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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-10-1502

Aubrey Lynn Shaw

v.

State of Alabama

**Appeal from Mobile Circuit Court
(CC-08-1209 and CC-08-1210)**

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-

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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

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circuit court reaffirmed Shaw's sentences of death.¹

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, §

¹In 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.)

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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

²In 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

evidence was presented concerning the timing of

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.)

[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.

"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

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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

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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); Synder 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.