REL: December 16, 2020

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-1090

Lionel Rory Francis

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-17-3377)

WINDOM, Presiding Judge.

Lionel Rory Francis was indicted for capital murder in the shooting death of his 20-month-old daughter, Alexandria Francis. Francis was

convicted of murder made capital for the intentional killing of a victim who was less than 14 years of age, see § 13A-5-40(a)(15), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Francis be sentenced to death. The Madison Circuit Court accepted the jury's recommendation and sentenced Francis to death.

Facts

Emergency personnel responding to an emergency call on the evening of May 27, 2016, to report the shooting of a 20-month-old child at a house Francis shared with his girlfriend, Ashley Ross, found Francis calmly sitting on the curb and smoking a cigarette. Brandon Frazier, a driver and engineer for the Huntsville Fire Department, testified that it was as though Francis were "waiting for a ride." (R. 739.) Officer Gerald Gambino of the Huntsville Police Department approached Francis, who matched the description of the suspect given in the emergency call, and placed him in handcuffs. Francis responded: "I invoke my rights." (R. 749.)

Frazier hurried toward the house past Francis, whose dispassionate mien contrasted sharply with Ross's frenzy. Frazier testified that Ross

was screaming "He shot my baby!" (R. 740.) Ross hurriedly directed the first responders to a bedroom where Alexandria was lying on the floor in a narrow gap between the bed and a wall. Alexandria was unresponsive but had a slight pulse; a gunshot wound to the left side of her forehead was readily apparent. Frazier carried Alexandria outside to a waiting paramedic. Alexandria was rushed to the hospital, where she died as a result of the gunshot wound.

Dr. Valerie Green, state medical examiner with DFS, described the gunshot wound to Alexandria's forehead as "a star-like pattern, gaping, [and] open," with "areas of soot and searing ... along the edges of the wound." (R. 851-52.) According to Dr. Green, this indicated that the wound was a hard-contact gunshot wound, which is created when the barrel of a gun is placed on the skin with some pressure.

Investigator Richard Eason of the Huntsville Police Department obtained a statement from Francis within an hour of the shooting. Francis told Inv. Eason that the shooting had been accidental: "I went in the room to put my gun underneath the mattress where I keep it at. And Alexandria ran up and when I pulled the gun back to try to get it out the

way, it went off." (State's Exhibit 10, 13:58.) Inv. Eason aptly described Francis as emotionless.

Ross offered little in the way of an explanation for Francis's shooting Alexandria. Ross testified that Francis had never been physically abusive nor had he ever threatened her with a weapon. Ross acknowledged that there had been an argument earlier that day about the couple's finances, but she saw it as a relatively trivial matter. Overall, Ross had considered Francis to be a good boyfriend and a caring father.

Although Ross struggled to conjure a motive for Francis's actions, her testimony provided the jury with clarity regarding his intent. Ross testified that, on the day of the shooting, she had just taken a shower and was in her bedroom getting dressed. Alexandria was in the bedroom as well, playing with the bedroom door. Ross noticed Francis quietly enter the bedroom and assumed he intended to take a nap. Ross testified that as she put on her shirt, she heard the cock of a pistol and then a gunshot. Ross turned to see Alexandria lying on the ground and rushed to her side. Ross asked Francis what he had done, and Francis responded: "Now you

got to live with what you made me do." (R. 813.) Francis then turned and walked out of the bedroom.

After Ross telephoned emergency 911, she confronted Francis in the living room. She asked Francis, "So you just going to kill us? You going to kill your family?" (R. 814.) Francis answered: "I'm not going to kill you, but I will not have a baby by you." Francis placed the pistol on an end table in the living room and walked outside, where emergency personnel found him sitting on the curb smoking a cigarette.

Standard of Review

Because Francis has been sentenced to death, this Court applies the plain-error standard of review set out in Rule 45A, Ala. R. App. P., which requires that

> "[i]n 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."

The Alabama Supreme Court has explained:

> " ' "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." ' Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
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> > " 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S., at 163, n.14.'
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> "See also Ex parte Hodges, 856 So. 2d 936, 947–48 (Ala. 2003) (recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

Ex parte Brown, 11 So. 3d 933, 938 (Ala. 2008).

Discussion

I.

A defendant convicted of capital murder is eligible to be sentenced to death only if the jury unanimously finds that the State has proven beyond a reasonable doubt the existence of at least one aggravating circumstance listed in § 13A-5-49, Ala. Code 1975. Ex parte Waldrop, 859 So. 2d 1181, 1187 (Ala. 2002). In this case the State offered evidence of only one aggravating circumstance – "The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." § 13A-5-49(2), Ala. Code 1975.[1] The State specifically asserted that Francis had been convicted of a felony involving the use or threat of violence to the person. In Issues II, III, IX, and X of

[1]In 2018, § 13A-5-49, Ala. Code 1975, was amended to included as an aggravating circumstance that the "capital offense was committed when the victim was less than 14 years of age." Because Francis committed the capital murder in 2016, this aggravating circumstance could not be applied to his offense. See Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App. 1990) ("A defendant's sentence is determined by the law in effect at the time of the commission of the offense." (citing Bracewell v. State, 401 So. 2d 123, 124 (Ala. 1979) and Taylor v. City of Decatur, 465 So. 2d 479, 481 (Ala. Crim. App. 1984))).

the appellant's brief, Francis challenges, in one manner or another, the application of this aggravating circumstance.

Whether Francis had been convicted of a felony involving the use or threat of violence to the person would appear, on its face, to be a rather straightforward inquiry; not so in this case, however, due to an unusual aspect of North Dakota's sentencing scheme. On April 5, 2007, Francis was charged in Cass County, North Dakota, by way of information, which stated:

> "The Cass County State's Attorney charges that the above-named defendant(s) committed the following offense in Cass County, North Dakota:
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> "Count 1(a): AGGRAVATED ASSAULT in violation of N.D.C.C. § 12.1-17-02 in that on or about 11 February 2007 the above-named defendant willfully caused serious bodily injury to another human being, or, caused bodily injury or substantial injury to another human being while attempting to inflict serious bodily injury on any human being, to wit: that on or about the above-stated date, the defendant, LIONEL RORY FRANCIS, punched M.C.J. ... in the head in a parking lot at the Bowler at 2630 South University Drive in Fargo and/or kicked M.C.J. ... in the head while M.C.J. ... was on the ground as a result of which M.C.J. ... suffered physical pain and lost at least two teeth.
>
> "Or, in the alternative,

> Count 1(b): ACCOMPLICE TO AGGRAVATED ASSAULT in violation of N.D.C.C. §§ 12.1-03-01 & 12.1-17-02 in that on or about 11 February 2007 the above-named defendant, with intent that an offense be committed, commanded, induced, procured, or aided another to willfully cause serious bodily injury to another human being, or cause bodily injury or substantial injury to another human being while attempting to inflict serious bodily injury on any human being to wit: that on or about the above-stated date, the defendant, LIONEL RORY FRANCIS, helped Franklin Roosevelt Hinkston, Jr., to commit the offense alleged in Count One."

(C. 70.)

The information indicated that the offenses were charged as Class C felonies.[2] On October 16, 2007, Count 1(a) was dismissed and Francis pleaded guilty to Count 1(b), accomplice to aggravated assault; yet, under North Dakota law, because the Cass County District Court sentenced Francis to only 189 days in jail, Francis was deemed to have been convicted of a misdemeanor. (C. 538.) At the time of Francis's offense, N.D. Cent. Code § 12.1-32-02(9) stated, in relevant part, that "[e]xcept as

[2]Pursuant to N.D. Cent. Code § 12.1-17-02, aggravated assault is a Class C felony, "except if the victim is under the age of twelve years or the victim suffers permanent loss or impairment of the function of a bodily member or organ in which case the offense is a Class B felony."

provided in section 62.1-02-01, a person who is convicted of a felony and sentenced to imprisonment for not more than one year is deemed to have been convicted of a misdemeanor."[3] In other words, the North Dakota Legislature had, in effect, granted trial courts the authority to determine whether a defendant's conduct merited a felony or misdemeanor conviction.

The State filed a pretrial motion to have Francis's North Dakota conviction deemed a felony conviction that involved the use or threat of violence. Defense counsel objected, relying in part on N.D. Cent. Code § 12.1-32-02. The State acknowledged that Francis's prior conviction in North Dakota had been deemed a misdemeanor but argued that the circuit court should employ the conduct-based approach described by Rule 26.6(b)(3)(iv), Ala. R. Crim. P. That rule provides guidance as to which

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[3]North Dakota Cent. Code § 62.1-02-01 prohibits, among other things, possession of a firearm by individuals with a prior felony conviction involving violence or intimidation. Section 62.1-02-01(2)d. states that, "[f]or the purposes of this section, 'conviction' means a determination that the person committed one of the above-mentioned crimes upon a verdict of guilt, a plea of guilty, or a plea of nolo contendere even though ... [t]he person's conviction has been reduced in accordance with subsection 9 of section 12.1-32-02 or section 12.1-32-07.1."

prior convictions can be used for sentence enhancement under the Alabama Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975 ("HFOA"). The State argued that the critical question was not whether Francis's conduct in North Dakota constituted a felony under North Dakota law, but whether his conduct in North Dakota would have constituted a felony under Alabama law had it been committed in Alabama. The State asserted that, given the factual allegations in the information to which Francis pleaded guilty, Francis's conduct in North Dakota constituted second-degree assault, a felony in Alabama. See § 13A-6-21, Ala. Code 1975.

The circuit court agreed. In its order addressing the State's motion, the circuit court cited Rule 26.6(b)(3)(iv) and stated that Francis's prior North Dakota conviction for accomplice to aggravated assault was analogous to second-degree assault under § 13A-6-21(a)(1), Ala. Code 1975. The circuit court found that, "as a matter of law, [Francis's] prior conviction in North Dakota is 'a felony involving the use or threat of violence to the person.' " (C. 135.)

The only evidence the State offered during the penalty phase in support of its lone alleged aggravating circumstance was State's sentencing exhibit no. 1, which included the order of judgment, the information, and the case summary. (C. 533-39.) Francis moved for a judgment of acquittal after the State rested its case in the penalty phase and then again after the close of all evidence in the penalty phase. Francis argued that the State had failed to offer evidence that he had been convicted of a felony involving the use or threat of violence to the person; both motions were denied. Additionally, the circuit court indicated to Francis that if he were to argue to the jury during closing argument that his prior conviction was not a felony, it would sustain the State's objection to such an argument. (R. 1056-57.) In its penalty-phase instructions, the circuit court gave the following instruction with respect to the aggravating circumstance:

> "In this case the State has asserted the aggravating factor that the defendant has previously been convicted of a felony involving the use or threat of violence to a person. It will be up to the 12 of you to decide if the State has proven the existence of such a conviction beyond a reasonable doubt. But I charge you as a matter of law the document that is State's Sentencing Exhibit No. 1 describes a crime which constitutes

> a felony involving the use or threat of violence to the person under the laws of the State of Alabama."

(R. 1104.)

During its penalty-phase deliberations, the jury noted that the case summary of Francis's North Dakota conviction indicated that he had been convicted of a misdemeanor. It posed the following question to the circuit court: "For clarification, in State's Exhibit 1, was the defendant found guilty of a Class C felony or a misdemeanor? See circled area of page 3 of 4 [of the case summary.]" (C. 532.) The circuit court reinstructed the jury:

> "I charge you that as a matter of law the document that is State's Sentencing Exhibit No. 1 does describe a crime which constitutes a felony involving the use or threat of violence to the person under the laws of the State of Alabama. The classification of crimes and their elements is a legal question for this Court to decide. The existence of the conviction or lack of the same is a question of fact for you as the jury to decide."

(R. 1129.) The jury later found the existence of the aggravating circumstance that the defendant was previously convicted of a felony involving the use or threat of violence.

Francis argues that the circuit court had no authority to analyze his conduct in North Dakota to determine whether it would have constituted a felony offense in Alabama. Francis notes that this authority is specifically granted with respect to sentencing defendants under the HFOA, see Rule 26.6(b)(3)(iv), Ala. R. Crim. P., but asserts that there is no comparable authority granted "in the capital statute to translate out-of-state convictions into analogous Alabama felonies." (Francis's brief, at 79.) The State counters that, even in the absence of an express grant of authority, the analysis used by the circuit court in this case was appropriate because it "ensures uniform application of the death penalty in Alabama." (State's brief, at 20.)

> " 'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.'
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> "IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). ' "[I]t is well established that criminal statutes should not be 'extended by construction.' " ' Ex parte Mutrie, 658 So. 2d 347, 349 (Ala. 1993) (quoting Ex parte

Evers, 434 So.2d 813, 817 (Ala.1983), quoting in turn Locklear v. State, 50 Ala. App. 679, 282 So. 2d 116 (1973)).

> " 'A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants. Schenher v. State, 38 Ala. App. 573, 90 So. 2d 234, cert. denied, 265 Ala. 700, 90 So. 2d 238 (1956).
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> " 'Penal statutes are to reach no further in meaning than their words. Fuller v. State, 257 Ala. 502, 60 So. 2d 202 (1952).
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> " 'One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, is not to be punished thereunder, merely because the act may contravene the policy of the statute. Fuller v. State, supra, citing [Young v. State], 58 Ala. 358 (1877).
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> " 'No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused. Fuller v. State, supra.'

"Clements v. State, 370 So. 2d 723, 725 (Ala. 1979) (quoted in whole or in part in Ex parte Murry, 455 So. 2d 72, 76 (Ala. 1984), and in Ex parte Walls, 711 So. 2d 490, 494 (Ala. 1997)) (emphasis added)."

Ex parte Bertram, 884 So. 2d 889, 891 (Ala. 2003).

Section 13A-5-49(2), Ala. Code 1975, is not ambiguous. It states that it is an aggravating circumstance if "[t]he defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." Section 13A-5-49(2) does not include misdemeanor convictions committed in another jurisdiction involving the use or threat of violence to the person that would have constituted a felony under the Alabama Criminal Code had that offense been committed in Alabama. This Court cannot expand § 13A-5-49(2) by construction. "This would disregard the elementary rule that a penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it." Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 (1905). See also Ex parte Bertram, supra.

The legislature has declared that "[a]ll provisions of [the Alabama Criminal Code] shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in Section 13A-1-3." § 13A-1-6, Ala. Code 1975. Section 13A-1-3(2), Ala. Code 1975, states that it is a general purpose of the

Alabama Criminal Code to "give fair warning of the nature of the conduct proscribed and of the punishment authorized upon conviction." Allowing Francis's misdemeanor conviction to be ensnared by § 13A-5-49(2) would frustrate the legislature's stated purpose of providing fair warning. The State's policy argument about the uniform application of § 13A-5-49(2) "should be directed to the legislature, not to this Court. As [the Alabama Supreme Court] stated in Boles v. Parris, 952 So. 2d 364, 367 (Ala. 2006): '[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.' " Ex parte Ankrom, 152 So. 3d 397, 420 (Ala. 2013).

This Court holds that the circuit court's conduct-based approach to evaluating Francis's conduct under the laws of Alabama was error. In order to prove the existence of the aggravating circumstance found in § 13A-5-49(2), the State was required to prove beyond a reasonable doubt that Francis "was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." However, because of the length of Francis's sentence, his prior conviction for accomplice to aggravated assault was deemed a misdemeanor under North

Dakota law. See N.D. Cent. Code § 12.1-32-02(9).[4] This Court must

[4]In State v. Buckholz, 692 N.W.2d 105 (N.D. 2005), the Supreme Court of North Dakota held that the trial court had erroneously found no probable cause to believe that Buckholz had committed the offense of felon in possession of a firearm, a violation of N.D. Cent. Code § 62.1-02-01. Buckholz had previously been convicted of a felony, but, because he was sentenced to not more than one year in prison, that conviction was deemed a misdemeanor under N.D. Cent. Code § 12.1-32-02(9). The trial court found that Buckholz was not a felon and dismissed the charge. The Court observed that § 62.1-02-01 specifically stated that "a person is convicted of a felony even if 'the defendant's conviction has been reduced in accordance with subsection 9 of section 12.1–32–02.' " Buckholz, 692 N.W.2d at 107. Therefore, the trial court had erred in discharging Buckholz. In further support of its holding, the Supreme Court also stated that "[a] person convicted of a felony and sentenced to not more than one year, despite the immediate reduction to a misdemeanor conviction, is still initially convicted of a felony." Id. (emphasis added). This language, although dicta, suggests that North Dakota views convictions reduced pursuant to § 12.1–32–02(9), such as Francis's, as both a prior felony conviction and a misdemeanor conviction.

On the other hand, in Ratliff v. State, 881 N.W.2d 129 (N.D. 2016), the Supreme Court of North Dakota briefly revisited its holding in Buckholz while considering the interplay between § 12.1–32–02(9) and § 12.1–32–09(1)(c), North Dakota's version of the HFOA. Ratliff was convicted of various felonies and the State moved to enhance his sentence with a prior felony conviction for which Ratliff had been sentenced to no more than one year in prison. Pursuant to § 12.1–32–02(9), Ratliff's prior conviction had been deemed a misdemeanor, but that section also stated that, "if an order is entered revoking a probation imposed as a part of the sentence, the person is deemed to have been convicted of a felony." Ratliff's probation had been revoked for the prior conviction and the trial court used it as a prior felony conviction to enhance his sentence. On

conclude that the State's evidence was insufficient to prove beyond a reasonable doubt that Francis had been previously convicted of a felony involving the use or threat of violence to the person. Therefore, Francis was not eligible to be sentenced to death. See Ex parte Waldrop, 859 So. 2d at 1187. Rather, Francis was eligible only for a sentence of life in prison without the possibility of parole, see § 13A-5-39(1), Ala. Code 1975, and this cause is due to be remanded for resentencing.

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appeal, Ratliff argued that the trial court had erred in enhancing his sentence with his prior conviction. The State cited the Supreme Court's statement in Buckholz that "[a] person convicted of a felony and sentenced to not more than one year, despite the immediate reduction to a misdemeanor conviction, is still initially convicted of a felony." But, the Supreme Court clarified that Buckholz "concerned a felon in possession of a firearm charge." Ratliff, 881 N.W.2d at 238; see N.D. Cent. Code 62.1-02-01(2) (defining "conviction" "[f]or purposes of this section" (emphasis added)). The Supreme Court affirmed the judgment of the trial court but did not rely on its statement in Buckholz. Instead, it held that "[t]he revocation of Ratliff's probation for his 2003 conviction results in the application of this conviction as a felony under the habitual offender statute." Id. (emphasis added).

If North Dakota viewed a felony conviction reduced pursuant to § 12.1–32–02(9), such as Francis's, as both a prior felony conviction and a misdemeanor conviction, then whether Ratliff's probation had been revoked would have been irrelevant. Therefore, it appears that North Dakota views Francis's conviction only as a misdemeanor conviction.

Although we are remanding this case for resentencing, in the interest of judicial economy we will address the remaining issues raised on appeal. However, we will not address any issues relating solely to the penalty phase because our remand of this case renders those issues moot.[5] Further, because Francis's sentence of death will be vacated, this court is not obligated to search the record for plain error. Rule 45A, Ala. R. App. P. Thus, any issues raised on appeal must be correctly preserved before this court can review them.[6] See Ex parte Coulliette, 857 So. 2d 793, 794

[5]In addition to the issues addressed in Part I of this opinion, Francis raises the following penalty-phase issues in his brief on appeal: that the circuit court erred in limiting the jury's consideration of mitigation evidence during the penalty phase (Issue XI); that the circuit court erred in failing to instruct the jury that a sentence of life in prison without the possibility of parole would prevent Francis from ever being released (Issue XII); that the circuit court erred in imposing a sentence of death following an advisory, non-unanimous jury verdict (Issue XIII); and that the circuit court erred by misleading the jury as to the importance of its role in sentencing (Issue XIV).

[6]Francis raises the following guilt-phase issues in his brief on appeal for plain-error review: that the circuit court erred in admitting improper testimony and argument commenting on Francis's invocation of his rights (Issue I); that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), in exercising its peremptory strikes (Issue V); that the circuit court erred in allowing the State to comment during closing argument on Francis's failure to express remorse (Issue VI); that the circuit court erred in admitting into evidence Francis's statement to law enforcement (Issue

(Ala. 2003) (" 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' " (quoting Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992))).

II.

In Issue IV, Francis argues that the circuit court erred in failing to remove from the venire prospective jurors B.B., L.S., J.B., and D.B. Francis asserts that those prospective jurors, based on their answers during voir dire, were unqualified to serve. Francis moved to excuse each of those prospective jurors for cause, and the circuit court denied his motions.

> "To justify a challenge for cause, there must be a proper statutory ground or ' "some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." ' Clark v. State, 621 So. 2d 309, 321 (Ala. Cr. App. 1992) (quoting Nettles v. State, 435 So. 2d 146, 149 (Ala. Cr. App. 1983)). This court has held that 'once a juror indicates initially that he or she is biased or prejudiced or has deepseated impressions' about a case, the juror should be removed for cause. Knop v. McCain, 561 So. 2d 229, 234 (Ala.

VII); and that the circuit court erred in allowing the jury to experiment with the murder weapon during guilt-phase deliberations (Issue VIII).

> 1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law. Ex parte Taylor, 666 So. 2d 73, 82 (Ala. 1995). A juror 'need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.' Kinder v. State, 515 So. 2d 55, 61 (Ala. Cr. App. 1986)."

Ex parte Davis, 718 So. 2d 1166, 1171–72 (Ala. 1998).

> "The test for determining whether a strike rises to the level of a challenge for cause is 'whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence.' Marshall v. State, 598 So. 2d 14, 16 (Ala. Cr. App. 1991). 'Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause.' Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983). 'The decision of the trial court "on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion." ' Nettles, 435 So. 2d at 153."

Dunning v. State, 659 So. 2d 995, 997 (Ala. Crim. App. 1994).

Further, "[j]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court." Johnson v. State, 820 So. 2d 842, 855 (Ala. Crim. App. 2000).

> "It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and

> cross-examination techniques that frequently are employed ... [during voir dire] .... Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge may properly choose to believe those statements that were the most fully articulated or that appeared to be have been least influenced by leading."

Patton v. Yount, 467 U.S. 1025, 1039 (1984).

A.

Francis argues that the circuit court erred in denying his motion to strike prospective juror B.B. for cause. Francis asserts that B.B. was not qualified to serve because B.B. wrote on his juror questionnaire that he would "give more weight to the testimony of a law-enforcement officer than any other witness" (R. 270); that death was the "only appropriate sentence for someone convicted of capital murder" (R. 273); and that he wanted "justice for Alexandria and her family." (R. 272.) Also, B.B. stated during voir dire "that the punishment would be more ... serious for a child being involved in the crime" and that, if the crime occurred as alleged by

the State, he "would lean ... towards death" as an appropriate punishment. (R. 275-76.)

During voir dire, B.B. qualified his answer on the juror questionnaire about the weight he would afford to the testimony of a law-enforcement officer relative to other witnesses:

> "But it depends. Is the citizen a witness of whatever the crime was? Is the officer the first one there on the scene? I mean, there are a lot of factors involved in that. I mean, that was kind of my knee-jerk reaction of saying, yes, I would give more to the officer, but I would have to – I would listen no matter what and take in both side, you know, with an open mind. But I can't say that I wouldn't lean towards the officer a bit if he or she is, you know, the first one there, you know, and her job is to, you know, uphold the law."

(R. 272.) The State followed up on B.B.'s position:

> State: "I'm guessing what I'm asking is can you – can you give each person that testifies – can you be fair to each person that testifies and give them, I guess – judge them by their actual testimony and not by their position?"
>
> B.B.: "I – I want to say yes, but it would be difficult to not – without more detail of what their testimony is about or what – you know, if we're talking about the scene or whatever, the officer is the first one there as opposed to somebody that was walking by on the street or something, I'm going to take the officer's word rather than a witness from afar."

State: "That's based on his actual involvement in the case _"

B.B.: "Right."

State: "– more so than his position as a police officer? Is that fair to say?"

B.B.: "Yes, sir."

State: "That's what I'm trying to get at."

B.B.: "Right."

State: "Just because he's wearing a uniform, you're not automatically going to believe every single word he says?"

B.B.: "No. No, not blindly. I'm going to listen to it and then factor in, you know – it's going to have some factor, but it's not going to be just an open and close, okay, he's got a badge on, that's right, or she, or right or wrong."

(R. 281-82.)

B.B.'s answers indicated that he did not base his trust in the testimony of law-enforcement officers on their position as officers; rather, his trust would depend on their involvement in the case relative to other witnesses. B.B.'s answers did not indicate an absolute bias or favor toward law-enforcement officers.

B.B.'s answer on his juror questionnaire about justice for Alexandria and her family was wholly innocuous given his further explanation:

> "The name was said, and that's the only reason why I put that down. I would say that one way or another, there is a victim, and I hope the best for that victim's family. I mean, somebody suffered badly. The person is not around anymore. I would say there is a lot of pain involved, and I hope the best for that family. ... Without knowing any other details about the case, I wouldn't know [what justice would look like]. I would have to have more information to make that decision."

(R. 272.)

Turning to his feelings on capital punishment, this Court notes that B.B. could not recall answering on his juror questionnaire that death was the only appropriate sentence for someone convicted of capital murder. B.B. admitted that he may have written that but stated that "[i]t would be really hard to ... make that decision honestly without more details of what went on in the case." (R. 273.) Defense counsel asked B.B. to assume an intentional murder of Alexandria and asked if he would automatically vote to impose a death sentence. B.B. answered, "With only knowing that, I would lean more so towards death, yes." (R. 276.) Without presenting any details of Francis's potential mitigating evidence,

defense counsel asked B.B. if he could consider the mitigating evidence or if this offense warranted "an automatic death sentence." (R. 276.) B.B. answered only that it would be "difficult to lean away from the death penalty ... from the details you told me." (R. 276-77.) The circuit court asked B.B. if he could listen to its instructions in the penalty phase and follow the law. B.B. responded, "I believe so, yes, ma'am." (R. 283.)

To the extent B.B. gave answers that indicated a bias, he was sufficiently rehabilitated through further questioning and responses. See Johnson, 820 So. 2d at 855. This Court finds no abuse of discretion in the circuit court's denying Francis's motion to strike B.B. for cause. See Ex parte Davis, 718 So. 2d at 1171–72.

B.

Francis argues that the circuit court erred in denying his motion to strike prospective juror L.S. for cause. Francis asserts that L.S. was not qualified to serve because L.S. indicated that the death penalty would be appropriate for the "murder of a child" and that he would "have to go with the death sentence in Francis's case." (R. 483, 485.) L.S. also stated that

Francis's background would not matter in his sentencing decision. (R. 489.)

As with B.B., L.S.'s answer about the death penalty being appropriate in this case was qualified. Again, defense counsel asked L.S. to assume an intentional murder of a child and then mentioned, without detail, that the defense would present mitigating evidence. Defense counsel asked L.S. if he could engage in a weighing process or if he would automatically vote for death. L.S. answered, "Under the scenario that you presented, I would have to go with the death sentence." (R. 486.) When asked specifically if he could follow the circuit court's instructions about weighing the aggravating and mitigating circumstances, L.S. responded, "I would follow the judge's instructions."

L.S.'s responses indicated he could render a verdict according to the evidence and the law. This Court finds no abuse of discretion in the circuit court's denying Francis's motion to strike L.S. for cause. See Ex parte Davis, 718 So. 2d at 1171–72.

C.

Francis argues that the circuit court erred in denying his motion to strike prospective juror J.B. for cause. Francis asserts that J.B. was not qualified to serve because J.B. stated that the death penalty was appropriate in any situation involving the "[w]illfull taking of a life that is not in self-defense or in defense of others." (R. 360.) J.B. was asked, given an intentional murder of a child, if he would automatically vote to impose a sentence of death. J.B. answered, "I can't imagine any justification that would cause me to think otherwise." (R. 361.)

When defense counsel later pressed J.B. as to whether his vote for death would be automatic, J.B. answered:

> "I can't say that 100 percent because I believe my responsibility both legally and morally is to hear the evidence and judge according to that. I believe there is a biblical responsibility. As I understand from a biblical perspective we have a responsibility to punish according to what the crime is, but we also have a responsibility to fully investigate and understand what happened. And so I can't say that I could come to a 100 percent assured decision without fully investigating and understanding what happened. ... I mean, I can't assume what somebody has done. I mean, you're giving me a hypothetical situation and asking me to make a moral judgment on it, and I – I can't make a judgment without knowing what happened."

(R. 365-66.)

J.B.'s responses indicated he could render a verdict according to the evidence and the law. This Court finds no abuse of discretion in the circuit court's denying Francis's motion to strike J.B. for cause. See Ex parte Davis, 718 So. 2d at 1171–72.

D.

Francis argues that the circuit court erred in denying his motion to strike prospective juror D.B. for cause. Francis asserts that D.B. was not qualified to serve because she stated that, if the State proved the intentional killing of a child, she would automatically vote for death, and because she indicated on her juror questionnaire that an accused ought to testify.

D.B. stated that, in accordance with the circuit court's instructions, she could weigh the aggravating and mitigating evidence. (R. 311.) Also, D.B. explained her thoughts on an accused's testifying: "Well, I feel everybody should know what [the accused's] feelings are on why what happened or how come it happened or, you know, to hear his side of the story." (R. 304.) Nonetheless, D.B. was asked specifically by defense

counsel if she would hold it against an accused who failed to testify, and D.B. answered: "I wouldn't hold anything against anybody." (R. 305.)

D.B.'s responses indicated she could render a verdict according to the evidence and the law. This Court finds no abuse of discretion in the circuit court's denying Francis's motion to strike D.B. for cause. See Ex parte Davis, 718 So. 2d at 1171–72.

III.

In Issue XV, Francis argues that the circuit court erred by death-qualifying the jury. Francis alleges that this practice resulted in a conviction-prone jury and violated his rights against cruel and unusual punishment and to due process, equal protection, a fair trial, and a reliable sentence.

> "As this Court has repeatedly stated:
>
> " 'A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Neither

> the federal nor the state constitution prohibits the state from death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391–92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1297, 122 L. Ed. 2d 687 (1993).'

"Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995).

> "Other states have likewise held that death-qualifying a jury does not violate the state constitution or create a conviction-prone jury. See State v. Williams, 355 N.C. 501, 552, 565 S.E.2d 609, 639 (2002) ('[T]his Court has held that "death-qualifying" a jury is constitutional under both the federal and state Constitutions.'); State v. Alvarez, 872 P.2d 450 (Utah 1994) (holding that death-qualifying the jury does not offend Utah Constitution); State v. Hughes, 106 Wash. 2d 176, 188, 721 P.2d 902, 908 (1986) ('The process [of death-qualifying jurors] does not result in a jury that is unrepresentative of the community and is not violative of either the state or federal constitution.')."

Wiggins v. State, 193 So. 3d 765, 819 (Ala. Crim. App. 2014).

The circuit court's death-qualifying the jury did not violate Francis's constitutional rights. Therefore, this issue does not entitle him to any relief.

Conclusion

Francis's conviction for capital murder is affirmed. His sentence of death, however, is due to be vacated. Thus, this cause is remanded to the

circuit court for it to vacate Francis's sentence of death and to fix the appellant's sentence at the only sentence provided by law – life in prison without the possibility of parole. Due return should be filed in this court no later than 42 days from the date of this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS.

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