its statutory definition, involved the use of force. Code 1975, §§ 13A–5–49(2), 13A–8–43.

Cases that cite this headnote

[43] **Sentencing and Punishment**
Vileness, Heinousness, or Atrocity

Evidence was sufficient to show that murders were especially heinous, atrocious, or cruel, as aggravating factor at penalty phase of capital murder trial; victims were an elderly couple who had been viciously stabbed to death in their home, one spouse watched helplessly while the other spouse was stabbed multiple times and ultimately died, first victim had been stabbed 18 times, and second victim had been stabbed 32 times. Code 1975, § 13A–5–49(8).

Cases that cite this headnote

[44] **Sentencing and Punishment**
Dual Use of Evidence or Aggravating Factor

Sentencing and Punishment
Killing While Committing Other Offense or in Course of Criminal Conduct

Sentencing and Punishment
More Than One Killing in Same Transaction or Scheme

At penalty phase of capital murder trial, trial court could consider, as aggravating factors, the facts that defendant had committed murders during the course of a burglary and that two victims had been killed during one course of conduct, even though those

factors were elements of the capital offenses of which defendant had been convicted; double-counting was constitutionally permitted and statutorily required. Code 1975, §§ 13A–5–49(4), 13A–5–49(9).

Cases that cite this headnote

[45] **Sentencing and Punishment**
⚖ Arguments and Conduct of Counsel

Prosecutor's comments at closing during penalty phase of capital murder trial, that defendant did not "shed a tear" during presentation of evidence of victim's stabbing deaths and that defendant only cried when his wife testified, was not an improper comment on defendant's failure to testify but instead was a proper comment on defendant's demeanor during course of trial.

Cases that cite this headnote

[46] **Sentencing and Punishment**
⚖ Presentation and Reservation in Lower Court of Grounds of Review

Prosecutor's comments during closing argument at capital murder trial, misstating which mitigating factors jury could consider, did not rise to the level of plain error, since trial court properly instructed jury that it could consider anything presented by defendant as mitigation and that arguments of counsel were not evidence.

Cases that cite this headnote

[47] **Sentencing and Punishment**
⚖ Instructions

Trial court's jury instruction on weighing of aggravating and mitigating circumstances at penalty phase of capital murder trial did not create presumption in favor of death sentence; instructions correctly informed the jury that it could recommend a sentence of death only if the aggravating circumstance or circumstances outweighed the mitigating circumstance or circumstances.

Cases that cite this headnote

[48] **Sentencing and Punishment**
⚖ Determinations Based on Multiple Factors

Death sentence was warranted for homicides of two victims, where there were no statutory mitigating circumstances, and five aggravating circumstances, including: (1) the murders were committed while defendant was on probation, (2) defendant had previously been convicted of an offense involving the use or threat of violence to the person, (3) murders were committed during the course of a burglary, (4) murders were especially heinous, atrocious, or cruel as compared to other capital murders, and (5) murders were committed by one act or pursuant to one scheme or course of conduct. Code 1975, § 13A–5–49(1, 2, 4, 8, 9).

Cases that cite this headnote

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Opinion

JOINER, Judge.

*1 Aubrey Lynn Shaw was convicted of murdering 83–year–old Doris Gilbert and 79–year–old Robert Gilbert during the course of a burglary and pursuant to one act or course of conduct, offenses defined as capital by §§ 13A–5–40(a)(4) and 13A–5–40(a)(10), Ala.Code 1975, respectively. The jury, by a vote of 10 to 2, recommended that Shaw be sentenced to death. The circuit court followed the jury's recommendation and sentenced Shaw to death.

The State's evidence tended to show that on August 20, 2007, police were dispatched to the Gilberts' residence

in the Gilbert Stables community after receiving a 911 emergency telephone call concerning a possible double homicide. David James Melton, a law-enforcement officer with Blakeley State Park, testified that he was working patrol on the morning of August 20, 2007, and was dispatched to the Gilberts' house, that he was the first to enter the house, that the door was unlocked, and that when he entered the house he found Doris Gilbert's body lying face up on the bed and Robert Gilbert's body lying face down on the floor near the bed. Dr. F. John Krolikowski, a medical examiner for the State of Alabama, testified that the victims had a total of 50 stab wounds to their bodies, that Doris had 18 stab wounds, and that Robert had 32 stab wounds. The Gilberts, Dr. Krolikowski said, both died as a result of "multiple sharp force injuries." (R. 1234.)

Tera Orellana, a neighbor of the Gilberts, testified that on the morning of August 20, 2007, Joanne Shaw—Shaw's mother—knocked on Orellana's door and asked her to come across the street and talk with Shaw because, she said, something "terrible had happened." When Orellana entered Joanne's house, Orellana said, Shaw said to her: "I killed two people." (R. 1000.) Orellana said that she asked who he had killed, and he looked out the window and gestured towards the Gilberts' house. (Joanne's house was approximately 50 yards from the Gilberts' house.) Orellana testified that Shaw kept repeating: "I f – – – ed up." He asked her to give him a ride, and she left, she told him, to get her keys. Orellana then called one of her neighbors, Karen Rivers, and Rivers called emergency 911. Orellana said that, on the morning of August 20, 2007, Shaw appeared to be "high," was sweating, and was wearing a muscle shirt, shorts, and tennis shoes. She did not notice any blood on him or on the clothing he was wearing.

Herald L. Drake testified that he was the Gilberts' caretaker and that he lived in a trailer behind their house. He said that on August 19, 2007, Shaw came by his residence at around 8:30 p.m. and asked him for $20. He told Shaw that he did not have any money. Drake said that about five minutes later Shaw came back and again asked for $20 but that he did not give Shaw any money. Drake also testified that Robert Gilbert kept a .357 Magnum gun on his bedside table and a .38 caliber Charter Arms revolver in the living room. Testimony showed that, after the Gilberts were killed, those two guns were missing from the Gilberts' residence.

James Watson testified that Shaw came by his house on August 19, 2007, and stayed three or four hours, that he left and came back at around 1:00 a.m. on the morning of August 20, that he asked to borrow a T-shirt, that he asked if Watson knew anyone who was interested in buying a .357 Magnum gun, and that Shaw stayed the night at his house.

*2 Corporal Charles Nathaniel Bailey, Jr., a crime-scene investigator with the Mobile County Sheriff's Department, testified that he collected numerous items at or near the scene of the murders. He said that, approximately 1,500 feet from the Gilberts' driveway, police discovered an NBA T-shirt that appeared to have blood on it, that a Charter Arms gun was found about 1,200 feet from the victims' driveway, and that north of the driveway he found a Ruger .357 Magnum revolver. A steak knife was also recovered near the Gilberts' residence, and it appeared to have blood on it. Bailey testified that he took several swabs of the substance on the knife and sent the swabs to the Department of Forensic Sciences to be tested. Forensic tests revealed the presence of Robert Gilbert's blood on the recovered knife.

Richard Cayton, a deputy with the Mobile County Sheriff's Department, testified that he assisted in apprehending Shaw, that Shaw was arrested within hours of police discovering the Gilberts' bodies, and that Shaw was found in his mother's house halfway under a bed. Shaw was wearing no shirt or shoes and had what appeared to be blood stains on his socks and pants. A pair of Nike tennis shoes were in the room where he was arrested, and those shoes had what appeared to be blood on them. Forensic tests revealed that the substance on the socks and the tennis shoes was blood and that the blood was consistent with Robert Gilbert's DNA. The tread pattern on those shoes matched the pattern that was left by bloody shoe prints in the Gilberts' garage.

No witnesses testified in Shaw's defense. Shaw's main defense was that he was so intoxicated at the time of the murders he was unable to form the specific intent to kill. Shaw also argued that the State had failed to prove that the murders occurred during the course of a burglary because, he said, he was welcome in the Gilbert house.

The jury convicted Shaw of four counts of capital murder as charged in the two indictments. After a penalty-phase

hearing, the jury recommended, by a vote of 10 to 2, that Shaw be sentenced to death. The circuit court followed the jury's recommendation and sentenced Shaw to death. This appeal, which is automatic in a case involving the death penalty, followed. *See* § 13A–5–53, Ala.Code 1975.

Standard of Review

Many of the issues that Shaw raises in his brief on appeal were not raised in the circuit court. Rule 45A, Ala. R.App. P., however, requires this Court to review the circuit court proceedings for "plain error." That rule states:

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

(Emphasis added.)

*3 [1] In discussing the scope of plain-error review, this Court, in *Hall v. State*, 820 So.2d 113 (Ala.Crim.App.1999), stated:

> "Plain error is defined as error that has 'adversely affected the substantial right of the appellant.' The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price*, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State*, 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

820 So.2d at 121–22. " 'The plain error exception to the contemporaneous objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States v. 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)). [1]

Guilt–Phase Issues

I.

[2] Shaw first argues that the circuit court erred in admitting into evidence a portion of his statement to police. [2] Specifically, he contends that the State failed to show that this statement was voluntary or that he had waived his *Miranda* [3] rights.

The record reflects that before trial Shaw moved to suppress his statements to police. In that motion, Shaw argued that the statements he made to police should be suppressed because, he said, they were taken in violation of his right against self-incrimination and his right to counsel. (C. 162.) A hearing was held on the motion. (C. 69–87.) The circuit court found that Shaw invoked his right to counsel and that any statements he made after invoking that right were not admissible. (C. 171.) That portion of Shaw's statement that was made before Shaw invoked his right to counsel was admitted without objection from Shaw. (R. 1140.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

On appeal, Shaw argues for the first time that the circuit court erred in admitting the portion of his statement that occurred before he invoked his right to counsel because, he argues, statements made by Det. Don Gomien of the Mobile County Sheriff's Department rendered Shaw's statement involuntary. Det. Gomien said the following to Shaw:

> *4 "There's a lot of questions to be asked and a lot of answer[s] we need and I'm sure you have some

> questions too. I guarantee if you don't that by the time I get through you'll have some. We need to discuss with you what happened today. Okay and at this point you've got to understand that we're detectives and we're going to ask you these questions and that's why we read you that form right there, that's all."

(C. 253.) Shaw asserts that Det. Gomien's comments communicated to Shaw that he had to talk to police "regardless of whether he invoke[d] his *Miranda* rights." (Shaw's brief, p. 41.) He cites the case of *Hart v. Attorney General of Florida*, 323 F.3d 884 (11th Cir.2003), to support his assertions.

In *Hart*, the United States Court of Appeals for the Eleventh Circuit held that Hart's statement to police was involuntary because police told him that "honesty wouldn't hurt him," a statement, the court said, that contradicted the *Miranda* warnings that had been given to Hart. No such contradictory statements were made in this case.

Michael McLean, a former homicide detective with the Mobile County Sheriff's Department, testified that he interviewed Shaw with Det. Gomien after Shaw had been arrested and brought to the police station. McLean said that he read Shaw his *Miranda* rights and that Shaw signed the waiver-of-rights form. (R. 1137; C. 447.) A transcript of the statement shows that Shaw initially indicated that he did not want to sign the waiver-of-rights form, that he needed to read it before he signed it, and that he then signed the waiver-of-rights form after reading it. (C. 450.) McLean testified that Shaw did not appear to be under the influence of any substance, that Shaw appeared to understand what was happening, and that he made no promises or inducements to Shaw in order to obtain a statement.

In evaluating a circuit court's ruling admitting a defendant's statement to law enforcement, we apply the standard articulated by the Alabama Supreme Court in *McLeod v. State*, 718 So.2d 727 (Ala.1998):

> "For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. *Ex parte Singleton*, 465 So.2d 443, 445 (Ala.1985). The initial determination is made by the trial court. *Singleton*, 465 So.2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. *Marschke v. State*, 450 So.2d 177 (Ala.Crim.App.1984)....
>
> "The Fifth Amendment to the Constitution of the United States provides in pertinent part: 'No person ... shall be compelled in any criminal case to be a witness against himself....' Similarly, § 6 of the Alabama Constitution of 1901 provides that 'in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself.' These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Hubbard v. State*, 283 Ala. 183, 215 So.2d 261 (1968).
>
> *5 "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In *Culombe*, 367 U.S. at 602, 81 S.Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his *will has been overborne* ' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. *Id.* (emphasis added).
>
> "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' *Boulden v. Holman*, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139–40, 22 L.Ed.2d 433 (1969); *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See *Ex parte Matthews*, 601 So.2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); *Jackson v. State*, 562 So.2d 1373, 1380 (Ala.Crim.App.1990) (stating that, to admit a

confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); *Eakes v. State*, 387 So.2d 855, 859 (Ala.Crim.App.1978) (stating that the true test to be employed is 'whether the defendant's will was *overborne* at the time he confessed') (emphasis added)."

718 So.2d at 729 (footnote omitted).

We have reviewed the transcript and the videotape of Shaw's statement. The record shows that police read Shaw his *Miranda* rights, that Shaw was asked if he understood those rights, that Shaw was asked if he had any questions, that Shaw indicated that he understood his rights, and that police told Shaw that he did not have to sign the waiver-of-rights form if he did not want to. Shaw then read the waiver-of-rights form containing the *Miranda* rights and signed the form. Several times Shaw indicated that he wanted to "talk" to police.

***6** Based on the totality of the circumstances, we hold that the portion of Shaw's statement that occurred before Shaw invoked his right to counsel was not coerced or the product of misrepresentations and that Shaw voluntarily waived his *Miranda* rights. For these reasons, Shaw is due no relief on this claim.

II.

[3] Shaw next argues that the circuit court erred in failing to conduct an appropriate inquiry into allegations of juror misconduct that occurred during voir dire examination of the prospective jurors.

The record shows that near the conclusion of voir dire prospective juror C.M.[4] informed the circuit court that she had overheard another juror, B.H., make statements about Shaw while she was sitting next to B.H. in the courtroom. The circuit court questioned C.M. about what she had heard, and the following occurred:

"[C.M.]: Wednesday, when you lawyers approached the bench and y'all were discussing some of the questions, the juror to my left, [B.H.], made the comment that, 'He's obviously guilty. What are we doing here? What is he going to tell us? Oops, I didn't mean to?' I felt like that was—obviously, she had already made up her mind. And you had just gotten through asking us to—if you can't get past the—just because he's been arrested and indicted doesn't mean that, you know, he's guilty. That's just the process of the law. And I felt like she would not give a fair, balanced account of the facts given that statement, and I felt like—

"The Court: We needed to know it.

"[C.M.]:—everyone needed to know.

"....

"[Defense counsel]: Were there other people that heard that comment?

"[C.M.]: Yes, sir. I believe she said that to—or said some kind of remark to [S.B.] on her other side, but I don't know if [S.B.] would remember or paid any attention to it.

"The Court: Anybody else you think may have heard the remark?

"[C.M.]: I don't know.

"The Court: You were also on the end of the row.

"[C.M.]: Yes, sir. On the back, on the end."

(R. 893–94.) C.M. indicated that she would not discuss the matter with any other prospective juror. Both the prosecutor and defense counsel agreed to remove B.H. for cause based on her comments concerning Shaw's guilt. The circuit court then called S.B. and asked her about what she had heard. S.B. indicated that she had not heard anything specific, only that the prospective jurors had spoken about their obligations. Neither the prosecutor nor defense counsel asked S.B. any more questions. (R. 899.) Shaw made no objection to the circuit court's method of handling the situation. Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. For the first time on appeal, Shaw argues that the court's method of handling the allegation of juror misconduct was error because, he says, the circuit court's inquiry was not sufficient.

[4] **[5]** **[6]** **[7]** **[8]** "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). However, "the trial judge has a duty to conduct a '*reasonable investigation* of irregularities claimed to have been committed' before

he concludes that the rights of the accused have not been compromised." *Holland v. State*, 588 So.2d 543, 546 (Ala.Crim.App.1991) (emphasis added).

*7 "What constitutes a 'reasonable investigation of irregularities claimed to have been committed' will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.

" 'Th[e] discretion of the trial court to grant a mistrial includes the discretion to determine the extent and type of investigation requisite to a ruling on the motion. *United States v. Flynn*, 216 F.2d 354, 372 (2d Cir.1954)[, cert. denied, 348 U.S. 909, 75 S.Ct. 295, 99 L.Ed. 713 (1955)]; *Lewis v. United States*, 295 F. 441 (1st Cir.1924)[, cert. denied, 265 U.S. 594, 44 S.Ct. 636, 68 L.Ed. 1197 (1924)]; *Tillman, [v. United States*, 406 F.2d 930 (5th Cir.), vacated on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969)]; *Killilea v. United States*, 287 F.2d 212 (1st Cir.1961)[, cert. denied, 366 U.S. 969, 81 S.Ct. 1933, 6 L.Ed.2d 1259 (1961)]; *United States v. Khoury*, 539 F.2d 441 (5th Cir.1976)[, cert. denied, 429 U.S. 1040, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977)]. A full evidentiary hearing at which witnesses and jurors can be examined and cross examined is not required. *Tillman*, supra, 406 F.2d [at] 938. The trial judge need not examine the juror to determine if that juror admits to being prejudiced before granting a mistrial.'

"*Woods v. State*, 367 So.2d 974, 980 (Ala.Cr.App.), reversed on other grounds, 367 So.2d 982 (Ala.1978), partially quoted in *Cox v. State*, 394 So.2d 103, 105 (Ala.Cr.App.1981). As long as the court makes an inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry."

Sistrunk v. State, 596 So.2d 644, 648–49 (Ala.Crim.App.1992). *See also Gamble v. State*, 791 So.2d 409 (Ala.Crim.App.2000); *Price v. State*, 725 So.2d 1003 (Ala.Crim.App.1997); *Clemons v. State*, 720 So.2d 961 (Ala.Crim.App.1996); *Hamilton v. State*, 680 So.2d 987 (Ala.Crim.App.1996); *Riddle v. State*, 661 So.2d 274 (Ala.Crim.App.1994); and *Hayes v. State*, 647 So.2d 11 (Ala.Crim.App.1994).

[9] [10] "The trial court's decision as to how to proceed in response to allegations of juror misconduct or bias will not be reversed absent an abuse of discretion." *United States v. Youts*, 229 F.3d 1312, 1320 (10th Cir.2000). "[I]t is within the trial court's discretion to determine what constitutes an 'adequate inquiry' into juror misconduct." *State v. Lamy*, 158 N.H. 511, 523, 969 A.2d 451, 462 (2009).

*8 Here, the circuit court questioned C.M. and S.B. about what had occurred and invited the prosecutor and the defense counsel to ask S.B. more questions. C.M. indicated that when B.H. made the statement she was at the end of a row at the back of the courtroom. There was no indication that B.H.'s comments were heard by other prospective jurors. We hold that the circuit court adequately investigated the claim of juror misconduct. Shaw is due no relief on this claim.

III.

[11] Shaw next argues that the circuit court erred in denying his *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), motion because, he says, the prosecutor improperly struck black prospective jurors from the jury venire solely on the basis of their race. Specifically, Shaw argues that the State failed to meet its heavy burden of rebutting, he says, his strong prima facie case of discrimination, that the State exercised disparate treatment between the white and black prospective jurors, and that the State improperly relied on demeanor when striking black prospective jurors.

The United States Supreme Court in *Batson* held that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to strike a black prospective juror from a black defendant's jury based solely on their race. This holding was extended to white defendants in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); to defense counsel in criminal cases in *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); and to gender-based strikes in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

[12] Shaw's jury panel was composed of 48 individuals. Of that number, 15 were black prospective jurors. The

State used 11 of its peremptory strikes to remove black prospective jurors. Shaw, a white defendant, made a *Batson* objection. The prosecutor then made a reverse *Batson* objection because, he argued, Shaw used all of his strikes but one to remove white males from the panel. The circuit court found that Shaw had established a prima facie case of a *Batson* violation and asked the prosecutor to state his reasons for striking the black prospective jurors. (R. 909.)

> "After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors. *Batson [v. Kentucky*], 476 U.S. [79] at 97, 106 S.Ct. at 1723 [(1986)]. The state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. However, this showing need not rise to the level of a challenge for cause. *[Ex parte] Jackson,* [516 So.2d 768 (Ala.1986)]."

Ex parte Branch, 526 So.2d 609, 623 (Ala.1987).

***9** The prosecutor gave the following reasons for striking the black prospective jurors:

— *Prospective Juror S.M. (No. 4):*[5] This prospective juror circled two different answers on her juror questionnaire concerning her views on the death penalty —she indicated both that she was in favor of the death penalty and that she was not in favor of the death penalty. "Her answers were waffling back and forth as it applied to the death penalty.... A lack of commitment to the death penalty." (R. 912.) Also, the prosecutor indicated that this prospective juror "looked put-out to be here." (R. 932.)

— *Prospective Juror M.W. (No. 13):* "[U]nlike any other member of the venire [M.W.] had six prior DUI offenses. And while he said they were not all convictions, he did not disclose several of them." (R. 912.)

— *Prospective Juror M.R. (No. 18):* "She was another one who had convictions that she did not list that involved direct interaction with law enforcement, and that being disorderly conduct and failure to obey that involved no other victims, a police officer saying she did one thing that she said she didn't or may not have done. She has a friend who is in prison for attempted murder, has a son who has had some issues that actually got her involved in the—the offenses." (R. 912–13.)

— *Prospective Juror T.B. (No. 20):* "[T.B.] was waffling all over the death penalty, all in regards to the death penalty. She put on her questionnaire that she—she felt like she shouldn't kill anyone, a lifetime sentence in a proper facility should be a sufficient punishment, and she was struck based on her views on the death penalty. She also checked she is not in favor of the death penalty and that—then she put she could impose the death penalty later." (R. 913.)

— *Prospective Juror T.M. (No. 29):* She indicated that she could not impose the death penalty, that she was the victim of a robbery that had not been solved, and that she had a niece who had "some bad check issues." (R. 913.)

— *Prospective Juror K.S. (No. 47):* "[K.S.] is a corrections officer [at the Mobile County jail] who has the potential for direct contact with the defendant.... He has some specialized knowledge that he felt like he would be able to take back into the jury room. Has a history with a family with problems with drugs." (R. 917.)

— *Prospective Juror B.H. (No. 50):* She has a son who was arrested for loitering, she said that she didn't know anything about that case, she has previously served on a jury in a rape case, "she made statements regarding the defendant in that case, that he had pled guilty, but he didn't have any—quote, he didn't have any choice. She didn't understand why she was there or why they were going through the process," and she has a sister who is member of the police department.[6]

— *Prospective Juror F.C. (No. 54):* She indicated on juror questionnaire that she believed in the death penalty and she indicated that she could never return a verdict of death then changed answers on death penalty during voir dire examination; she was a character

witness for a defendant who, she said, was wrongfully charged with child rape.

— *Prospective Juror R.S. (No. 57):* "She said the death penalty was imposed too often. And later, then she said it depends on the case. She had—her best friend is ... a woman who killed her boyfriend because he brought a prostitute home. And that was a very close friend. She had lots of details about the case." (R. 919.) She said that she had been to court numerous times with her friend and that her friend had been convicted of killing her boyfriend.

***10** — *Prospective Juror M.D. (No. 59):* She indicated on juror questionnaire that she was not in favor of the death penalty, that she had a moral or religious belief that prevented her from sitting in judgment, and that she believed no one had a right to sentence anyone to death.

— *Prospective Juror O.S. (No. 66):* She had several prior convictions that she did not disclose and two brothers that were in jail for robbery and burglary. [7]

This Court has stated the following concerning the sufficiency of a race-neutral reason:

> "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). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' *Id.* '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judges's province." ' *Hernandez,* 500 U.S. at 365, 111 S.Ct. at 1869."

Allen v. State, 659 So.2d 135, 147 (Ala.Crim.App.1994).

> "While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause, *Batson,* 476 U.S., at 97, 106 S.Ct., at 1723, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character."

Hernandez v. New York, 500 U.S. 352, 362–63, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

[13] This Court has repeatedly held that a prospective juror's views on the death penalty are sufficient race-neutral reasons to remove a prospective juror. "A juror's opposition to capital punishment is a sufficiently race-neutral reason to strike a juror." *Smith v. State,* 797 So.2d 503, 522 (Ala.Crim.App.2000). "Strikes based on '[p]revious criminal charges, prosecutions, or convictions of the venire-member or a family member ...' have been found not to violate *Batson.*" *Knight v. State,* 652 So.2d 771, 773 (Ala.Crim.App.1994). "Age, place of employment and demeanor of the potential juror have been held to be sufficiently race-neutral reasons for exercising a peremptory challenge." *Sanders v. State,* 623 So.2d 428, 432 (Ala.Crim.App.1993).

> "[W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor."

***11** *Thaler v. Haynes,* 559 U.S. 43, 48, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010).

The record shows that, of the prosecutor's 18 strikes, the prosecutor struck 7 white prospective jurors and 11 black prospective jurors. A review of the prosecutor's striking process shows no evidence of disparate treatment.

The prosecutor's first two strikes were of white jurors. The first strike was prospective juror D.O.—a white female. The prosecutor stated that he struck D.O. because she had a stepson with drug problems, she attended death-penalty

protests, she knew a defense witness, and she had a brother involved with drugs.

The prosecutor's second strike was prospective juror A.J. —a white male. A.J. was struck, the prosecutor said, because he was not in favor of the death penalty and had specialized knowledge of the legal system because he was a recent law-school graduate.

The prosecutor then struck prospective juror T.M., a black female, because she indicated that she could not impose the death penalty. A white female, prospective juror L.C., was then struck by the prosecutor for this same reason. " 'Where whites and blacks are struck for the same reason, there is no evidence of disparate treatment.' " *Bush v. State*, 695 So.2d 70, 100 (Ala.Crim.App.1995) (quoting *Carrington v. State*, 608 So.2d 447, 449 (Ala.Crim.App.1992)).

[14] **[15]** The prospective jurors challenged by Shaw on appeal were struck by the State for multiple reasons.

> "It is well settled that '[a]s long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made.' *Johnson v. State*, 648 So.2d 629, 632 (Ala.Crim.App.1994). See also *Jackson v. State*, 791 So.2d 979, 1009 n. 6 (Ala.Crim.App.2000); *Brown v. State*, 705 So.2d 871, 874 (Ala.Crim.App.1997); and *Wood v. State*, 715 So.2d 812, 816 (Ala.Crim.App.1996), aff'd, 715 So.2d 819 (Ala.1998). 'Where a prosecutor gives a reason which may be a pretext, ... but also gives valid additional grounds for the strike, the race-neutral reasons will support the strike.' "

Martin v. State, 62 So.3d 1050, 1059–60 (Ala.Crim.App.2010).

> "As recently noted by the Court of Criminal Appeals, 'disparate treatment' cannot automatically be imputed in every situation where one of the State's basis for striking a venireperson would technically apply to another venireperson whom the State found acceptable. *Cantu v. State*, 842 S.W.2d 667, 689 (Tex.Crim.App.1992). The State's use of its peremptory challenges is not subject to rigid quantification. *Id.* Potential jurors may possess the same objectionable characteristics, yet in varying degrees. *Id.* The fact that jurors remaining on the panel possess one or more of the same characteristics as a juror that was stricken, does not establish disparate treatment."

Barnes v. State, 855 S.W.2d 173, 174 (Tex.App.1993). *See also Wiggins v. State*, [Ms. CR–08–1165, May 2, 2014] ---- So.3d ---- (Ala.Crim.App.2014).

***12** Shaw argues that there is evidence of disparate treatment because four white prospective jurors—T.P., M.H., C.L., and J.M.—had friends or family members with a criminal history but were not struck. The black prospective jurors that had relatives or friends with prior criminal histories—M.R., T.M., K.S., B.H., and O.S.—were struck for other reasons as well. M.R. had prior convictions; T.M. said she could not impose the death penalty; K.S. was a corrections officer at the Mobile County jail who had "the potential for direct contact with" Shaw; B.H. had served as a juror in a rape case and had a sister who was a member of the police department; and O.S. had several prior convictions.

Shaw also argues that the State removed black prospective jurors based on their views on the death penalty but failed to remove white prospective jurors—T.P. and C.L. —for that reason. As the State asserts in its brief, both white prospective jurors indicated that they could impose the death penalty. The black prospective jurors were not "similarly situated" to the white prospective jurors who were not struck for this reason. *See Wiggins, supra.*

Shaw further argues that although several black prospective jurors indicated that they were opposed to the death penalty, they were subsequently rehabilitated during voir dire; thus, he asserts, there were not sufficient grounds to remove those prospective jurors.

> " '[T]hat [the juror] was ultimately "rehabilitated" by the defense did not mean the State had to accept her ambivalent views. See *Vargas v. State*, 838 S.W.2d 552, 555 (Tex.Crim.App.1992). The reason behind peremptory strikes does not

> have to rise to the level of a challenge for cause to be considered legitimately race-neutral.' "

Benjamin v. State, 156 So.3d 424, 433 (Ala.Crim.App.2013) (quoting *Green v. State*, 839 S.W.2d 935, 939 (Tex.App.1992)).

A trial court's ruling on a *Batson* motion is entitled to great deference on appeal. As the United States Supreme Court stated in *Hernandez*:

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. at 1724, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984)."

500 U.S. at 365, 111 S.Ct. 1859.

***13** We have examined the transcript of the voir dire examination, the juror questionnaires, and the prosecutor's explanations, and we have found nothing to suggest that the circuit court abused its considerable discretion in denying Shaw's *Batson* motion. Accordingly, Shaw is due no relief on this claim.

IV.

[16] Shaw next argues that the circuit court erred in allowing the jury to see a videotape of him handcuffed and in a jail uniform because, he says, it destroyed his presumption of innocence.

[17] **[18]** Michael McLean, a former homicide detective with the Mobile County Sheriff's Department, testified that he spoke with Shaw after he was arrested and that Shaw's statement was audiotaped and videotaped. McLean identified State's exhibit number 132 as a copy of the recorded interview with Shaw. Defense counsel specifically stated that he had no objections when this recording was identified and offered into evidence. (R. 1140.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

> " 'The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice.' *United States v. Dawson*, 563 F.2d 149, 151 (5th Cir.1977) (citations omitted). A court violates that presumption when it 'compels an accused to stand trial before a jury while dressed in identifiable prison garb.' *United States v. Birdsell*, 775 F.2d 645, 652 (5th Cir.1985) However, '[i]f, for whatever reason, the defendant fails to object to this attire, the presence of compulsion necessary to establish a constitutional violation is negated.' *Id.* (citations omitted)."

United States v. Pena, 429 Fed.Appx. 405, 406 (5th Cir.2011) (not selected for publication in the *Federal Reporter*).

> "Compelling an accused to stand trial before a jury in prison clothes violates the Fourteenth Amendment; however, the failure to make a contemporaneous objection to the defendant's appearance negates the presence of compulsion necessary to establish a constitutional violation. *Estelle v. Williams*, 425 U.S. 501, 512–13, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *United States v. Birdsell*, 775 F.2d 645, 652 (5th Cir.1985), cert. denied, 476 U.S. 1119 [106 S.Ct. 1979, 90 L.Ed.2d 662] (1986)."

Keller v. Day (No. 92–3434), 9 F.3d 102 (5th Cir.1993) (table) (not selected for publication in the *Federal Reporter*).

This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a

videotape that is shown to the jury during trial. We have stated:

> " ' "The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice." *United States v. Dawson,* 563 F.2d 149, 151 (5th Cir.1977) (citations omitted). A government entity violates that presumption of innocence when it "compels an accused to stand trial before a jury while dressed in identifiable prison garb." *United States v. Birdsell,* 775 F.2d 645, 652 (5th Cir.1985).'

***14** "*United States v. Pryor,* 483 F.3d 309, 311 (5th Cir.2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs. As the United States Court of Appeals for the Eleventh Circuit stated in *Gates v. Zant,* 863 F.2d 1492 (11th Cir.1989):

> " 'Gates' other challenge to the videotaped confession is that its admission was unduly prejudicial because it portrayed him in handcuffs. As we have noted previously, although the handcuffs are not always visible, it is evident throughout the fifteen-minute tape that the defendant is handcuffed. We are aware of no cases which address the propriety of handcuffing during a videotaped confession. Nonetheless, the resolution of the issue is apparent from earlier cases addressing handcuffing in and around trials.
>
> " 'The principal difficulty arising from shackling or handcuffing a defendant at trial is that it tends to negate the presumption of innocence by portraying the defendant as a bad or dangerous person. The Supreme Court has referred to shackling during trial as an "inherently prejudicial practice" which may only be justified by an "essential state interest specific to each trial." *Holbrook v. Flynn,* 475 U.S. 560, 569, 106 S.Ct. 1340, 1346, 89 L.Ed.2d 525 (1986). See also *Illinois v. Allen,* 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). This court recently has extended the general prohibition against shackling at trial to the sentencing phase of a death penalty case. *Elledge v. Dugger,* 823 F.2d 1439, 1450–52 (11th Cir.1987), modified, 833 F.2d 250 (1987), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988).
>
> " 'On the other hand, a defendant is not necessarily prejudiced by a brief or incidental viewing by the jury of the defendant in handcuffs. *Allen v. Montgomery,* 728 F.2d 1409, 1414 (11th Cir.1984); *United States v. Diecidue,* 603 F.2d 535, 549–50 (5th Cir.1979), cert. denied sub nom. *Antone v. United States,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781, 446 U.S. 912, 100 S.Ct. 1842, 64 L.Ed.2d 266 (1980); *Wright v. Texas,* 533 F.2d 185, 187–88 (5th Cir.1976); *Jones v. Gaither,* 640 F.Supp. 741, 747 (N.D.Ga.1986), aff'd without opinion, 813 F.2d 410 (11th Cir.1987). The new fifth circuit is among those circuits which adhere to this rule. *King v. Lynaugh,* 828 F.2d 257, 264–65 (5th Cir.1987), vacated on other grounds, 850 F.2d 1055 (5th Cir.1988); see also *United States v. Williams,* 809 F.2d 75, 83–86 (1st Cir.1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1959, 2469, 2484, 95 L.Ed.2d 531, 877, 96 L.Ed.2d 377 (1987); *United States v. Robinson,* 645 F.2d 616, 617–18 (8th Cir.1981), cert. denied, 454 U.S. 875, 102 S.Ct. 351, 70 L.Ed.2d 182 (1981). In these latter cases, the courts generally have held that the defendant must make some showing of actual prejudice before a retrial is required.
>
> " 'Thus, the case law in this area presents two ends of a spectrum. This case falls closer to the "brief viewing" end of the spectrum and requires a showing of actual prejudice before a retrial is required. The prosecution showed the fifteen-minute tape twice during several days of trial. The handcuffs were only visible during short portions of the tape.

***15** " 'Gates has made no attempt to show that he suffered actual prejudice because the jury saw him in handcuffs. Our independent examination of the record also persuades us that he did not suffer any prejudice. Although defense counsel strenuously objected to the admission of the videotape, he did not object to the handcuffing in particular. He did not ask for a cautionary instruction or a poll of the jury. Furthermore, the videotape at issue here was taken at the scene of the crime, not at the police station. Thus, jurors likely would infer that handcuffing was simply standard procedure when a defendant is taken outside the jail. The viewing of the defendant in handcuffs on television rather than in person further reduces the potential for prejudice. In light of the foregoing facts, and the fact that Gates sat before the jury without handcuffs for several days during his

> trial, we conclude that the relatively brief appearance of the defendant in handcuffs on the videotape did not tend to negate the presumption of innocence or portray the defendant as a dangerous or bad person. We therefore conclude on the particular facts of this case that the handcuffing of Gates during the videotaped confession does not require a new trial.'
>
> "863 F.2d at 1501–02. See also *Barber v. State*, 952 So.2d 393 (Ala.Crim.App.2005)."

Doster v. State, 72 So.3d 50, 85–86 (Ala.Crim.App.2010). *See Black v. State*, 120 So.3d 654, 655 (Fla.Dist.Ct.App.2013) ("[W]e are persuaded that the trial court's decision allowing the state to present to the jury both the audio and visual portions of appellant's brief, videotaped police interview, in which appellant could be seen wearing a jail uniform, handcuffs, and leg chains, was not an abuse of the trial court's discretion.").

We have examined the videotape of the interview. The beginning of the videotape shows Shaw entering an interrogation room wearing a white jumpsuit. He is handcuffed and the handcuffs are visible as he enters and sits down at a table. For the majority of the interview Shaw has his hands in his lap, under the table, or he is holding his hands together—the handcuffs are not clearly visible the entire interview. The white jumpsuit that Shaw is wearing has no visible writing on it but has a round blue circle on the front. There is no indication that the jumpsuit is a "jail uniform." The videotape also shows that Shaw is not wearing shoes. The entire videotape lasts approximately 12 minutes. Our review of the record shows no indication that the jury's observance of Shaw wearing handcuffs in the videotape "adversely affected [Shaw's] substantial rights." Accordingly, we find no plain error in regard to this claim—Shaw is due no relief.

V.

***16** **[19]** Shaw next argues that the circuit court erred in allowing the hearsay statements of Shaw's mother to be admitted during Tera Orellana's testimony. Specifically, Shaw argues that the admission of those statements violated his rights to confrontation, cross-examination, due process, and a fair trial.

The record shows that Orellana, a neighbor of the victims, testified as to what occurred on the morning after the murders:

> "[Prosecutor]: Do you remember the morning of August 20, 2007?
>
> "[Orellana]: Yes, ma'am.
>
> "[Prosecutor]: How do you remember that?
>
> "[Orellana]: I remember it being a horrible—one of the most horrible mornings I've ever had in my life.
>
> "[Prosecutor]: What happened?
>
> "[Orellana]: I got a knock on the door, and it was Miss Joanne [Shaw's mother].
>
> "....
>
> "[Orellana]: But Miss Joanne come over and asked me could I walk across the street with her; that there was somebody—that Lynn—we call Aubrey Lynn, and she asked me that Lynn needed somebody to talk to. Could I come over there with them—with her, *that something horrible had happened, and he needed to talk to somebody.*"

(R. 998–99) (emphasis added). Shaw did not object to the above statement; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. On appeal, Shaw argues that the emphasized portion of Orellana's testimony was hearsay and inadmissible.

[20] **[21]** "Hearsay" is defined in Rule 801(c), Ala. R. Evid., as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

> "A statement offered for some purpose other than to prove the truth of its factual assertions is not hearsay. *Bryant v. Moss*, 295 Ala. 339, 342, 329 So.2d 538 (1976). See also *Cory v. State*, 372 So.2d 394 (Ala.Cr.App.1979); *Epps v. State*, 408 So.2d 562, 564 (Ala.Cr.App.1981). Thus, 'utterances offered for some purpose other than to prove the truth of the out of court declaration fall outside the rule.' *Ex parte Bryars*, 456 So.2d 1136, 1138 (Ala.1984). Where the statement's value does not depend upon its truth, its admission would not violate the hearsay rule. See E. Cleary, *McCormick's Handbook on the Law of Evidence* (2d ed.

1972), § 249, at page 590. Thus, a statement may be admissible where it is not offered to prove the truth of whatever facts might be stated, 'but rather to establish the reason for action or conduct by the witness.' *Tucker v. State*, 474 So.2d 131, 132 (Ala.Cr.App.1984), rev'd on other grounds, 474 So.2d 134 (Ala.1985). See also *Tillis v. State*, [469 So.2d 1367 (Ala.Crim.App.1985)]."

Edwards v. State, 502 So.2d 846, 849 (Ala.Crim.App.1986).

In *Sawyer v. State*, 598 So.2d 1035 (Ala.Crim.App.1992), this Court explained:

" 'A statement may be admissible where it is not offered to prove the truth of whatever facts might be stated, "but rather to establish the reason for action or conduct by the witness [when the reason for the action or conduct is relevant to an issue at trial]." ' *Edwards v. State*, 502 So.2d 846, 849 (Ala.Cr.App.1986) (quoting *Tucker v. State*, 474 So.2d 131, 132 (Ala.Cr.App.1984), rev'd on other grounds, 474 So.2d 134 (1985)). The officers related information obtained from other sources to explain why they proceeded as they did. This was not hearsay. See, e.g., *Brannon [v. State*], 549 So.2d [532] at 539 [(Ala.Crim.App.1989)]; *McCray v. State*, 548 So.2d 573, 576 (Ala.Cr.App.1988). See, also, *Molina v. State*, 533 So.2d 701, 714 (Ala.Cr.App.1988), cert. denied, 489 U.S. 1086, 109 S.Ct. 1547, 103 L.Ed.2d 851 (1989); *Tillis v. State*, 469 So.2d 1367, 1370 (Ala.Cr.App.1985)."

***17** 598 So.2d at 1038.

Joanne Shaw's statements to Orellana were not offered to prove their truth but were offered to show why Orellana went to Joanne's house to speak with the defendant. Thus, those statements were not offered to prove the truth of the matter asserted and by definition were not hearsay. *See* Rule 801(c), Ala. R. Evid.

Moreover, even if the statements were hearsay, any possible error in their admittance was harmless beyond a reasonable doubt. *Belisle v. State*, 11 So.3d 256, 299 (Ala.Crim.App.2007). Orellana testified to the admission that Shaw made to her—he told her that he had killed two people. For these reasons, we find no error, much less plain error, in regard to this claim. Shaw is due no relief.

VI.

Shaw next argues that the State failed to establish a proper chain of custody for several exhibits introduced by the State. Specifically, he argues that the State violated *Ex parte Holton*, 590 So.2d 918 (Ala.1991), because it failed to identify each link in the chain of custody for each of the challenged items.

The Alabama Supreme Court, in *Ex parte Holton, supra*, stated the following concerning a proper chain of custody:

"The chain of custody is composed of 'links.' A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: '(1) [the] receipt of the item; (2)[the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3)[the] safeguarding and handling of the item between receipt and disposition.' Imwinklereid, *The Identification of Original, Real Evidence*, 61 Mil. L.Rev. 145, 159 (1973)."

590 So.2d at 919–20.

***18** After the Supreme Court's decision in *Ex parte Holton*, however, the Alabama Legislature adopted § 12–21–13, Ala.Code 1975, effective August 7, 1995. That statute provides:

> "Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence."

Subsequent to the adoption of § 12–21–13, Ala.Code 1975, the Supreme Court in *Hale v. State*, 848 So.2d 224 (Ala.2002), discussed the application of § 12–21–13:

> "This statute, by its terms, applies only to '[p]hysical evidence connected with or collected in the investigation of' the charged crime. To invoke the statute the proponent of the evidence must first establish that the proffered physical evidence is in fact the very evidence 'connected with or collected in the investigation.' Moreover,
>
> > " '[i]n *Land v. State*, 678 So.2d 201 (Ala.Cr.App.1995), aff'd, 678 So.2d 224 (Ala.1996), a case which appears to rely on § 12–21–13, this court ruled that where a witness can specifically identify the evidence, and *its condition is not an issue in the case, then the State is not required to establish a complete chain of custody* in order for the evidence to be admitted into evidence. We stated: 'The eyeglasses were admissible without establishing a chain of custody because [the testifying officer] was able to specifically identify them, and their condition was not an issue in the case.' *Land*, 678 So.2d at 210...."

848 So.2d at 228–29. *See also Morales v. State*, 286 Ga.App. 698, 703, 649 S.E.2d 873, 878 (2007) ("Items of evidence which are distinct and recognizable physical objects, such that they can be identified by the sense of observation, are admissible into evidence without the necessity of showing a chain of custody."); *People v. Hill*, 220 A.D.2d 927, 928, 632 N.Y.S.2d 881, 882 (1995) ("[S]trict proof of the chain of custody was not required because clothing is not fungible...."); and *Hutchinson v. State*, 477 N.E.2d 850, 853 (Ind.1985) ("[N]on-fungible items do not require this high degree of scrutiny that must be applied to fungible items.... In addition, a non-fungible item may be admitted into evidence based upon testimony that the items is the one in question and is in a substantially unchanged position.").

In *Ex parte Mills*, 62 So.3d 574 (Ala.2010), the Alabama Supreme Court considered a chain-of-custody challenge on appeal to determine whether the admission of certain items into evidence at trial, without objection, constituted "plain error." The court stated:

> ***19** "Mills did not challenge the chain of custody as to any of the now-challenged items at trial. Unlike *Birge [v. State*, 973 So.2d 1085 (Ala.Crim.App.2007)], in which evidence indicated that several different unidentified individuals could have handled the specimens and there were discrepancies in the records about the specimens, nothing in the present case indicates that the items were tampered with or altered in any manner from the time [law enforcement] relinquished custody of them to DFS [the Department of Forensic Sciences] until the time Bass tested them at DFS. Mills also has made no 'showing of ill will, bad faith, evil motivation, or some evidence of tampering' while the items were at DFS. *Lee [v. State*], 898 So.2d [790] at 847 [(Ala.Crim.App.2001)]. Thus, this link, at worst, is a 'weak' link rather than a 'missing' link in the chain of custody."

62 So.3d at 598. "[E]vidence that an item has been sealed is adequate circumstantial evidence to establish the handling and safeguarding of the item." *Lane v. State*, 644 So.2d 1318, 1321 (Ala.Crim.App.1994).

This Court has also stated the following concerning evidence that is "routinely handled by governmental officials":

> " ' "Tangible evidence of a crime is admissible when shown to be 'in substantially the same condition as when the crime was committed.' And it is to be presumed that the integrity of evidence routinely handled by governmental officials was suitably preserved '[unless the accused makes] a minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering.' If, however, that condition is met, the Government must establish that acceptable precautions were taken to maintain the evidence in its original state.
>
> " ' "The undertaking on that score need not rule out every conceivable chance that somehow the [identity] or character of the evidence underwent change. '[T]he possibility of misidentification and adulteration must be eliminated,' we have said, 'not absolutely, but as a matter of reasonable probability.' So long as the court is persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded, the jury should be permitted to consider and assess it in the light of surrounding circumstances." ' "

Moorman v. State, 574 So.2d 953, 956–57 (Ala.Crim.App.1990) (quoting *United States v. Roberts*, 844 F.2d 537, 549–50 (8th Cir.1988), quoting in turn *United States v. Anderson*, 654 F.2d 1264, 1267 (8th Cir.1981), quoting in turn *United States v. Lane*, 591 F.2d 961 (D.C.Cir.1979)). *See Lee v. State*, 898 So.2d 790, 847–48 (Ala.Crim.App.2001).

> "Although the ideal practice would be for one person to maintain exclusive and constant control of the [evidence], these rules are made for practical people who deal with such evidence as part of day to day routine. The chain of custody requirements aim at a 'reasonable probability' that there has been no tampering; they are not intended as an obstacle course or a walk through a legalistic mine field."

***20** *Blanco v. State*, 485 So.2d 1217, 1220 (Ala.Crim.App.1986). "The totality of the circumstances test is applied to alleged deficiencies in a chain of custody." *Whitt v. State*, 733 So.2d 463, 473 (Ala.Crim.App.1998).

This Court has also recognized that the admission of evidence without a proper chain of custody may constitute harmless error. *See Brannon v. State*, 61 So.3d 1100, 1103 (Ala.Crim.App.2010).

With these principles in mind, we review each challenged item of evidence.

A.

[22] First, Shaw argues that the State failed to establish a proper chain of custody for the blood-identification, or bloodstain, cards relating to the victims, State's exhibits 127 and 128. At the time State's exhibits 127 and 128 were admitted, Shaw made no objections. Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Dr. F. John Krolikowski, the medical examiner who performed the autopsies on the two victims, testified:

"[Prosecutor]: Did you also, as part of your autopsy, take bloodstain cards from the victim?

"[Dr. Krolikowski]: Yes. As a routine part of our examination, we take a piece of specially treated material and put drops of blood on it for future use in an investigation of a given case, and these blood drops contain the DNA that can be used to identify the decedent.

"[Prosecutor]: All right. Dr. Krolikowski, I'm showing you what we already have admitted as State's Exhibit No. 127 and 128. Are those the bloodstain cards that you took from Robert and Doris Gilbert?

"[Dr. Krolikowski]: Yes. On the back are my initials and the date which I personally inscribed and had placed on these envelopes."

(R. 1201–02.) Patrick Goff, a forensic scientist with the Alabama Department of Forensic Sciences, testified that he processed the samples on the bloodstain cards that had been collected at the time of the autopsies, that the cards were marked as State's exhibits 127 and 128, and that he obtained DNA for both victims from those cards. The exhibits reflect that Dr. Krolikowski's initials are on the back of each bloodstain card, and he identified the cards as having been prepared by him. There is no indication from Goff's testimony that the cards had been altered or tampered with in any way.

Shaw has made no "showing of ill will, bad faith, evil motivation, or some evidence of tampering" regarding the cards while they were in State custody. *Lee*, 898 So.2d at 847. Shaw has failed to "explain[ ] how he has been denied a substantial right or how the failure to show a chain of custody for the [bloodstain cards] has affected the fairness and integrity of his trial so as to rise to the level of plain error." *Lee*, 898 So.2d at 850. Accordingly, we find no plain error in regard to the admission of this evidence. Shaw is due no relief on this claim.

B.

***21** **[23]** Shaw next argues that the State failed to present a proper chain of custody for the shoes that were admitted as State's exhibit 123. Shaw did not object to the admission of that exhibit and, in fact, specifically

stated that he had no objection. (R. 1116.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Daniel Earl Holifield, a deputy with the Mobile County Sheriff's Department, testified that he collected evidence at the location where Shaw was arrested. He said that photographs were made of the bedroom where Shaw was found, that a pair of shoes were found in that bedroom, that the shoes were size 10 1/2 gray Nike tennis shoes, that he collected those shoes, that the shoes appeared to have blood on them, and that he put the shoes in a brown evidence bag and secured the bag with evidence tape. (R. 1115.) Holifield identified State's exhibit 123 as the shoes that he collected at the time of Shaw's arrest. Photographs of the shoes were also admitted at trial. Patrick Goff testified that the shoes were given an identification number when they arrived at the Department of Forensic Sciences and that he tested the substances on the shoes. He said that he found Robert Gilbert's blood on one of the shoes. The record contains no suggestion that the shoes were tampered with or altered in any way.

The Supreme Court of Georgia recently addressed a similar issue and stated:

> "The blood-stained shoes were distinct and recognizable objects, identified by the detectives who seized them and the serologist at the forensic laboratory who received them; there is no merit to a chain of custody objection on the ground that there was not testimony from every person with custody of the shoes before they were delivered to the laboratory. *Felton v. State*, 283 Ga. 242, 246(2)(b), 657 S.E.2d 850 (2008)."

Walker v. State, 294 Ga. 851, 853, 757 S.E.2d 64, 67 (2014). *See also People v. Morris*, 997 N.E.2d 847, 864, 375 Ill.Dec. 536, 553 (2013) ("Because the State sufficiently laid a foundation for the pants and boots, it was not required to establish a chain of custody for the evidence to be admissible, and the trial court did not err when it allowed the items into evidence...."); *State v. Sutton*, 320 S.W.3d 729, 734 (Mo.Ct.App.2010) ("When an exhibit is clearly identified at trial even as modified as the exhibits here were by the officers cutting out patches, chain of custody is irrelevant.").

The shoes were properly admitted into evidence after they were specifically identified as the shoes that were seized when Shaw was arrested. We find no error, much less plain error, in regard to this issue.

C.

[24] Shaw further argues that the State failed to prove a proper chain of custody for the socks that were seized at the police station. A review of the record shows that the socks were not admitted into evidence but that the results of the forensic tests conducted on the socks were admitted.

When the exhibit containing the test results was discussed at trial, Shaw did not object. Thus, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

*22 Corporal Charles Nathaniel Bailey, Jr., a crime-scene investigator with the Mobile County Sheriff's Department, testified that he collected the clothing that Shaw was wearing at the time Shaw was taken into police custody and that he placed the clothing in a sealed bag and sent that bag to the Department of Forensic Sciences. He identified State's exhibit 131 as the bag that he had used to collect the clothing.

Patrick Goff, a forensic scientist with the Alabama Department of Forensic Sciences, testified that he tested the socks that he received from the Department of Forensic Sciences. He found Robert Gilbert's blood on the socks.

Again, Shaw has made no allegation that the socks were tampered with in any way, and there is no indication in the record that the socks were altered. Although the socks were not admitted into evidence, the results of the forensic tests conducted on the socks were admitted. Any error in admitting testimony concerning the socks or in admitting the forensic tests conducted on the socks was, at most, harmless beyond a reasonable doubt. *See Brannon, supra.*

D.

[25] Shaw next argues that the State did not present a proper chain of custody for the swabs that were collected from the knife recovered near the murder scene—State's exhibit 129.

At the time the swabs were received and admitted into evidence, Shaw did not object and, in fact, stated that he had no objection. (R. 1082.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Frederick Reed, a crime-scene investigator with the Mobile County Sheriff's Department, testified that he collected a knife near the murder scene, that he placed the knife in an evidence bag, and that he gave the bag and knife to Charles Bailey. Bailey, the lead crime-scene investigator on the case, testified that, after he received the knife from Reed, he processed the knife for fingerprints and swabbed the blade for the presence of blood. (R. 1080–81.) No fingerprints were found on the knife. Bailey identified State's exhibit 129 as the two swabs that he collected from the knife and turned into the Department of Forensic Sciences in a sealed envelope or container, and Bailey testified that the exhibit was in substantially the same condition as when he had processed it. Patrick Goff testified that he received the swabs and tested them and found the presence of Robert Gilbert's blood.

[26] Shaw has made no showing of "ill will, bad faith, evil motivation, or some evidence of tampering." *Lee*, 898 So.2d at 847.

> "Circumstantial evidence is generally sufficient to authenticate the item sought to be entered into evidence, except when there appears to be evidence that the item of evidence was tampered with or that a substitution was made while the item was in the custody of the link who has failed to appear and testify."

Ex parte Holton, 590 So.2d at 920.

***23** Here, the circumstantial evidence was adequate to establish a sufficient chain of custody for the swabs. "[T]he State provided testimony concerning the gathering of this evidence as well as its handling. Any weaknesses in the links of the chains of evidence address weight to be afforded the evidence rather than its admissibility." *Jackson v. State*, 169 So.3d 1, 85 (Ala.Crim.App.2010) (opinion on return to remand). The swabs were properly admitted into evidence at Shaw's trial. There was no error, much less plain error, in the admission of this evidence. Shaw is due no relief on this claim.

E.

[27] Shaw next argues that the State failed to present a proper chain of custody for an NBA T-shirt, recovered approximately 1,500 feet north of the Gilberts' residence and near the .38 caliber Charter Arms gun. The T-shirt was marked and admitted as State's exhibit 130. A picture of the shirt was also admitted as State's exhibit 86.

Shaw stated that he had no objection when this evidence was admitted at trial. Thus, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Corporal Charles Bailey, a crime-scene investigator with the Mobile County Sheriff's Department, testified that he recovered a NBA T-shirt north of the Gilberts' residence. He identified State's exhibit 130 as the T-shirt that he had collected near the murder scene and said that it was in substantially the same condition as when he had collected it. Patrick Goff testified that the blood on the T-shirt matched Robert Gilbert's DNA profile. There was no testimony that the T-shirt belonged to Shaw or had any connection to Shaw. Shaw makes no argument that the T-shirt was tampered with or altered in any way.

The T-shirt was identified as the shirt that was collected near the murder scene and was properly admitted at trial. Thus, we find no plain error in the admission of the T-shirt. Shaw is due no relief on this claim.

F.

[28] Shaw next argues that the State failed to present a chain of custody for the two guns—a Charter Arms .38 caliber revolver and a Ruger .357 Magnum—that were admitted into evidence as State's exhibits 121 and 122.

Crime-scene investigator Charles Bailey testified that State's exhibit 121 was the Charter Arms revolver that he recovered approximately 1,200 feet from the Gilberts' driveway. (R. 1091.) He said that State's exhibit 122 was the Ruger .357 Magnum that he recovered the day

after the murders in a tall grassy area near the Gilberts' house. Those exhibits were received into evidence without objection. (R. 1092.) Thus, we review this claim for plain error. *See* Rule 45(a), Ala. R.App. P. The State also introduced photographs of the guns in the locations where they had been discovered. State's exhibit 87 is a photograph of the Charter Arms revolver, and State's exhibit 88 is a photograph of the Ruger .357 Magnum. Bailey also said that he processed the guns for fingerprints and found no prints on either gun. Bailey identified the guns admitted at trial as the guns he had collected near the scene of the murders.

"[B]ecause the condition of the [guns were] not an issue in this case, and [their] authenticity was established by other means, it was not necessary to establish a chain of custody." *Ex parte Works*, 640 So.2d 1056, 1059 (Ala.1994). Accordingly, the guns were correctly admitted into evidence. Shaw is due no relief on this claim.

VII.

***24** **[29]** Shaw next argues that in closing argument in the guilt phase the prosecutor improperly commented on Shaw's right to remain silent following his arrest. Specifically, he challenges the following argument made by the prosecutor in closing:

> "The defense says [Shaw] in that video was as high as a person can be. And I submit to you, ladies and gentlemen of the jury, I don't think that's at all accurate, and I think when you have an opportunity to read the transcript, you'll have it back there in the jury box with you, and listen to the DVD again, if you so choose, you won't think so either. I've gone through and counted 15 times that [Shaw] is given an opportunity to explain. He never once says I was high out of my mind. I didn't know what was going on. I just stole something. I didn't kill anybody. That's not what he says. He manipulates and he tries to control that interview.
>
> "Detective Gomien says: It's been a long day, ain't it? He says: Every day's a long day.
>
> "He doesn't answer any of these questions. He tries to turn around all of the questions on the officers. That's not someone who is high as a person can be, and that's certainly not the words of an innocent person.
>
> "Detective McLean tries to talk to him about what his mom said about knowing the Bible. [Shaw] fully in his right mind, totally aware of what he's done, says: No need to waste y'all's time.
>
> "He knows exactly what he's doing. Detective McLean's trying to get him talking, and he didn't want to. He didn't want to tell them anything.
>
> "Detective McLean says: Well, in order to get you to talk, you know—
>
> "And what does the defendant say? We're talking. And you heard his voice, and you saw his demeanor, and you saw what the response to that question really meant.
>
> "Detective Gomien: I want to talk about today. The defendant: Talk about it. Talk about it.
>
> "He's wise enough to know he doesn't want to sign what they put in front of him, and he looks at it, and he contemplates it, and he considers it before he does it. He's not high as a person can be. He is fully aware of what he is—
>
> > "[Defense counsel]: I object that he's not wanting to sign. He has an absolute right not to sign anything, and we're getting real close to—
> >
> > "The Court: All right. [Prosecutor] take care.
>
> "[Prosecutor]: He is fully aware of what is going on, and he is fully aware of what he's done.
>
> "How old are you? A simple question like how old are you, he responds with: What's age got to do with it anyway? He won't answer their questions. He's turning it around into another question. He is trying to manipulate the police. Instead of taking responsibility, he's turning it around on them.
>
> > "[Defense counsel]: Judge, this is improper argument, and I object.
> >
> > ***25** "The Court: Let's move on to something else. Move on."

(R. 1284–86.)

On appeal, Shaw argues that the prosecutor violated *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), by commenting on Shaw's post-arrest,

post-*Miranda* silence. Shaw did not make this specific argument at trial; thus, we review this claim for plain error. *See* Rule 45A. Ala. R.App. P.

The United State Supreme Court in *Doyle* held that "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619–20, 96 S.Ct. 2240. Later in *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), the Supreme Court clarified its holding in *Doyle* and stated:

> "*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."

447 U.S. at 408, 100 S.Ct. 2180.

> " 'What *Anderson v. Charles*, [447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222, reh. denied, 448 U.S. 912, 101 S.Ct. 27, 65 L.Ed.2d 1173 (1980),] teaches is that the *Doyle* [*v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976),] rule has no application unless the defendant has remained silent and could be considered to have done so in reliance on the implied assurances of the *Miranda* warnings.' *United States v. Crowder*, 719 F.2d 166, 172 (6th Cir.1983), cert. denied, 466 U.S. 974, 104 S.Ct. 2352, 80 L.Ed.2d 825 (1984)."

State v. Joly, 219 Conn. 234, 256 n. 15, 593 A.2d 96, 108 n. 15 (1991).

The Louisiana Court of Appeal, in *State v. Thibodeaux*, 687 So.2d 477 (La.Ct.App.1996), considered whether a similar argument constituted error. The court stated:

> "In *State v. Wallace*, 612 So.2d 183 (La.App. 1 Cir.1992), writ denied, 614 So.2d 1253 (La.1993), as in the case at hand, police officers indicated at trial that the defendant made some inculpatory statements after being advised of his *Miranda* rights, and the defendant did not testify at trial. The defendant in *Wallace* contended that the prosecutor improperly referred to his postarrest silence during closing arguments. During the closing arguments, the prosecutor stated:
>
> " 'Officer Nores, Officer Boehm told you that when [the defendant] came back to the jail he said, I shot that bastard and I'd shoot all of them if you gave me a chance. Your hands are tied, but mine are not. What bastards is he talking about? I asked him. Blacks. Same thing Jeff Boehm said. Now, if there were a legitimate self-defense issue, it didn't come out in what he told the police at that time.'
>
> ***26** "*Id.* at 188.
>
> "The appellate court found that the prosecutor's remarks referred to the inconsistency between the defense asserted at trial (justification) and the defendant's inculpatory statements and that as such, the closing arguments did not violate *Doyle* [*v. Ohio*, 426 U.S. 610 (1976)]."

687 So.2d at 480–81. *See also Sidney v. State*, 571 P.2d 261, 264 (Alaska 1977) ("Omissions and inconsistencies in [the defendant's] exculpatory statement could properly be pointed out at trial.... We read *Doyle v. Ohio*, [426 U.S. 610 (1976),] as not changing that rule.").

Shaw's defense was that he was so intoxicated at the time of the murders that he could not form the specific intent to kill. The prosecutor in his closing argued that Shaw's actions on the videotape were inconsistent with this defense. The prosecutor's argument was not a comment on Shaw's silence and did not violate *Doyle*.

Moreover, the United States Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), recognized that a *Doyle* violation may be harmless beyond a reasonable doubt. This Court has likewise found that a *Doyle* violation may be harmless. *See Kelley v. State*, [Ms. CR–10–0642, Sept. 5, 2014] — So.3d ——, —— (Ala.Crim.App.2014) ("Assuming without deciding that a *Doyle* violation occurred, any error was harmless and did not rise to the level of plain error. Rule 45A, Ala. R.App. P."). *See also State v. Mason*, 420 S.W.3d 632, 639–40 (Mo.Ct.App.2013)

("[O]ur review of the record convinces us that Defendant is not entitled to any relief because the [*Doyle*] error was harmless beyond a reasonable doubt."); *State v. Grant*, 105 So.3d 81, 88 (La.Ct.App.2012) ("A *Doyle* error is subject to a harmless error review."); *Beasley v. State*, 74 So.3d 357, 362 (Miss.Ct.App.2010) ("Even assuming a *Doyle* violation, the Supreme Court has held that any error in permitting a prosecutor to comment on the defendant's right to remain silent is subject to harmless error review."); *Sobolewski v. State*, 889 N.E.2d 849, 857 (Ind.Ct.App.2008) ("[T]he use of a defendant's post-arrest silence to impeach a defendant's exculpatory explanation is subject to harmless error analysis."); *State v. Bereis*, 117 Conn.App. 360, 379, 978 A.2d 1122, 1134 (2009) ("[W]e conclude that the *Doyle* violation in this case was harmless beyond a reasonable doubt."); and *State v. Pruitt*, 42 Kan.App.2d 166, 173, 211 P.3d 166, 172 (2009) ("An error of constitutional magnitude [a *Doyle* violation] is governed by the federal constitutional error rule, which provides that an error is only harmless if it can be declared beyond a reasonable doubt to have had little, if any, likelihood of changing the trial's outcome."). Even if we were to find that there was a *Doyle* violation, which we do not, any conceivable error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Shaw is due no relief on this claim.

VIII.

***27 [30]** Shaw next argues that his two convictions for the capital offense of murder during the course of burglary were improper because, he says, the State improperly relied on the murder of each victim as the underlying offense to establish the burglary. Specifically, Shaw argues that use of the murder itself to elevate the crime to capital murder "violates the requirement that capital murder statutes 'genuinely narrow' the class of persons eligible for the death penalty." (Shaw's brief, p. 91.)

Shaw did not raise this issue at trial; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

This Court has previously considered and rejected this argument. In *Hyde v. State*, 778 So.2d 199 (Ala.Crim.App.1998), we stated:

> "[Hyde] erroneously argues that the trial court erred in allowing the murder to be elevated to capital murder based on the same facts that constituted the murder itself. Because the State showed that the appellant committed the murder during a burglary of Whitten's house, the murder was properly elevated to, and the appellant was properly convicted of, the capital offense of burglary/murder. See § 13A–5–40(a)(4), Ala.Code 1975."

778 So.2d at 213. In *Whitehead v. State*, 777 So.2d 781 (Ala.Crim.App.1999), this Court held:

> "Whitehead contends that 'the use of the murder itself to elevate the murder to capital murder violates the requirement that capital murder statutes "genuinely narrow" the class of persons eligible for the death penalty.' (Whitehead's brief to this court, p. 20.) This same argument was raised on appeal by Whitehead's codefendant Hyde and was rejected by this court. See *Hyde [v. State]*, [778 So.2d 199 (Ala.Crim.App.1998)]. Likewise, we reject Whitehead's argument. Whitten's murder was elevated to capital murder because it was committed during the course of a burglary and because the victim was a witness, not because of the murder itself. See § 13A–5–40(a)(4), Ala.Code 1975. Because the State sufficiently proved the elements of burglary, Whitehead was properly convicted of the capital offense of murder during a burglary."

777 So.2d at 839. Here, the murders were elevated to capital murders because they were committed during the course of a burglary and not because of the murders themselves. *See Whitehead, supra.* Shaw was properly charged and convicted of murdering Doris Gilbert and Robert Gilbert during the course of a burglary.

In the same section of his brief, Shaw also argues that his convictions for burglary/murder were invalid because, he says, the circuit court failed to define the underlying crime of "theft" to satisfy the burglary element of the capital-murder offense. There was no objection made at the conclusion of the court's instructions; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

This Court has specifically addressed this issue and stated:

***28** "The appellant also contends that the court's instructions on burglary were erroneous in that the court failed to define theft. However, we do not believe that this failure amounted to plain error.

"We are persuaded by the state's argument, which concerns the components of the offense of burglary. Section 13A–7–5[, Ala.Code 1975,] defines burglary in the first degree as follows:

" 'A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime:

" '(1) Is armed with explosives or a deadly weapon....'

"As this court stated in *Richardson v. State*, 456 So.2d 1152 (Ala.Cr.App.1984):

" 'Under Alabama Code 1975, § 13–2–40, defining first degree burglary (not to be confused with burglary as defined in Alabama's new Criminal Code, Alabama Code (1975), § 13A–7–5 et seq.), and at common law, "a defendant who breaks and enters into a dwelling house must, at the time he does so, intend to commit a felony therein. *It is not necessary that the felony intended be committed.* Nor does it matter why the intended felony was not committed." C. Torcia, 3 *Wharton's Criminal Law* § 338 (1980).'

"456 So.2d at 1155. (Emphasis added.)

"Because it is not necessary for a conviction of first degree burglary that the intended felony be committed, we find no plain error in the court's failure to define the elements of the underlying felony, i.e., theft."

Hutcherson v. State, 677 So.2d 1174, 1199–1200 (Ala.Crim.App.1994), *rev'd on other grounds*, 677 So.2d 1205 (Ala.1996).

Later, the Alabama Supreme Court in *Ex parte Hagood*, 777 So.2d 214 (Ala.1999), stated the following concerning a circuit court's failure to define the term "theft" in the court's penalty-phase jury instructions in a capital case concerning the application of the aggravating circumstance that the murder was committed in the course of robbery:

"The Court of Criminal Appeals, in its well-reasoned opinion, recognized that there are instances where, even though a term has been defined by statute, the failure to define that term for the jury does not constitute reversible error. It went on to explain that in those instances, the 'term' is not susceptible to different interpretations. Consequently, it stated that it could not say that the term 'theft' is subject to only one interpretation and thus could not say that the term 'theft' could be understood by average jurors in its common usage. [*Hagood v. State*,] 777 So.2d [162] at 197 [(Ala.Crim.App.1998)]. We disagree.

"The Court of Criminal Appeals recognized in its opinion that in some cases, even though a relevant term is statutorily defined, the trial court's failure to give the statutory definition does not constitute reversible error. This is one of those cases. The term 'theft' is a term of sufficient common understanding and did not need to be specifically defined in order for the jury to adequately consider the crime of robbery as an aggravating circumstance in this case. Other courts that have addressed this issue have reached the same result. See *State v. Ng*, 110 Wash.2d 32, 44, 750 P.2d 632, 639 (1988) ('theft,' like 'assault,' is a term of such common understanding as to allow the jury to convict of robbery); see also *Commonwealth v. Yarris*, 519 Pa. 571, 598, 549 A.2d 513, 527 (1988) ('theft' is commonly understood as stealing, and the trial court's recitation of theft as an element of the crime of robbery is adequate); *Gauldin v. State*, 632 S.W.2d 652, 656 (Tex.App.1982) (the charge to the jury, which included as an element of the robbery offense, that it occurred 'in the course of committing theft,' is sufficient); *State v. Hudson*, 157 W.Va. 939, 944–45, 206 S.E.2d 415, 419 (1974) (instruction that the crime of robbery consists of a felonious taking of property from a person by violence and that it also consists of theft of property from the victim by the use of force and arms was held sufficient); compare *Grant v. State*, 420 So.2d 903 (Fla.Dist.Ct.App.1982) (the elements of the underlying felony need not be explained with the same particularity that would be required if that offense were the primary crime charged); and *Hensley v. State*, 228 Ga. 501, 503–04, 186 S.E.2d 729, 731 (1972) (the trial court's instructions to the jury, defining 'armed robbery' in the

language of a Georgia statute, which uses the term 'with intent to commit theft,' were sufficient).

"In a capital case, when the judge is charging the jury on the underlying felony stated in the aggravating circumstance found in § 13A–5–49(4), Ala.Code 1975, the preferred practice is to charge the jury on each element of the applicable underlying felony. However, in this case, we conclude that the trial court's failure to give the jury the statutory definition of 'theft' was not error, because the instruction sufficiently apprised the jury of the crime of robbery."

***29** 777 So.2d at 219–20.

For these reasons we likewise find no plain error in the circuit court's failure to instruct the jury on the definition of "theft"—the underlying offense for burglary. *See Hagood, supra.* Shaw is due no relief on this claim.

IX.

[31] Shaw next argues that his convictions for four counts of capital murder for murdering two people violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Specifically, he argues that Count II of each of the two indictments was the same offense; thus, he argues, he was convicted twice of violating § 13A–5–40(a)(10), Ala.Code 1975, for killing two people pursuant to one scheme or course of conduct.

The two indictments returned against Shaw charged, in pertinent part:

Indictment I

"Count I

"Aubrey Lynn Shaw whose name is to the Grand Jury otherwise unknown than as stated, did intentionally cause the death of another person, to-wit: Doris Gilbert, by stabbing her with a knife, and the said Aubrey Shaw caused said death during the time that he knowingly and unlawfully entered or remained, or attempted to enter or remain, unlawfully in a dwelling of another, to-wit: Robert and Doris Gilbert, with intent to commit a crime therein, to-wit: murder and/or theft, and while effecting entry or while in said dwelling or in immediate flight therefrom, the said Aubrey Shaw did cause physical injury to the said Doris Gilbert who was not a participant in the said crime, by, to-wit: stabbing her with a knife, in violation of § 13A–5–40(a)(4) of the Code of Alabama.

"Count II

"Aubrey Shaw, whose name is to the Grand Jury otherwise unknown than as stated did intentionally cause the death of another person, to-wit: Doris Gilbert, by stabbing her with a knife, and did intentionally cause the death of another person, to-wit: Robert Gilbert, by stabbing him with a knife, pursuant to one scheme or course of conduct, in violation of § 13A–5–40(a)(10), of the Code of Alabama."

Indictment II

"Count I

"Aubrey Lynn Shaw whose name is to the Grand Jury otherwise unknown than as stated, did intentionally cause the death of another person, to-wit: Robert Gilbert, by stabbing him with a knife, and the said Aubrey Shaw caused said death during the time that he knowingly and unlawfully entered or remained, or attempted to enter or remain, unlawfully in a dwelling of another, to-wit: Robert and Doris Gilbert, with intent to commit a crime therein, to-wit: murder and/or theft, and while effecting entry or while in said dwelling or in immediate flight therefrom, the said Aubrey Shaw did cause physical injury to the said Robert Gilbert who was not a participant in the said crime, by, to-wit: stabbing him with a knife, in violation of § 13A–5–40(a)(4) of the Code of Alabama.

"Count II

***30** "Aubrey Shaw, whose name is to the Grand Jury otherwise unknown than as stated did intentionally cause the death of another person, to-wit: Robert Gilbert, by stabbing him with a knife, and did intentionally cause the death of another person, to-wit: Doris Gilbert, by stabbing her with a knife, pursuant to one scheme or course of conduct, in violation of § 13A–5–40(a)(10), of the Code of Alabama."

[32] "A defendant can be convicted of two or more capital murders for the death of one victim, so long as those convictions are in accordance with *Blockburger [v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.

306 (1932)], i.e., so long as each conviction required an element not required in the other convictions." *Heard v. State*, 999 So.2d 992, 1009 (Ala.2007).

In this case, the only distinction in Count II of both indictments is the order of the names of the two victims. Both counts required proof of the exact same elements—the intentional murders of both Doris Gilbert and Robert Gilbert.

This Court in *Yeomans v. State*, 898 So.2d 878 (Ala.Crim.App.2004), held that the multiple convictions in that case for the capital offense of killing two or more people during one course of conduct violated the Double Jeopardy Clause. We stated:

> "The Double Jeopardy Clause provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' U.S. Const., Amend. V. The United States Supreme Court has discussed the constitutional principles regarding the prohibition against double jeopardy quite simply:
>
> > " 'In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 168–169 [97 S.Ct. 2221, 53 L.Ed.2d 187] (1977); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342 [31 S.Ct. 421, 55 L.Ed. 489] (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger* " test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.'
>
> "*United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).
>
> "The three indictments charging Yeomans with the murder of two or more persons pursuant to one scheme or course of conduct were alternative methods of charging the same offense. The only variation in the three indictments was the order in which the victims' names were listed. The same elements established each of the three charges; none of the three offenses contained an element not also required for the other two offenses. Therefore, convictions on these counts violated double-jeopardy principles, and the convictions on the three separate counts of capital murder pursuant to § 13A–5–40(a)(10), Ala.Code 1975, cannot stand. See *Wynn v. State*, 804 So.2d 1122, 1150 (Ala.Crim.App.2000); *Stewart v. State*, 601 So.2d 491, 494–95 (Ala.Crim.App.1992), aff'd in part, rev'd in part on other grounds, 659 So.2d 122 (Ala.1993), aff'd, 730 So.2d 1246 (Ala.1999)."

898 So.2d at 890. *See Parks v. State*, 989 So.2d 626, 634 (Ala.Crim.App.2007) ("[The defendant] alleges that his constitutional protection against double jeopardy was violated when he was tried and convicted of counts one and two of his indictment for murder wherein two or more persons are murdered by one act or pursuant to one course or scheme of conduct when both counts reflect the murder of the same two people. We agree with his argument that counts one and two of his indictment represented the death of two persons committed by one act or course of conduct and merely reversed the order of the victim's names in each count.").

***31** A Texas Court of Appeals has reached this same conclusion:

> "Here, according to the State, Saenz committed capital murder by violating section 19.03(a)(7)(A) of the Texas Penal Code. Section 19.03(a)(7)(A) provides that a person commits capital murder if he murders more than one person during the same criminal transaction. Tex. Pen.Code Ann. § 19.03(a)(7)(A) (Vernon 2003). Looking at statutory construction, section 19.03(a)(7)(A) defines capital murder as the murder of more than one person. Unlike other assault-type offenses that require only one victim, section 19.03(a)(7)(A) states that in committing capital murder, a person must murder more than one victim. As such, section 19.03(a)(7)(A) necessarily requires the murder of more than one victim. Therefore, we hold that the allowable unit of prosecution for section 19.03(a)(7)(A) is more than one victim.
>
> "Here, Saenz was accused in three separate counts of the capital murder of three victims. If the allowable unit of prosecution is more than one victim, Saenz necessarily committed only one capital murder. All three counts contain the same victims, the same allowable unit of prosecution. All three counts, therefore, constitute only one offense of capital murder. Because the indictment

states only one allowable unit of prosecution, Saenz can be convicted of only one offense. As such, Saenz's double jeopardy rights were violated."

Saenz v. State, 131 S.W.3d 43, 52 (Tex.App.2003) (footnotes omitted).

For the reasons stated by this Court in *Yeomans*, Shaw could not be convicted of two counts of murdering the same two individuals during one scheme or course of conduct. Thus, one of Shaw's convictions for violating § 13A–5–40(a)(10), Ala.Code 1975, is due to be set aside. [8]

Penalty–Phase Issues

X.

Shaw next asserts that the circuit court undermined the presentation of mitigation evidence and his right to counsel by allowing Shaw to waive—against his attorney's advice—the presentation of additional mitigating evidence.

The following exchange occurred after witnesses had testified on Shaw's behalf during the penalty phase:

"The Court: [Defense counsel,] I understand an issue has come up regarding proceeding forward with the mitigation stage, and if you'll put something on the record, I'll take it from there.

"[Defense counsel]: Yes, your Honor. At this point in time, once we broke for lunch, we spoke with Mr. Shaw, and we've had some ongoing discussions since a little before noon today, and at this point in time he has told us he does not wish to go forward with the rest of his mitigation phase with witnesses which would, the bulk of them, be family witnesses that would testify to social history, family history, incidents of abuse, various forms of abuse, the physical, sexual, emotional, in addition to some of the extended drug use and abuse. He has told us, and it's still his opinion, that I can call Dr. [Thomas S.] Bennett, which I would still like to do and go forward with.

***32** "At this point in time, Judge, everyone's aware that we qualified quite a number of mitigation witnesses when we started this process about a week ago or close to a week ago, and when we broke yesterday, your Honor was aware that it would be a full day, if not longer, of mitigation evidence and that this phase was extremely important to this trial, and it's something that we've, it's been no secret to anybody, we've diligently been working on and putting hours and hours into for an extended period of time that he has unequivocally told us at this point we cannot call anymore family members who would testify to all the social history.

"The Court: Okay. All right. All right. Mr. Shaw, way back whenever this case was arraigned, you know, I appointed you two very skilled and qualified defense counsel. You understand that?

"[Shaw]: (Nods head up and down.)

"The Court: And if you'll answer out loud so my court reporter can—

"[Shaw]: Yes.

"The Court: And your counsels clearly tried this case with an eye towards what they were going to do at this stage of the proceedings, if necessary, and now you're wanting to hamstring them a little bit. And I understand you don't want your family to have to go through painful stuff from the past. I understand that. I do. They understand that, I'm sure, but it's my understanding if you have these folks—they're willing to do this; is that right? Is that my understanding?

"[Defense counsel]: Absolutely, Judge.

"The Court: The family is willing to do it?

"[Defense counsel]: Yes.

"The Court: So, Mr. Shaw, they've bitten the bullet, so to speak. They're willing to do it. I know you didn't want to put them through it, but they want to do it for you is what it looks like to me. As hard as it is for them, and it's going to be hard, it's going to be hard for you and hard for everybody. It's going to hard for everybody to listen to bad stuff that happens, but your lawyers feel this is necessary for you to do for the benefit of this jury because this jury doesn't know you. They don't know your background. They don't know all your history, and they're not going to know it all unless your lawyers put these witnesses on. Look, I'm not going to make you do anything, but I will say your lawyers—I've authorized, I know, thousands and thousands of

dollars of expenses to get this testimony lined up, and you have an expert. It's a lot of money, and it's well spent money in my opinion, because I think every defendant is entitled to his day in court and due process. That's a very important clause in the Alabama Constitution and the United State Constitution. I want you to have your full due process, I do, and your lawyers believe this testimony is absolutely necessary for you to get full —your full day in court, and I do, too. And I really encourage you to think about allowing them to put on this testimony. Again, I know it's emotional. It's a hard day, but this is—it's been several years now, and it's about to end. It's coming to a close, and your lawyers want to do everything they can to help you in this proceeding. Okay? And I would implore you—again, these aren't rookie lawyers. These are folks that have had a lot of experience in this area. They know what they're doing. They know what they're doing. So when they're telling you this is something you ought to do, this is something you probably ought to do, all right, again, as hard as it is. So if you would, I mean, will you consider talking with them a little bit more about this and reconsidering the instruction you've given them at this point?

"[Shaw]: (No audible response.)

***33** "The Court: I mean, they've put a lot of time into this case.

"[Shaw]: Your Honor, you know, from the get-go, I never wanted my family members on that stand. I know people's been hurt. I know, and I just feel like, you know, enough's been said. God is the final judge of all mankind, you know."

(R. 1431–35.) After this exchange, Shaw's defense counsel called three additional witnesses to testify on Shaw's behalf: Dr. Thomas S. Bennett, a clinical psychologist; Shaw's wife, Heather Michelle Shaw; and Shaw's cousin, Christy Lane Wynn. Shaw did not object to the court's method of handling this issue; thus, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

A.

[33] First, Shaw argues that the circuit court interfered with his right to counsel by permitting him to waive the presentation of mitigation evidence.

This Court has recognized that a competent defendant may waive the presentation of mitigation evidence at the penalty phase of a capital-murder trial.

> "We hold that a competent defendant can waive the presentation of mitigating evidence at a capital sentencing proceeding, provided the trial court carefully weighs possible statutory and nonstatutory mitigating circumstances against the aggravating circumstances to assure that death is the appropriate sentence."

Nelson v. State, 681 So.2d 252, 255 (Ala.Crim.App.1995). The majority of other states that have considered this issue have reached this same conclusion. *See State v. Robert*, 820 N.W.2d 136 (S.D.2012); *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604 (2012); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010); *State v. Bordelon*, 33 So.3d 842 (La.2009); *Grim v. State*, 971 So.2d 85 (Fla.2007); *Byrom v. State*, 927 So.2d 709 (Miss.2006); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002); *People v. Lavalle*, 181 Misc.2d 916, 697 N.Y.S.2d 241 (1999); *Zagorski v. State*, 983 S.W.2d 654 (Tenn.1998); *State v. Coleman*, 168 Ill.2d 509, 660 N.E.2d 919, 214 Ill.Dec. 212 (1995); and *People v. Bloom*, 48 Cal.3d 1194, 774 P.2d 698, 259 Cal.Rptr. 669 (1989).

Our neighboring State of Florida has recognized:

> "Competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel. See, e.g., *Boyd v. State*, 910 So.2d 167, 189–90 (Fla.2005) ('Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase.')."

Hojan v. State, 3 So.3d 1204, 1211 (Fla.2009).

***34** The circuit court correctly allowed Shaw to limit his attorneys' presentation of mitigating evidence at the penalty phase of his capital-murder trial.

B.

[34] Shaw further argues that even if he could legally waive the presentation of mitigation evidence the circuit court's inquiry into that waiver was not adequate.

This Court in *Adkins v. State*, 930 So.2d 524 (Ala.Crim.App.2001), cited with approval the Tennessee Supreme Court's decision in *Zagorski v. State*, 983 S.W.2d 654 (Tenn.1998), in which that court noted the requirements for waiving the presentation of mitigation evidence:

> "[W]hen a defendant, against his counsel's advi[c]e, refuses to permit the investigation and presentation of mitigating evidence, counsel must inform the trial court of these circumstances on the record, outside the presence of the jury. The trial court must then take the following steps to protect the defendant's interests and to preserve a complete record:
>
> "1. Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial;
>
> "2. Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and
>
> "3. After being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence."

983 S.W.2d at 660.

Shaw did not waive the presentation of all mitigation evidence, however; Shaw merely waived the presentation of some of his family members' testimony. The following individuals testified on Shaw's behalf during the penalty phase: Dr. Thomas S. Bennett, a clinical psychologist; Carol Sue Morgan, Shaw's aunt; Christy Lane Wynn, Shaw's cousin; and Heather Michelle Shaw, Shaw's wife. Each of those witnesses gave very detailed testimony.

Other states have recognized the distinction between waiving the presentation of *all* mitigating evidence and *limiting* the presentation of mitigation evidence. Courts in Florida and Ohio have held that a detailed colloquy is not required when a defendant merely limits his attorney's presentation of mitigating evidence but does not waive the presentation of all mitigation evidence. *See Boyd v. State*, 910 So.2d 167, 188 (Fla.2005) ("[W]hen a defendant waives presentation of mitigation against his attorney's wishes, the trial court must be informed of this decision, the attorney must indicate on the record whether there is mitigating evidence that could be presented and what that evidence would be, and the defendant must confirm that he has discussed these matters with his attorney and that despite his attorney's recommendation, he still wishes to waive mitigation.... [These requirements] are not applicable in this case because [the defendant] presented mitigating evidence."); *State v. Monroe*, 105 Ohio St.3d 384, 396, 827 N.E.2d 285, 300 (2005) ("Given our emphasis in [*State v.*] *Ashworth* [, 85 Ohio St.3d 56, 706 N.E.2d 1231 (1999),] on the word, 'all,' it is clear that we intended to require an inquiry of a defendant only in those situations where the defendant chooses to present no mitigating evidence whatsoever.").

We agree with the reasoning of the above decisions from Florida and Ohio; because Shaw did not waive the presentation of all mitigation evidence at the penalty phase of the trial, the circuit court was not required to conduct a full *Faretta*-type inquiry.[9]

*35 Moreover, even if the circuit court was required to conduct an in-depth colloquy before recognizing Shaw's waiver, the court's colloquy with Shaw was more than sufficient to satisfy this standard. *See Zagorski, supra.* For these reasons, we find no error in regard to this claim. Shaw is due no relief.

XI.

[35] Shaw next argues that the State elicited improper aggravating evidence in the penalty phase during the cross-examination of Shaw's mitigation witnesses. Specifically, he argues that it was error for the State to elicit testimony that Shaw had been accused of sexual abuse and that he stole from his step-grandfather.

Shaw made no objections when that testimony was elicited at the penalty phase; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Initially, we note that § 13A–5–45(d), Ala.Code 1975, addresses the evidence that is admissible at the penalty phase of a capital-murder trial. That section states:

> "*Any* evidence which has probative value and is relevant to sentence shall be received at the sentencing hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is afforded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama."

(Emphasis added.) Moreover, "[u]nder the provisions of §§ 13A–5–45(c) and (d), the strict rules of evidence are not applicable to sentencing hearings." *Billups v. State*, 72 So.3d 122, 132 (Ala.Crim.App.2010). *See also* Rule 1101(b), Ala. R. Evid.

Shaw's maternal aunt, Carol Sue Morgan, testified that Shaw was her sister's third child and that her mother, the woman who had raised Shaw, had been abusive. The following occurred during her direct examination:

"[Defense counsel]: And you talked about the things that he went through, and you've told us a little about some of the things that you went through?

"[Morgan]: Yes, ma'am.

"[Defense counsel]: Is that—that kind of behavior, did it continue through the next generation as far as you know, your conversations with [Shaw] and others, the beatings?

"[Morgan]: I do know that he used to get beatings, and he got—it was terrible. I mean, the boy never had a chance. I mean, his mama didn't want him. Then he comes and lives with mama who does some things to him that is gonna come out later.

"[Defense counsel]: And when you say did some things to him, what are you talking about, Carol? I know it's hard for you.

"[Morgan]: There's gonna be a lot of people that don't believe me, but I'm—things. Everybody knew that my mother—and at the time I didn't have any idea. I just thought he was her favorite. I mean, she was like obsessed with that child.

"[Defense counsel]: And when you say 'things,' are you talking about inappropriate things?

***36** "[Morgan]: Very much.

"[Defense counsel]: Is [Shaw] the only grandchild that inappropriate things were done to?

"[Morgan]: No, ma'am.

"[Defense counsel]: How many others that you're aware of?

"[Morgan]: My two girls. DHR [the Department of Human Resources] got called, and I'm sure it's documented, 'cause they—they got called when something come out.' "

(R. 1411–12.) On cross-examination, the State elicited testimony from Morgan that the Department of Human Resources ("DHR") had been called after Morgan's second-grade granddaughter told her mother that Shaw had molested her.

[36] [37] [38] [39] [40] "The scope of cross-examination in Alabama is quite broad." *Ex parte Deardorff*, 6 So.3d 1235, 1241 (Ala.2008).

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness."

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

> "[E]vidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant. This is true even if a defendant admits evidence during cross-examination of a State's witness, prompting the State to introduce otherwise inadmissible evidence in rebuttal. Therefore, where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's rebuttal or explanatory evidence about the matter."

State v. O'Hanlan, 153 N.C.App. 546, 561, 570 S.E.2d 751, 761 (2002). "Where one party has opened the door on an issue, the opposing party may introduce evidence to negate any false impressions created." *United States v. Goodman*, 243 Fed.Appx. 137, 140 (6th Cir.2007) (not selected for publication in the *Federal Reporter*). "It is fundamental that where the defendant 'opened the door' and 'invited error' there can be no reversible error." *United States v. Beason*, 220 F.3d 964, 968 (8th Cir.2000).

Certainly, Shaw opened the door to the above testimony when he asked Morgan about the allegations of sexual abuse in the household where Shaw was raised. The prosecutor's questions concerning the DHR report were within the scope of a proper cross-examination and did not constitute error, much less plain error.

Shaw also argues that it was error to cross-examine Christy Lane Wynn, Shaw's cousin, about allegations of sexual abuse that had been made against Shaw and allegations that Shaw assaulted and stole from his step-grandfather. The following occurred during Wynn's direct examination:

> "[Defense counsel]: Christy, in addition to your grandmother, were there other sexual abuse perpetrators that you're aware of in the house?
>
> ***37** "[Wynn]: Yes, ma'am. I know of an instance, and it's hard to talk about because I know it's hard for him, too, but there was this guy, he was a Navy guy, my grandmother let come from time to time to stay there when he was in, would allow him to sleep with my cousin, Aubrey [Shaw]. I heard things that I didn't want to hear.
>
> "....
>
> "[Defense counsel]: And I expect the Assistant District Attorney or the District Attorney will ask you some questions. Was there ever an incident where there was a report made regarding your daughter—
>
> "[Wynn]: Yes.
>
> "[Defense counsel]: —being potential victims?
>
> "[Wynn]: Yes, it was.
>
> "[Defense counsel]: Now, you've told us there's been a cycle of sexual abuse—
>
> "[Wynn]: Yes.
>
> "[Defense counsel]: —running rampant throughout Gilbert Stables? And was that report made accusing [Shaw] as doing something inappropriate?
>
> "[Wynn]: Yes."

(R. 1498–1505.) On cross-examination, the State questioned Wynn about various reports that had been made to DHR regarding allegations of sexual abuse made against Shaw. The State also questioned Wynn about whether she had ever seen Shaw beat up Tommy Gilbert, Shaw's step-grandfather, and take his money and truck. Wynn denied ever having seen this but said that she had heard about such instances.

In rebuttal, the State presented the testimony of Carol Ann Clark. She testified:

> "[Prosecutor]: Did you ever see Tom [Shaw's step-grandfather] have any problems with Aubrey Shaw?
>
> "[Clark]: I saw him—I saw Aubrey Shaw run him over one night and steal his money and his keys and his truck and knock the poor old man on the ground.
>
> "....
>
> "[Clark]: Aubrey Shaw used to steal his truck often, like at least three times a week....

> "[Clark]: Aubrey Shaw had attacked him at times for money for his drug habit. And he, also Mister Tom, had told me that he had lost hundreds of thousands of dollars in tools every year because Aubrey Shaw kept stealing them to support his drug habit."

(R. 1522–24.) Again, the questions asked of Wynn concerning the DHR report were questions within the scope of cross-examination and were proper. Accordingly, we find no error, much less plain error, in regard to this claim. *See Ex parte Deardorff, supra.*

[41] Moreover, Clark's testimony concerning Shaw's conduct toward his step-grandfather was properly admitted during the penalty phase because it was relevant to the issue of sentencing. Section 13A–5–45(d), Ala.Code 1975. Shaw is due no relief on this claim.

XII.

[42] Shaw next argues that the State failed to present sufficient evidence to establish the aggravating circumstance that he had previously been convicted of a crime of violence.

Section 13A–5–49(2), Ala.Code 1975, provides, in part: "Aggravating circumstances shall be the following: ... (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." "This aggravating circumstance was intended to single out those individuals who pose a present danger to the public because they have threatened felonious violence in the past." *Hadley v. State*, 575 So.2d 145, 156 (Ala.Crim.App.1990).

In its sentencing order, the circuit court stated the following concerning this aggravating circumstance:

> ***38** "The State presented evidence and again relies upon the convictions in the robbery third cases for this aggravator. The indictments to which [Shaw] pled guilty allege that Shaw did in the course of committing theft of property (purses/wallet) use force against the victims with the intent to overcome his/her physical resistance or physical power of resistance. The defense does not challenge the existence of this aggravator. The Court finds this aggravating circumstance does exist, and it is considered by the Court."

(C. 99–100.)

The State presented evidence indicating that Shaw had two prior felony convictions for robbery in the third degree, a violation of § 13A–5–43, Ala.Code 1975. The case-action summaries for the two prior convictions and the indictments relative to each conviction were admitted into evidence in the penalty phase. In May 2003, Shaw was indicted for robbery in the third degree. That indictment read as follows:

> "Aubrey Lynn Shaw whose name is to the Grand Jury otherwise unknown than as stated, did in the course of committing a theft of property to-wit: a purse and contents, the property of Donna Hartman, use force against the person of Donna Hartman and/or Lisa McGhee, with intent to overcome her physical resistance or physical power of resistance, in violation of § 13A–8–43(a)(1), Ala.Code 1975."

The case-action summary reflects that Shaw pleaded guilty to that offense in December 2003.

In February 2004, Shaw was indicted for robbery in the third degree. That indictment read:

> "Aubrey Lynn Shaw whose name is to the Grand Jury otherwise unknown than as stated, did in the course of committing a theft of property, to-wit: a wallet and it's contents, the property of Norman Cox, use force against the person of Norman Cox, with intent to overcome his physical resistance or physical power of resistance, in violation of § 13A–8–43(a)(1), Ala.Code 1975."

The case-action summary shows that in March 2004 Shaw pleaded guilty to the charged offense.

Section 13A–8–43, Ala.Code 1975, provides:

"(a) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

"(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

"(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property."

This Court in *Hadley v. State*, 575 So.2d 145 (Ala.Crim.App.1990), stated the following concerning the application of this aggravating circumstance:

> "Historically, offenses which have been found to uphold this aggravating circumstance include: armed robbery, *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981); kidnapping and attempted first degree murder, *Fitzpatrick v. State*, 437 So.2d 1072 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984); discharging a firearm into occupied property, *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1 (N.C.1987), cert. denied, 484 U.S. 970, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987); and robbery and aggravated robbery, *Gardner v. State*, 297 Ark. 541, 764 S.W.2d 416 (1989). In Alabama, offenses which have been held to uphold this aggravating circumstance include: robbery, *Brownlee v. State*, 545 So.2d 151 (Ala.Cr.App.1988), affirmed, 545 So.2d 166 (Ala.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989); capital murder, *Jones v. State*, 450 So.2d 165 (Ala.Cr.App.1983), affirmed, 450 So.2d 171 (Ala.1984), cert. denied, 469 U.S. 873, 105 S.Ct. 232, 83 L.Ed.2d 160 (1984); manslaughter, *Siebert v. State*, 562 So.2d 586 (Ala.Cr.App.1989), affirmed, 562 So.2d 600 (Ala.1990); murder, *Jackson v. State*, 459 So.2d 963 (Ala.Cr.App.), affirmed, 459 So.2d 969 (Ala.1984), cert. denied, 470 U.S. 1034, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); murder and criminal assault, *Coulter v. State*, 438 So.2d 336 (Ala.Cr.App.1982), affirmed, 438 So.2d 352 (Ala.1983); and robbery, *Ex parte Thomas*, 460 So.2d 216 (Ala.1984)."

575 So.2d at 156–57. *See* Thomas M. Fleming, Annotation, *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that Defendant was Previously Convicted of or Committed Other Violent Offense, had History of Violent Conduct, Posed Continuing Threat to Society, and the like—Post-Gregg Cases*, 65 A.L.R.4th 838 (1988).

***39** Robbery in the third degree, by its statutory definition in § 13A–8–43, Ala.Code 1975, involves the use or threat of force. Thus, proof of these convictions, by itself, was sufficient to prove the aggravating circumstance set out in § § 13A–5–49(2), Ala.Code 1975. *See State v. Holden*, 338 N.C. 394, 405, 450 S.E.2d 878, 884 (1994) ("[T]he judgment showing that the defendant had previously been convicted of attempted second-degree rape was sufficient, standing alone, to require that the trial court submit the aggravating circumstance that the defendant had committed a prior felony involving the use or threat of violence to the person."); *State v. Hamlette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981) ("On its face, armed robbery involves the threat or use of violence to the person. Defendant may, of course, present evidence, if he has any, in mitigation of his involvement in the previous felony which triggers this aggravating circumstance.").

The State proved beyond a reasonable doubt the aggravating circumstance that Shaw had previously been convicted of a crime of violence. *See* § 13A–5–49(2), Ala.Code 1975. This aggravating circumstances was correctly applied in this case. For these reasons, Shaw is due no relief on this claim.

XIII.

[43] Shaw next argues that the circuit court erred in finding that the murders were especially heinous, atrocious, or cruel as compared to other capital murders.

Section 13A–5–49(8), Ala.Code 1975, provides, in part: "Aggravating circumstances shall be the following: ... (8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."

In its sentencing order, the circuit court stated the following concerning this aggravating circumstance:

> "Although there was no testimony elicited at trial about exactly what went on in the Gilberts' residence at the time of the murders, the forensic evidence tells a gruesome story. Two very elderly and infirm persons were brutally stabbed and slashed to death. It is clear from the numerous defensive wounds on the victims that their deaths were not instantaneous, but likely were drawn out and painful. Additionally, each suffered the mental terror and agony of having to watch a spouse being brutally assaulted with a knife, while being physically powerless to stop it. Accordingly, this aggravating circumstance does exist and is considered by the Court."

(C. 102.)

The Alabama Supreme Court has held that this aggravating circumstance is properly applied when the victim or victims experience psychological torture.

> "One factor this Court has considered particularly indicative that a murder is 'especially heinous, atrocious or cruel' is the infliction of psychological torture. Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death. Such torture 'must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.' *Norris v. State*, 793 So.2d 847, 861 (Ala.Crim.App.1999)."

***40** *Ex parte Key*, 891 So.2d 384, 390 (Ala.2004). This Court has upheld the application of this aggravating circumstance in a multiple homicide where one spouse witnessed his or her spouse's death before ultimately being stabbed to death. *See Waldrop v. State*, 859 So.2d 1138 (Ala.Crim.App.2000); *Price v. State*, 725 So.2d 1003 (Ala.Crim.App.1997). Additionally, "[a] victim's age and physical condition are relevant when assessing this aggravating circumstance." *Gobble v. State*, 104 So.3d 920, 986 (Ala.Crim.App.2010).

As the Tennessee Supreme Court has aptly stated:

> "The anticipation of physical harm to oneself is torturous. [*State v.] Nesbit*, 978 S.W.2d [872] at 886–87 [(Tenn.1998)]; *State v. Hodges*, 944 S.W.2d 346, 358 (Tenn.1997), *cert. denied*, 522 U.S. 999, 118 S.Ct. 567, 139 L.Ed.2d 407 (1997). This mental torment is intensified when a victim either watches or hears a spouse, parent, or child being harmed or killed, or anticipates the harm or killing of that close relative and is helpless to assist. *See State v. Soto–Fong*, 187 Ariz. 186, 928 P.2d 610 (Ariz.1996), *cert. denied*, 520 U.S. 1231, 117 S.Ct. 1826, 137 L.Ed.2d 1033 (1997) (killing is especially cruel when a victim suffers mental anguish by watching or hearing the defendant kill another or while waiting his own fate while parent or spouse is killed); *see also State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007, 1020 (Ariz.1983) (uncertainty as to ultimate fate relevant to establish cruelty); *Dampier v. State*, 245 Ga. 882, 268 S.E.2d 349 (Ga.1980); *Hawkins v. State*, 891 P.2d 586 (Okla.Crim.App.1994) (mental suffering includes uncertainty over one's ultimate fate)."

State v. Carter, 988 S.W.2d 145, 150 (Tenn.1999).

Moreover, this aggravating circumstance has withstood constitutional attacks.

"In *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir.1989), the United States Court of Appeals for the Eleventh Circuit upheld this Court's application of the 'especially heinous, atrocious or cruel' aggravating circumstance because this Court's application of it provided a 'principled way to distinguish' cases in which the death penalty is appropriately imposed from cases in which it is not. *Id.* at 1513, 1515 (upholding our application of Ala.Code 1975, § 13A–5–49(8) and quoting *Godfrey [v. Georgia*], 446 U.S. [420,] 431, 100 S.Ct. 1759 [64 L.Ed.2d 398 (1980)]). The Eleventh Circuit emphasized that the Alabama appellate courts' interpretation of § 13A–5–49(8) passed muster under the Eighth Amendment because this Court and the Court of Criminal Appeals had consistently defined 'especially heinous, atrocious or cruel' to include only 'those conscienceless or pitiless homicides which are *unnecessarily torturous* to the victim.' *Lindsey v. Thigpen*, at 1514 (quoting *Ex parte Kyzer*, 399 So.2d 330, 334 (Ala.1981)) (emphasis added)."

Ex parte Clark, 728 So.2d 1126, 1138 (Ala.1998).

> ***41** "With respect to Minor's constitutional challenge to the heinous, atrocious, or cruel aggravating circumstance in § 13A–5–49(8), Ala.Code 1975, [that it is unconstitutionally vague and overbroad] this Court has repeatedly upheld that circumstance against similar challenges. See *Duke v. State*, 889 So.2d 1 (Ala.Crim.App.2002); *Ingram v. State*, 779 So.2d 1225 (Ala.Crim.App.1999), aff'd, 779 So.2d 1283 (Ala.2000); *Freeman v. State*, 776 So.2d 160 (Ala.Crim.App.1999), aff'd, 776 So.2d 203 (Ala.2000); *Bui v. State*, 551 So.2d 1094 (Ala.Crim.App.1988), aff'd, 551 So.2d 1125 (Ala.1989), judgment vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991); and *Hallford v. State*, 548 So.2d 526 (Ala.Crim.App.1988), aff'd, 548 So.2d 547 (Ala.1989)."

Minor v. State, 914 So.2d 372, 437 (Ala.Crim.App.2004).

In this case, Doris Gilbert and Robert Gilbert, an elderly couple, were viciously stabbed to death in their home. One spouse watched helplessly while the other spouse was stabbed multiple times and ultimately died. Doris Gilbert was stabbed 18 times and Robert Gilbert was stabbed 32 times. The murders in this case, by any definition, were heinous, atrocious, or cruel as compared to other capital murders. This aggravating circumstance was proven beyond a reasonable doubt and was correctly applied in this case. Shaw is due no relief on this claim.

XIV.

Shaw next argues that his sentence of death must be vacated because, he says, the sentence violates the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). While acknowledging the Alabama Supreme Court's decision in *Ex parte Waldrop*, 859 So.2d 1181 (Ala.2002), Shaw contends that he disagrees with that holding and that it does not comport with the United States Supreme Court's holding in *Ring*. Shaw asserts that since the court released *Ring* a sentence of death is appropriate only when a jury unanimously finds that an aggravating circumstance exists and that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances.

The Alabama Supreme Court addressed this issue in *Waldrop* and stated:

"Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir.1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital

case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See *Harris v. Alabama*, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required" ' (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').

"Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See *California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); *Zant v. Stephens*, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does')."

***42** 859 So.2d at 1189. For the reasons stated by the Supreme Court in *Waldrop*, Shaw is due no relief on this claim.

In the same section of his brief, Shaw also argues that the Supreme Court's decision in *Waldrop* "eases the State's burden of proving that the death penalty is an appropriate punishment by holding that the jury need not be unaware that its culpability phase finding alone may authorize the trial judge to impose the death penalty in certain cases." (Shaw's brief, pp. 96–97.) Last, he contends that the decision in *Waldrop* undermines the reliability of the sentencing process.

Shaw recognizes that *Waldrop* dictates our result in regard to these claims. This Court is bound by the decisions of the Alabama Supreme Court, § 12–3–16, Ala.Code 1975, and has no authority to modify or reverse that decision. For these reasons, Shaw is due no relief on these claims.

XV.

[44] Shaw next argues that his death sentence is unconstitutional because, he says, several of the aggravating circumstances supporting the death sentence overlap with elements of the capital-murder offenses. The circuit court found two aggravating circumstances: (1) that the murders were committed during the course of a burglary, § 13A–5–49(4), Ala.Code 1975; and (2) that two or more persons were killed pursuant to one act or scheme or course of conduct, § 13A–5–49(9), Ala.Code 1975. Specifically, Shaw argues that the use of the underlying felonies as aggravating circumstances resulted in the failure to narrow the class of individuals eligible for the death penalty and renders his death sentence unconstitutional.

The United States Supreme Court in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), in upholding Louisiana's practice of using an element of the capital-murder offense as an aggravating circumstance, stated:

"Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.' The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm."

***43** 484 U.S. at 246, 108 S.Ct. 546.

In *Vanpelt v. State*, 74 So.3d 32, 89 (Ala.Crim.App.2009), this Court addressed this issue and stated:

"Contrary to [the appellant's] assertions, there is no constitutional or statutory prohibition against double counting certain circumstances as both an element of the offense and an aggravating circumstance. See § 13A–5–45(e), Ala.Code 1975 (providing that 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven

beyond a reasonable doubt for purposes of the sentence hearing'). The United States Supreme Court, the Alabama Supreme Court, and this court have all upheld the practice of double counting. See *Lowenfield v. Phelps*, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ('The fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.'); *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ('The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).'); *Ex parte Kennedy*, 472 So.2d 1106, 1108 (Ala.1985) (rejecting a constitutional challenge to double counting); *Brown v. State*, 11 So.3d 866 (Ala.Crim.App.2007); *Harris v. State*, 2 So.3d 880 (Ala.Crim.App.2007); *Jones v. State*, 946 So.2d 903, 928 (Ala.Crim.App.2006); *Peraita v. State*, 897 So.2d 1161, 1220–21 (Ala.Crim.App.2003); *Coral v. State*, 628 So.2d 954 (Ala.Crim.App.1992); *Haney v. State*, 603 So.2d 368 (Ala.Crim.App.1991). Because double counting is constitutionally permitted and statutorily required, Vanpelt is not entitled to any relief on this issue. § 13A–5–45(e), Ala.Code 1975."

74 So.3d at 89.

Here, there was no unconstitutional double counting when elements of the capital murders—burglary and the death of two or more people—were also used as aggravating circumstances that supported Shaw's sentence of death. For the reasons stated above, Shaw is due no relief on this claim.

XVI.

*44 Shaw next argues that the prosecutor erred when he made certain arguments in closing at the penalty phase. Specifically, Shaw challenges two arguments made by the prosecutor.

This Court has stated the following when reviewing the propriety of a prosecutor's argument:

" '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)."

Simmons v. State, 797 So.2d 1134, 1162 (Ala.Crim.App.1999).

Moreover, " '[t]his 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)).

We now examine each challenged argument.

A.

[45] Shaw first challenges the following argument:

> "[Shaw's] wife was very telling, ladies and gentlemen of the jury, and you saw it yourself. In all of the testimony in the guilt phase of this trial, [Shaw] never once cried a tear. In all of the horrific photographs of Bob and Doris Gilbert brutally slain, laying in that room in their own pools of blood, in all of the horrific photographs of Bob and Doris Gilbert when Dr. Krolikowski was performing the autopsy and going through each of the fifty stab wounds never shed a tear, never shed a tear, didn't care at all about what he had done to Bob and Doris Gilbert. It was only when his wife got on the stand that he shed a tear about her testimony. That is very telling, ladies and gentlemen of the jury, very telling."

(R. 155–56.) Specifically, Shaw argues that the above comments were comments on Shaw's failure to testify and were impermissible and constituted reversible error.

Shaw made no objection to the prosecutor's argument; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

In *Thompson v. State*, 153 So.3d 84 (Ala.Crim.App.2012), we addressed a similar claim and stated:

> "In *Hunt v. Commonwealth*, 304 S.W.3d 15 (Ky.2009), the prosecutor commented that Hunt had shown a 'total and complete lack of remorse or regret over anything that occurred.' In finding no reversible error, the Kentucky Supreme Court stated:
>
> > " 'Rather than a comment on Hunt's silence, we construe the statements as relating to his courtroom demeanor. A prosecutor is entitled to comment on the courtroom demeanor of a defendant. *Woodall v. Commonwealth*, 63 S.W.3d 104, 125 (Ky.2001). We find no error in the comments cited.'
>
> ***45** "304 S.W.3d at 38. 'The conduct of the accused or the accused's demeanor during the trial is a proper subject of comment.' *Wherry v. State*, 402 So.2d 1130, 1133 (Ala.Crim.App.1981). This Court has held that 'remorse is ... a proper subject of closing arguments.' *Ex parte Loggins*, 771 So.2d 1093, 1101 (Ala.2000)."

153 So.3d at 175. *See Kelley v. State*, [Ms. CR–10–0642, Sept. 5, 2014] — So.3d — (Ala.Crim.App.2014); *White v. State*, [Ms. CR–09–0662, May 2, 2014] — So.3d — (Ala.Crim.App.2014) (opinion on return to remand). *See also Moffett v. State*, 137 So.3d 247 (Miss.2014) ("The prosecutor's comments about Moffett's demeanor during the trial were made to a jury that had the opportunity to personally view his demeanor for themselves. The jurors had the opportunity to form their own opinions and were not required to rely on the prosecutor's opinions."); *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998) ("Remarks relating to a defendant's demeanor are permissible because the defendant's demeanor is 'before the jury at all times.' ").

The prosecutor's arguments were not comments on Shaw's failure to testify but were comments on Shaw's demeanor during the course of the trial. Those remarks were proper and did not constitute error, much less, plain error. Shaw is due no relief on this claim.

B.

[46] Shaw next argues that the prosecutor misled the jury on the law concerning mitigating circumstances and that the prosecutor's misstatement denied him due process, a fair trial, and an individualized sentencing determination.

The prosecutor argued the following in his closing in the penalty phase:

> "[I] want to tell you what the law says are mitigating circumstances set forth by law that the defendant can claim in a criminal trial, capital murder trial: One, the defendant has no significant history of criminal activity. Two, the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Number 3, the victim was a participant in the defendant's conduct or consented to it. Number 4, the defendant was an accomplice in the capital murder committed by another person and his participation was relatively minor. Number 5, the defendant acted under duress or under the domination of another person. Number 6, the capacity of the defendant to appreciate the criminality of his conduct to conform his conduct to the requirements of law was substantially impaired. And number 7, the age of the defendant at the time of the crime.
>
> "Now, these are all the ones the law allows, but let's talk about this particular case, which one of these apply or could apply in this particular case."

***46** (R. 1552–53.) There was no objection at the time this argument was made to the jury; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

This Court has held that a prosecutor's misstatements concerning the weighing of the aggravating and the mitigating circumstances did not rise to the level of plain error.

> "Whatever misstatements the prosecutor made regarding the weighing of aggravating and mitigating circumstances did not ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' *Vanpelt [v. State]*, 74 So.3d [32] at 90 [(Ala.Crim.App.2009)]. The circuit court charged the jury at the penalty phase that what the attorneys said was not evidence. (Vol. XIII, R. 1984–85, 88–

92.) Further, the circuit court correctly charged the jury on the weighing of the aggravating circumstances and the mitigating circumstances. (Vol. XIII, R. 1998–99.) Jurors are presumed to follow the trial court's instructions. See *Irvin v. State*, 940 So.2d 331, 352 (Ala.Crim.App.2005) (citing *Taylor v. State*, 666 So.2d 36, 70 (Ala.Crim.App.), on return to remand, 666 So.2d 71 (Ala.Crim.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996)). No plain error occurred, and no basis for reversal exists regarding this claim."

Reynolds v. State, 114 So.3d 61, 144 (Ala.Crim.App.2010). Many courts have held likewise. *See State v. Taylor*, 362 N.C. 514, 546, 669 S.E.2d 239, 265 (2008) ("[A] prosecutor's misstatement of the law may be cured by the trial court's subsequent correct instruction."); *Cox v. State*, 819 So.2d 705, 718 (Fla.2002) ("[T]he prosecutorial misrepresentation of the law was harmless error, and certainly does not constitute fundamental error."); *State v. Bridgewater*, 823 So.2d 877, 903 (La.2002) ("Misstatements of law by the district attorney during argument do not give rise to reversible error when the trial court properly instructs the jury at the close of the case."); *Holsinger v. State*, 750 N.E.2d 354, 358 (Ind.2001) ("The prosecution did misstate the law by telling the jury that a defendant is not required to give the State any information. But in light of overwhelming evidence of Defendant's guilt, allowing this statement over objection would have constituted harmless error."); *Robbins v. State*, 243 Ga.App. 21, 25, 532 S.E.2d 127, 131 (2000) ("In view of the fact that the trial court properly instructed the jury with regard to the State's burden of proof, we find it unlikely that the jury was either misled or confused by the prosecutor's mistake."); and *Wood v. State*, 959 P.2d 1, 14 (Okla.Crim.App.1998) ("[W]e find the Prosecutor's misstatement to be harmless.").

Although the prosecutor did made a misstatement concerning the law, the circuit court properly charged the jury that it could consider anything presented by Shaw as mitigation. The court further instructed the jury that arguments of counsel were not evidence. For these reasons, we find that the prosecutor's misstatements of the law were not so egregious that they rose to the level of plain error. *See Reynolds v. State, supra.* Shaw is due no relief on this claim.

XVII.

***47** **[47]** Shaw next argues that he was improperly sentenced to death because, he says, the circuit court gave an erroneous jury instruction concerning the process of weighing the aggravating and the mitigating circumstances. Specifically, he argues that the circuit court reversed the State's burden of proof.

After the court gave its instructions, the court specifically asked if either the State or defense counsel had any objections. Neither indicated that they did. (R. 1598.) Thus, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

The circuit court gave the following instruction:

"Under our law, the determination of whether a defendant should be sentenced to death or to life imprisonment without the possibility of parole depends on several factors. First, you must determine whether any aggravating circumstance exists. If you determine the existence of one or more aggravating circumstance, you will then have to determine whether the aggravating circumstances outweigh any mitigating circumstances.

"....

"All right. The process of weighing aggravating and mitigating circumstances is not a mechanical one. In other words, your weighing of the circumstances is not simply counting up the number of factors on one side versus the other side.

"If the jury determines that one or more aggravating circumstances exist and that they do not outweigh the mitigating circumstances, you shall return a verdict of life imprisonment without parole.

"If the jury determines that one or more aggravating circumstances exist and that they outweigh the mitigating circumstances, if any, they shall return a verdict of death.

"The law of our state recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a large number of mitigating circumstances. The law also recognizes that it is possible, at least in some situations, that a large number of aggravating circumstances might be

outweighed by one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different values or weights in determining the jury's recommended 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 the other circumstances in the case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

"....

"After full consideration and fair consideration of the evidence, if you are convinced beyond a reasonable doubt of the existence of the aggravating circumstance or circumstances on which I have charged you, and at least ten of you agree that the aggravating circumstance or circumstances outweighs any mitigating circumstance, then your verdict would be for death...."

(R. 1582–97.)

***48** "In setting forth the standard for plain error review of jury instructions, the court in *United States v. Chandler*, 996 F.2d 1073, 1085, 1097 (11th Cir.1993), cited *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197–98, 108 L.Ed.2d 316 (1990), for the proposition that 'an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner.' "

Williams v. State, 710 So.2d 1276, 1306 (Ala.Crim.App.1996).

In *Ex parte Cothren*, 705 So.2d 861 (Ala.1997), the Alabama Supreme Court considered a similar jury instruction and stated:

"Cothren contends that the following portion of the trial court's instructions constituted reversible error:

" '[T]he law also provides whether death or life imprisonment without parole should be imposed upon the defendant depends upon whether any aggravating circumstances exist and whether any circumstances exist-any mitigating circumstances exist that outweigh those aggravating circumstances.'

"Cothren correctly argues that Alabama law requires that the jury find the aggravating circumstances to outweigh the mitigating circumstances before it can recommend a death sentence. However, according to Cothren, that portion of the trial court's instructions set out above created an impermissible presumption in favor of a death sentence, a presumption that, he says, he had to attempt to overcome. The State contends that the trial court's instructions, taken as a whole, sufficiently informed the jury that it had to weigh the aggravating and mitigating circumstances and that it had to find that the aggravating circumstances outweighed the mitigating circumstances before it could recommend a death sentence.

"After reviewing the trial court's instructions, we hold that those instructions, taken as a whole, sufficiently informed the jury of the weighing process required under the law."

705 So.2d at 870–71.

Here, the circuit court's instructions, taken as a whole, correctly informed the jury that it could recommend a sentence of death only if the aggravating circumstance or circumstances outweighed the mitigating circumstance or circumstances. There is no "reasonable likelihood that the jury applied the instruction in an improper manner." *See Williams, supra.* Accordingly, we find no plain error, and Shaw is due no relief on this claim.

Conclusion

We affirm Shaw's two convictions for burglary/murder and one conviction for the murder of two or more people during one scheme or course of conduct. For the reasons stated in Part IX of this opinion, this case is hereby remanded to the Mobile Circuit Court for that court to set aside one of Shaw's two convictions for violating § 13A–5–40(a)(10), Ala.Code 1975. *See Yeomans, supra.* Because we are instructing the circuit court to set aside one of Shaw's capital-murder convictions and because the circuit court specifically referenced four capital-murder convictions in its sentencing order, we further instruct that court to reweigh the aggravating circumstances and the mitigating circumstances pursuant to § 13A–5–47(e), Ala.Code 1975, and to enter a new sentencing order. Due return should

be filed in this Court within 60 days from the date of this opinion.

AFFIRMED IN PART, AND REMANDED WITH INSTRUCTIONS.

KELLUM and BURKE, JJ., concur.

WINDOM, P.J., and WELCH, J., concur in part and dissent in part with writing by WINDOM, P.J., which WELCH, J., joins.

WINDOM, Presiding Judge, concurring in part and dissenting in part.

***49** I agree with all aspects of the majority's opinion except the decision to order the circuit court to reconsider Aubrey Lynn Shaw's sentence on remand. Therefore, I respectfully dissent from that part of the opinion.

The majority correctly holds that Shaw's two convictions for murder made capital because "two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct" violate the Double Jeopardy Clause; therefore, one of those convictions must be set aside. § 13A–5–40(a)(10), Ala.Code 1975. The majority's decision, however, incorrectly concludes that "because the circuit court specifically referenced four capital-murder convictions in its sentencing order [and because this Court has ordered that one of those convictions be set aside], [this Court must] instruct that court to reweigh the aggravating circumstances and the mitigating circumstances pursuant to § 13A–5–47(e), Ala.Code 1975." --- So.3d at ---. Specifically, I do not believe that the circuit court considered Shaw's two convictions under § 13A–5–40(a)(10), Ala.Code 1975, as two aggravating circumstances under § 13A–5–49(9), Ala.Code 1975 (defining the following aggravating circumstance: "The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct."). Further, even if the circuit court did consider Shaw's two convictions under § 13A–5–40(a)(10), Ala.Code 1975, as two aggravating circumstances under § 13A–5–49(9), Ala.Code 1975, the "aggravating facts" underlying Shaw's two convictions are the same and support at least one valid aggravating circumstance; therefore, no constitutional error occurred. *Brown v. Sanders*, 546 U.S. 212, 223, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006).

First, I do not believe that the circuit court considered Shaw's two convictions under § 13A–5–40(a)(10), Ala.Code 1975 (murder of two or more people), as two aggravating circumstances under § 13A–5–49(9), Ala.Code 1975 (murder of two or more people). In its sentencing order addressing the aggravating circumstance relating to murder of two or more people, the circuit court explained:

> "This statutory aggravator was established as a matter of law through the jury's verdict of guilty on Count Two of each of the indictments. Accordingly, this aggravating circumstance does exist and is considered by the Court."

(C. 55–56.) The circuit court referred to the aggravating circumstance in the singular and found that a single aggravating circumstance existed. Therefore, I do not believe that this Court's reversal of one of Shaw's two convictions for murder of two or more people requires this Court to order the circuit court to reconsider Shaw's sentence of death.

More importantly, even if the circuit court, or the jury, considered Shaw's two convictions for murder of two or more people as two separate aggravating circumstances under § 13A–5–49(9), Ala.Code 1975, no constitutional error occurred. As the Supreme Court of the United States has explained, "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Brown v. Sanders*, 546 U.S. at 220, 126 S.Ct. 884. In other words, it is the facts supporting an aggravating circumstance that must be considered in determining whether a sentence of death should be imposed. Thus, if an invalid aggravating circumstance is considered, no constitutional error occurs if the facts supporting that invalid aggravating circumstance could have been considered in support of a valid aggravating circumstance. *Id.* As the Supreme Court explained, consideration of an invalid aggravating circumstance will skew the sentencing scheme "and give rise to constitutional error, only where the jury could not have *given aggravating weight to the same facts* and

circumstances under the rubric of some other, valid sentencing factor." *Brown*, 546 U.S. at 221, 126 S.Ct. 884.

***50** Here, the facts supporting Shaw's two convictions for murder of two or more people were the same and supported the at least one valid aggravating circumstance that Shaw intentionally murdered two or more people. Because the aggravating facts supporting both of Shaw's capital-murder convictions under § 13A–5–40(a)(10), Ala.Code 1975, were properly considered by the circuit court and the jury in determining the proper sentence to impose, the fact that this Court has ordered that one of those convictions be set aside does not render Shaw's sentence or the sentencing process invalid. *See Brown*, 546 U.S. at 221, 126 S.Ct. 884. Accordingly, I do not believe that this Court should require the circuit court to resentence Shaw.

For the foregoing reasons, I respectfully dissent from the portion of the majority's opinion ordering the circuit court to reconsider Shaw's sentence, and I concur in the remaining portions of the opinion.

WELCH, J., concurs.

On Return to Remand

JOINER, Judge.

Aubrey Lynn Shaw was convicted of four counts of capital murder for murdering 83–year–old Doris Gilbert and 79–year–old Robert Gilbert during the course of a burglary and by one act or course of conduct, offenses defined as capital in §§ 13A–5–40(a)(4) and 13A–5–40(a)(10), Ala.Code 1975. The jury, by a vote of 10 to 2, recommended that Shaw be sentenced to death. The circuit court followed the jury's recommendation and sentenced Shaw to death. Shaw appealed to this Court. By opinion dated July 18, 2014, this Court affirmed Shaw's two convictions for murdering Doris and Robert Gilbert during the course of a burglary and one conviction for committing the murders pursuant to one act or course of conduct. *See Shaw v. State*, [Ms. CR–10–1502, July 18, 2014] — So.3d —— (Ala.Crim.App.2014). After finding a double-jeopardy violation, we remanded the case for the circuit court to vacate one of Shaw's convictions under § 13A–5–40(a)(10), Ala.Code 1975. In an abundance of caution, we further instructed the circuit court to reweigh the aggravating circumstances and the mitigating circumstances.

On remand, the circuit court complied with this Court's instructions: it set aside one of Shaw's convictions under § 13A–5–40(a)(10), Ala.Code 1975, and reweighed the aggravating circumstances and the mitigating circumstances. Further, the circuit court reaffirmed Shaw's sentences of death. [1]

***51 [48]** As required by § 13A–5–53, Ala.Code 1975, this Court must now address the propriety of Shaw's capital-murder convictions and his sentences of death.

The record reflects that Shaw's sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor. *See* § 13A–5–53(b)(1), Ala.Code 1975.

The circuit court found five aggravating circumstances as set out in § 13A–5–49, Ala.Code 1975: (1) that the murders were committed while Shaw was on probation for two prior convictions for robbery in the third degree, § 13A–5–49(1), Ala.Code 1975; (2) that Shaw had previously been convicted of an offense involving the use or threat of violence to the person, § 13A–5–49(2), Ala.Code 1975; (3) that the murders were committed during the course of a burglary, § 13A–5–49(4), Ala.Code 1975; (4) that the murders were especially heinous, atrocious, or cruel as compared to other capital murders, § 13A–5–49(8), Ala.Code 1975; and (5) that the murders were committed by one act or pursuant to one scheme or course of conduct, § 13A–5–49(9), Ala.Code 1975.

The circuit court found no statutory mitigating circumstances. (Supp. C. 153–58.) In regard to the nonstatutory mitigating circumstances, the circuit court found as follows:

> "a. *Lack of stable and nurturing environment:* The Court addressed this matter in dealing with the statutory mitigator concerning extreme mental or emotional disturbance. While the evidence is insufficient for Shaw to meet the requisites of that statutory mitigator, the Court finds that the facts and evidence concerning Shaw's upbringing constitute a nonstatutory mitigating circumstance, and the Court assigns it some weight.
>
> "b. *Drug abuse:* The defense urges that [Shaw's] long term abuse of illegal drugs, as well as the use of

drugs around the time of the murders, justifies the finding of a nonstatutory mitigating circumstance. This issue was considered above in the discussion of 'impaired capacity.' [2] Some evidence was presented concerning the timing of [Shaw's] drug use prior to the murders and the possible effect on his appreciation of the wrongfulness of his actions. This Court considers Shaw's voluntary long-term use of illegal drugs, along with his use of drugs around the time of the murders, to be a nonstatutory mitigating circumstance and assigns it some weight.

"c. *Mental status:* The Court has considered [Shaw's] mental-health status in conjunction with the statutory mitigating circumstances of 'extreme mental or emotional disturbance' and 'impaired capacity.' The Court found that [Shaw's] mental-health status does not support a finding of the existence of either of these statutory mitigating circumstances. However, it is apparent that [Shaw] has suffered from some mental-health problems throughout his life, which have never been treated. The Court finds this to be a nonstatutory mitigating circumstance and assigns it weight.

"d. *Capacity to love and care:* [Shaw's] wife testified that [Shaw] has the capacity to love and care for others. Specifically, she testified that Shaw is a good father to their children, and that [Shaw] is a good husband, father, and person when he is not on drugs. She testified that Shaw helped her become closer to God, and that he has insisted to this day that she and the children keep God in their lives. This Court finds this nonstatutory mitigator does exist and assigns it weight.

***52** "e. *Capacity to conform in a prison environment:* The defense presented evidence that Shaw is capable of conforming in a prison environment for the rest of his life. This Court finds this nonstatutory mitigator does exist and assigns it some weight.

"f. *Mercy:* [Shaw], his attorneys, and family plead for mercy. Those calls for mercy cannot be rebutted by the State. The Court is also mindful of the tragic and irreplaceable loss suffered by the victims' family and friends. However, this nonstatutory mitigator is found to exist and is given some weight."

(Supp. C. 159–61.)

This Court has independently weighed the aggravating circumstances and the mitigating circumstances as required by § 13A–5–53(b)(2), Ala.Code 1975, and we are convinced that death was the appropriate sentence for the homicides of Doris and Robert Gilbert.

Neither are Shaw's sentences disproportionate or excessive compared to penalties imposed in similar capital-murder cases. *See* § 13A–5–53(b)(3), Ala.Code 1975. This Court has repeatedly upheld death sentences for murders committed during the course of a burglary and murders involving the death of two or more persons pursuant to one act. *See, e.g., White v. State,* [Ms. CR–09–0662, August 30, 2013] — So.3d —— (Ala.Crim.App.2013) (burglary/murder); *McCray v. State,* 88 So.3d 1 (Ala.Crim.App.2010) (burglary/murder); *Hall v. State,* 979 So.2d 125 (Ala.Crim.App.2007) (burglary/murder); *Belisle v. State,* 11 So.3d 256 (Ala.Crim.App.2007) (burglary/murder); *Jones v. State,* 987 So.2d 1156 (Ala.Crim.App.2006) (burglary/murder); *Walker v. State,* 932 So.2d 140 (Ala.Crim.App.2004) (burglary/murder). *See also Harris v. State,* 2 So.3d 880 (Ala.Crim.App.2007) (death of two or more persons); *Snyder v. State,* 893 So.2d 488 (Ala.Crim.App.2003) (death of two or more persons).

Last, as required by Rule 45A, Ala. R.App. P., we have searched the entire record for any error that may have affected Shaw's substantial rights and have found none.

Shaw's sentences of death are due to be, and are hereby, affirmed.

AFFIRMED.

WELCH, KELLUM, and BURKE, JJ., concur.

WINDOM, P.J., concurs in the result.

All Citations

--- So.3d ----, 2014 WL 3559389

Footnotes

1 The Alabama Supreme Court has embraced the federal standard for plain error in death-penalty cases. *See Ex parte Hodges*, 856 So.2d 936, 948 (Ala.2003).

2 Although this portion of Shaw's statement did not contain a confession, the State offered it to show Shaw's demeanor and state of mind at the time of his arrest.

3 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4 To protect the anonymity of the jurors we are using their initials.

5 S.M. served as an alternate juror. Rule 18.4(g)(3), Ala. R.Crim. P., provides that the last person or persons struck shall be the alternates. For purposes of reviewing a *Batson* claim, we view the alternate jurors as having been struck. *See Ex parte Bankhead*, 625 So.2d 1146, 1147 (Ala.1993).

6 Shaw indicated that he intended to strike this juror but that the State struck her before he could. (R. 934.)

7 Shaw indicated that he intended to strike this prospective juror but that the State struck her before he could. (R. 934.)

8 Shaw was properly convicted of two counts of burglary/murder and one count of murdering two people during one scheme or course of conduct. Each of those convictions required elements that the other convictions did not. We have upheld similar convictions against double-jeopardy attacks. *See Lewis v. State*, 57 So.3d 807 (Ala.Crim.App.2009); and *Williams v. State*, 710 So.2d 1276, 1321 (Ala.Crim.App.1996).

9 In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the United States Supreme Court held that before a defendant could validly waive his or her right to counsel the wavier must be knowingly and intelligently made.

1 In its order on remand, the circuit court specifically noted this Court's concern that the circuit court had considered Shaw's convictions under § 13A–5–40(a)(10), Ala.Code 1975, as separate and multiple aggravating circumstances; the circuit court, however, stated that it had, in fact, weighed those convictions as a single aggravating circumstance. (Supp. C. 141–42.)

2 In its sentencing order, the circuit court stated the following regarding whether Shaw's "capacity ... to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired":

> "The defense injects this mitigator. The defense presented evidence suggesting that Shaw was on a crack-cocaine binge during the hours leading up to the murders. Heather Shaw, [Shaw's] wife, testified that Shaw was on a cocaine binge for several days leading up to the murders. Tera Orellana saw Shaw in the morning shortly after the murders, and she testified that Shaw appeared to be high on drugs. Ms. Orellana also testified though that, at least by then, Shaw fully appreciated the wrongfulness of his conduct.
>
> "Furthermore, James Gary Watson testified that ... Shaw visited him on the night of the murders looking very 'antsy' and paranoid but not high on drugs. The detectives who questioned Shaw upon his arrest noted that Shaw's eyes were so red that it gave them concern about his health, but the detectives also testified that Shaw did not appear to be under the influence of drugs, or any mind-altering substance. Additionally, in finding [Shaw] guilty of capital murder, the jury necessarily rejected the notion that Shaw was so intoxicated by illegal drugs that he failed to form intent to commit murder.
>
> "This is a close call. The defense injected this statutory mitigator, which placed the burden on the State to disprove it. There is only one

> living person who knows exactly what happened that night and why. Although the task was difficult, the Court finds that the State met its burden of disproving the factual existence of this statutory mitigating circumstance by a preponderance of the evidence, and the Court gives it no weight. Even if the Court had determined that this statutory mitigating circumstance existed, the Court would have assigned little weight to this circumstance. Voluntary drug use never excuses criminal conduct, and there was no direct evidence presented that at the time of the murders Shaw was so impaired by drugs that he lacked capacity to appreciate the criminality of his conduct or to conform his conduct to the law."

(Supp. C. 156–57.)

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COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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July 2, 2015

CR-10-1502 **Death Penalty**

Aubrey Lynn Shaw v. State of Alabama (Appeal from Mobile Circuit Court: CC08-1209; CC08-1210)

NOTICE

You are hereby notified that on July 2, 2015, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Michael A. Youngpeter, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Bryan A. Stevenson, Attorney
Randall S. Susskind, Attorney
Jennae R. Swiergula, Attorney
James Clayton Crenshaw, Asst. Atty. Gen.
Kristi Deason Hagood, Asst. Atty. Gen.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

April 22, 2016

1141089

Ex parte Aubrey Lynn Shaw. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Aubrey Lynn Shaw v. State of Alabama) (Mobile Circuit Court: CC-08-1209; CC-08-1210; Criminal Appeals : CR-10-1502).

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 22, 2016:

Writ Denied. No Opinion. Shaw, J. - Moore, C.J., and Stuart, Bolin, Parker, Main, Wise, and Bryan, 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, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of April, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama