REL: December 17, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-18-0599

Brett Richard Yeiter

v.

State of Alabama

Appeal from Escambia Circuit Court
(CC-15-42)

MINOR, Judge.

A jury convicted Brett Richard Yeiter of capital murder for the shooting death of his father-in-law Paul Phillips while Phillips was sitting in his parked truck. See § 13A-5-40(a)(17), Ala. Code 1975. The jury unanimously found the existence of two aggravating factors and, by a vote of 10-2, recommended that the Escambia Circuit Court sentence Yeiter to

death. The trial court followed the jury's recommendation and sentenced Yeiter to death.

During its case-in-chief, the State introduced a statement from Yeiter in which he confessed to shooting Phillips. The statement referred to Yeiter's prior convictions—including one for a violent felony—and to his prior incarceration, including a 15-year-term of imprisonment. Before and during trial, Yeiter objected to the admission of the entire statement and argued that, even if the statement were admissible, the references to his prior convictions and his incarceration were not. The trial court overruled those objections and admitted the statement in full.

We hold that the trial court erred in admitting evidence during the guilt phase about Yeiter's prior convictions and incarceration and that the erroneous admission of that evidence was not harmless. Thus, we reverse Yeiter's conviction and death sentence.

Facts and Procedural History

On the evening of October 26, 2014, Phillips attended the Book of Acts Holiness Church, where he was the preacher. Phillips's grandson Nathan Blair also attended the church that evening. Blair's vehicle was

low on oil, so he decided to leave it parked in the church parking lot until he could get some oil. The next morning, Phillips and Blair returned to the church with oil to put in the vehicle. Yeiter, who was Phillips's son-in-law and Blair's stepfather, was already in the church parking lot. Yeiter was upset because Blair's vehicle was low on oil and Blair had allowed his vehicle to run low on oil in the past. (R. 1382-83, 1386, 1390-91, 1608.)

Blair testified that Yeiter "would try to pour the oil into the car, but he would—he would try to push [Phillips], you know, like trying to, I guess trying to get him to—agitated, you know." (R. 1391.) Blair testified that he thought Yeiter was "trying to start a fight with" Phillips and that Yeiter "grabbed [Phillips's] glasses off of his face" and threw them on the ground. (R. 1391.) Blair testified that once they put oil in the vehicle, Phillips sent him to take a bill to Kristen Garner's house, which was "around the corner" from the church. (R. 1392-94.) Before he left, Blair saw Phillips try to remove a lawnmower from the back of his truck and Yeiter tried to "shake it away" from Phillips. (R. 1392.)

In a statement he made to the police a week later, Yeiter said he was trying to help Phillips with the lawnmower but that he and Phillips "got

to tussling back and forth with the mower" and "[t]hat's when [Phillips] finally said he was going to get his gun. 'Let me go get my gun,' or something like that he said. Hell if I know." (R. 1614.) Yeiter got in his truck, drove the short distance to his house, got his shotgun, and returned to the church. (R. 1610-11.) When he returned, Yeiter saw Phillips sitting in his parked truck, and the engine was running. (R. 1614-15.) Yeiter said he walked toward Phillips but did not see a weapon. Yeiter said he told Phillips to "pull" his weapon, and then Yeiter shot Phillips. (R. 1616-17.) Yeiter said he "believe[d]" he shot Phillips "right in the chest." (R. 1617.) Yeiter, however, shot Phillips in the side of his head, killing him. (R. 1681.)

Blair returned to the church in time to hear the gunshot. He saw Yeiter in the parking lot holding a "long" gun in his hand. (R. 1394.) Yeiter drove away, and Blair went to Phillips's truck and saw that Phillips was shot. (R. 1395-96.) He returned to Garner's house, and she telephoned 911. (R. 1399-1400, 1492.)

Yeiter stopped at Suncoast Sod, a business near the church. He went

inside and told Toni Casey, who was Phillips's niece,[1] that he had shot Phillips. Yeiter gave his mobile phone to Casey and told him he did not need it anymore. (R. 1413-14.) Casey telephoned 911 and told them the Phillips family had "mentally abused" Yeiter for years and that they "just drove him crazy." (R. 1414, 1491.)

Emergency personnel responded to the scene within 20 minutes. Phillips was still breathing, but there was no evidence showing that he regained consciousness after Yeiter shot him. (R. 1429, 1803.) Police did not find a gun on Phillips or in his vehicle. (R. 1578-79, 1650.)

Yeiter drove west for a few days, using credit cards to buy gas and alcohol. (R. 1619, 1635-36.) He told law enforcement that he "threw [the shotgun] out in the woods somewhere" in Arkansas. (R. 1620.) He said he kept the gun with him until then because he "didn't know whether [he] was going to kill [himself] yet or not." (R. 1620.) Law enforcement arrested Yeiter in Texas, and authorities returned him to Alabama. (R. 1574-75, 1634.)

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[1]Casey also testified that her cousin Kim was married to Yeiter. (R. 1412.)

Law enforcement in Alabama interviewed Yeiter a week after the shooting. He told the police that he had consumed "half a gallon" of liquor beginning around 7 a.m. the day he shot Phillips. (R. 1640.) He said that when he drove to his house to get his gun, he "thought about it all the way [to his house] and all the way back." (R. 1615.) When he made his statement to the police a week after the shooting, Yeiter said he "would still [shoot Phillips] again because [Phillips has] had me over the years so fricking mad about everything." (R. 1627.) He said, "I did it .... Nothing is going to justify it." (R. 1637.) He then told the police that he had "been up there to Atmore before" on work release for first-degree theft of property and that he had a prior conviction in Michigan. (R. 1645.)

An Escambia County grand jury indicted Yeiter for capital murder in January 2015. (C. 81.) Before trial, Yeiter moved to suppress the statement he had made to the police, and he moved the trial court to remove any references to prior bad acts, including his prior convictions. (C. 303, 423.) The trial court denied the motions. (C. 396, R. 1343.)

At the end of the guilt phase of Yeiter's trial, the jury found him guilty of capital murder. The next day, after the evidence was presented

at the penalty phase, the jury returned special verdict forms showing that it unanimously found (1) that Yeiter had a prior felony conviction involving the use or threat of violence to a person and (2) that Yeiter's crime was especially heinous, atrocious, or cruel as compared to other capital offense. (C. 542-43.) The jury recommended, by a vote of 10-2, that the trial court sentence Yeiter to death. (C. 544.) That same day, without holding a separate hearing or entering a sentencing order, the trial court sentenced Yeiter to death.[2] (R. 1975.)

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[2]The trial court repeatedly stated that it had to follow the jury's verdict. (See R. 1934 ("[There is no] judicial override. The court has absolutely no discretion. Therefore I see no need to delay formal sentencing from the court. Because all I'm doing is pronouncing the sentence imposed by the jury."); R. 1784 ("[J]udicial override ... no longer exists."); R. 1813 ("Now, with the statute as it presently exists, the jury makes the decision.").) Although both the State and Yeiter agreed with the trial court, this position is erroneous.

Act No. 2017-131, Ala. Acts 2017, amended §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, eliminated judicial override, and placed the final sentencing decision in the hands of the jury. That Act, however, did not apply retroactively to Yeiter, who was charged with capital murder before April 11, 2017—the effective date of the Act. See § 2, Act No. 2017-131, Ala. Acts 2017 ("This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective

Standard of Review

Resolution of this appeal turns on one issue: Whether the trial court erred in admitting evidence of Yeiter's prior convictions and imprisonment. We review this claim to see if the trial court abused its discretion. See, e.g., Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000).

Discussion

Yeiter argues that the trial court's admission of evidence of his prior convictions and imprisonment during the guilt phase requires reversal of his conviction. We agree.

During its case-in-chief, the State introduced the statement Yeiter made to law enforcement a week after the shooting. The statement referred to Yeiter's prior bad acts, convictions, and imprisonment:

> "[YEITER]: ... I'm just a sorry motherfucker that was locked up all his damn life and I met [Phillips's] daughter. Okay?
>
> "....

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date of this act."). Under the versions of §§ 13A-5-45, 13A-5-46, and 13A-5-47 applicable to Yeiter, the judge, not the jury, had the final sentencing decision.

"... I just know one thing, it's one big damn mess. It is. After I done it, I knew it. I just got in that truck and drove, drove slow—you know, not slow. I drove the speed limit. You know what I'm saying. Just kept on thinking, kept on drinking. I was used to it. I used to do it every time I went to the rig, every Tuesday, coming east to west. Y'all ought to know, I flipped and rolled my truck up there end over end about 2008."

"INVESTIGATOR JOHNSON: That's right.

"[YEITER]: You remember that now, huh? Drunk on my ass.

"INVESTIGATOR JOHNSON: Up in—

"CAPTAIN BLAIR: I don't see how you drive that far drinking like that.

"[YEITER]: Fucking retarded. Got used to it. I used to go to work drunk on the drilling rig. Can you imagine that, doing all that dangerous shit?

"INVESTIGATOR JOHNSON: That was in Clark County, right, when you wrecked the truck?

"[YEITER]: I guess. It was right up the road here on 41. ... Flipped it end over end three times. They brought me down here to the jail so it must have been this county.

"INVESTIGATOR JOHNSON: Oh, that was in Brewton. I do remember that.

"[YEITER]: Yep. Drove a tree limb through the windshield. The guy stopped on a motorcycle. I never knew his

name. He pried that dang joker open so I could get out. Yep. They took the truck down there in Flomaton, put it on display for the students down there at the high school not to do this when you're drunk.

"You ready to take me back now?

"INVESTIGATOR JOHNSON: Well, I just want to make sure we went over everything. You know, make sure we didn't miss anything.

"CAPTAIN BLAIR: Brett, you haven't used the word shoot or killed. You said, I did it.

"[YEITER]: I did it. I said, I did kill him; did shoot him. What else you want me to say?

"CAPTAIN BLAIR: That's it. You got a long, hard road ahead of you buddy.

"[YEITER]: I know. Everybody got to pay, don't they? I'm going to have to pay. I know that. I ain't an idiot.

"....

"[YEITER]: Wish they'd give me the damn death penalty right now. It'd be a lot easier than this shit. You understand? I can't kill myself. Got to let somebody else do it. But I figure, hell, they do it all the time up there, you know, in Atmore, so they might as well just take me and do it. You understand?

"CAPTAIN BLAIR: Yeah.

"[YEITER]: That's what I want. But hell, I don't care. People got to do what they got to do. You don't think I thought

about this in a week?

"CAPTAIN BLAIR: Yeah.

"[YEITER]: Thought about all these things in a week. Hell, I already been up there to Atmore before, over there at work release for two years. Hell, I did fifteen years then, you know. Four years, nine months, twenty-two days to kill that sentence; two years at the work release over there. Before that I did fifteen years in Brew—Michigan, I mean.

"INVESTIGATOR JOHNSON: What was you in prison in Alabama for?

"[YEITER]: Theft of property in the first, enhanced, fifteen years. Stole a car.

"INVESTIGATOR JOHNSON: Out of Mobile County?

"[YEITER]: Yep. Right on Government Street. Before that I had the armed robbery charge.

"INVESTIGATOR JOHNSON: That was in Michigan?

"[YEITER]: Yep. I was 17, 18, something like that.

"INVESTIGATOR JOHNSON: But how long you been a free man?

"[YEITER]: Right now? Fifteen—sixteen years, I think. It don't matter though, not to me."

(R. 1623, 1642-46.)

Before trial, Yeiter filed a motion in limine asking the trial court to

redact from his statement "inadmissible evidence as it relates to prior arrests and convictions some of which were when [Yeiter] was '17-18 years old.' " (C. 423.) The trial court denied that motion. (R. 1348.) During trial, Yeiter renewed his objection when the State offered the statement into evidence. (R. 1583-84, 1587.) Yeiter reasserted the objection at the close of the State's case. (R. 1688.) The trial court overruled those objections.

In Horton v. State, 217, So. 3d 27 (Ala. Crim. App. 2016), this Court stated:

> " ' "The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App.2000), aff'd, 808 So. 2d 1215 (Ala. 2001). "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000). This is equally true with regard to the admission of collateral-bad-acts evidence. See Davis v. State, 740 So. 2d 1115, 1130 (Ala. Crim. App. 1998). See also Irvin v. State, 940 So. 2d 331, 344–46 (Ala. Crim. App. 2005).'

"Windsor v. State, 110 So. 3d 876, 880 (Ala. Crim. App. 2012).

"Generally, '[e]vidence of any offense other than that specifically charged is prima facie inadmissible.' Bush v.

State, 695 So. 2d 70, 85 (Ala. Crim. App. 1995), aff'd, 695 So. 2d 138 (Ala. 1997). '[T]he exclusionary rule prevents the State from using evidence of a defendant's prior [or subsequent] bad acts to prove the defendant's bad character and, thereby, protects the defendant's right to a fair trial.' Ex parte Drinkard, 777 So. 2d 295, 302 (Ala. 2000). '[T]he purpose of the rule is to protect the defendant's right to a fair trial by preventing convictions based on the jury's belief that the defendant is a "bad" person or one prone to commit criminal acts.' Ex parte Arthur, 472 So. 2d 665, 668 (Ala. 1985). ' "The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors." ' Ex parte Cofer, 440 So. 2d 1121, 1123 (Ala. 1983) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01(1) (3d ed. 1977)).

"However, '[t]he State is not prohibited from ever presenting evidence of a defendant's prior [or subsequent] bad acts.' Moore v. State, 49 So. 3d 228, 232 (Ala. Crim. App. 2009). '[E]vidence of collateral crimes or bad acts is admissible as part of the prosecutor's case if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty of the charged offense because of his past misdeeds.' Bush, 695 So. 2d at 85.

> " ' "In all instances, the question is whether the proposed evidence is primarily to prove the commission of another disconnected crime, or whether it is material to some issue in the case. If it is material and logically relevant to an issue in the case, whether to prove an element of the crime, or to

> controvert a material contention of defendant, it is not inadmissible because in making the proof the commission of an independent disconnected crime is an inseparable feature of it." '

"Bradley v. State, 577 So. 2d 541, 547 (Ala. Crim. App. 1990) (quoting Snead v. State, 243 Ala. 23, 24, 8 So. 2d 269, 270 (1942)). Rule 404(b), Ala. R. Evid., provides:

> " 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.'

" ' "Rule 404(b) is a principle of limited admissibility. This means that the offered evidence is inadmissible for one broad, impermissible purpose, but is admissible for one or more other limited purposes." ' Taylor v. State, 808 So. 2d 1148, 1165 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01 (5th ed. 1996)). Moreover:

> " 'Rule 404(b) is a test of relevancy. Rule 401, Ala. R. Evid., defines "relevant evidence" as "evidence having any tendency to make the

> existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As this Court noted in Hayes v. State, 717 So. 2d 30 (Ala. Crim. App. 1997): "Alabama recognizes a liberal test of relevancy, which states that evidence is admissible 'if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence.' " 717 So. 2d at 36, quoting C. Gamble, [McElroy's] Alabama Evidence § 401(b). "[A] fact is admissible against a relevancy challenge if it has any probative value, however[] slight, upon a matter in the case." Knotts v. State, 686 So. 2d 431, 468 (Ala. Crim. App. 1995), aff'd, 686 So. 2d 486 (Ala. 1996).'

"Draper v. State, 886 So. 2d 105, 119 (Ala. Crim. App. 2002). Because the question of the admissibility of collateral-act evidence is whether the evidence is relevant for a limited purpose other than bad character, 'the list of traditionally recognized exceptions [to the exclusionary rule] is not exhaustive and fixed.' Bradley, 577 So. 2d at 547. However,

> " '[t]he State has no absolute right to use evidence of prior acts to prove the elements of an offense or to buttress inferences created by other evidence. Evidence of prior bad acts of a criminal defendant is presumptively prejudicial. It interjects a collateral issue into the case which may divert the minds of the jury from the main issue.'

"Ex parte Cofer, 440 So. 2d at 1124. Therefore, '[f]or collateral-act evidence to be admissible for one of the "other purposes" in Rule 404(b), there must be a " 'real and open issue as to one or

more of those 'other purposes."' "' Draper, 886 So. 2d at 117 (quoting Gillespie v. State, 549 So. 2d 640, 645 (Ala. Crim. App. 1989), quoting in turn, Bowden v. State, 538 So. 2d 1226, 1227 (Ala. 1988)). When the question of the admissibility of collateral-acts evidence is 'extremely close, we conclude that any doubt about the admissibility of the testimony should, given the highly prejudicial nature of the evidence, be resolved in favor of the accused.' Brewer v. State, 440 So. 2d 1155, 1158 (Ala. Crim. App. 1983).

"Furthermore, 'even though evidence of collateral crimes or acts may be relevant to an issue other than the defendant's character, it should be excluded if "it would serve comparatively little or no purpose except to arouse the passion, prejudice, or sympathy of the jury," ... or put another way, "unless its probative value is 'substantially outweighed by its undue prejudice.' "' Bradley, 577 So. 2d at 547-48 (citations omitted). 'Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive.' Bush, 695 So. 2d at 85. See also Thompson v. State, 153 So. 3d 84, 136 (Ala. Crim. App. 2012) ('The [Alabama Supreme] Court [has] cautioned that Rule 404(b) evidence must be "reasonably necessary to [the State's] case." [Ex parte Jackson,] 33 So. 3d [1279,] 1286 [(Ala. 2009)].').

"As this Court explained in Woodard v. State, 846 So. 2d 1102 (Ala. Crim. App. 2002):

> " 'Evidence of collateral crimes is "presumptively prejudicial because it could cause the jury to infer that, because the defendant has committed crimes in the past, it is more likely that he committed the particular crime with which he is charged–thus, it

draws the jurors' minds away from the main issue." Ex parte Drinkard, 777 So. 2d 295, 296 (Ala. 2000). In Robinson v. State, 528 So. 2d 343 (Ala. Crim. App. 1986), this Court explained the exclusionary rule as follows:

> "'"'"On the trial of a person for the alleged commission of a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative function of such evidence is to show his bad character, inclination or propensity to commit the type of crime for which he is being tried. This is a general exclusionary rule which prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question."' Pope v. State, 365 So. 2d 369, 371 (Ala. Cr. App. 1978), quoting C. Gamble, McElroy's Alabama Evidence § 69.01 (3d ed. 1977). '"This exclusionary rule is simply an application of the character rule which forbids the State to prove the

> accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors."' Ex parte Arthur, 472 So. 2d 665, 668 (Ala. 1985), quoting McElroy's supra, § 69.01(1). Thus, the exclusionary rule serves to protect the defendant's right to a fair trial. '"The jury's determination of guilt or innocence should be based on evidence relevant to the crime charged."' Ex parte Cofer, 440 So. 2d 1121, 1123 (Ala. 1983); Terrell v. State, 397 So. 2d 232, 234 (Ala. Cr. App. 1981), cert. denied, 397 So. 2d 235 (Ala. 1981); United States v. Turquitt, 557 F.2d 464, 468 (5th Cir. 1977).
>
> "'"'If the defendant's commission of another crime or misdeed is an element of

guilt, or tends to prove his guilt otherwise than by showing of bad character, then proof of such other act is admissible.' Saffold v. State, 494 So. 2d 164 (Ala. Cr. App. 1986). The well-established exceptions to the exclusionary rule include: (1) relevancy to prove identity; (2) relevancy to prove res gestae; (3) relevancy to prove scienter; (4) relevancy to prove intent; (5) relevancy to show motive; (6) relevancy to prove system; (7) relevancy to prove malice; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes. Willis v. State, 449 So. 2d 1258, 1260 (Ala. Cr. App. 1984); Scott v. State, 353 So. 2d 36 (Ala. Cr. App. 1977). However, the fact that evidence of a prior bad act may fit into one of these exceptions will not alone justify its admission. ' "Judicial inquiry does not end with a determination that the evidence of another crime is relevant and probative of a necessary

element of the charged offense. It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects."' Averette v. State, 469 So. 2d 1371, 1374 (Ala. Cr. App. 1985), quoting United States v. Turquitt, supra at 468-69. '"'Prejudicial' is used in this phrase to limit the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial." [Citation omitted.] "Of course, 'prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contention;

> but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.' " ' Averette v. State, supra, at 1374."

" '528 So. 2d at 347.'

"846 So. 2d at 1106-07."

Horton, 217 So. 3d at 45-48.

On appeal, the State makes no argument that the challenged portions of the statement were admissible for any purpose. The State argues instead that " 'the evidence was so innocuous or cumulative that it could not have contributed substantially to the adverse verdict' " against Yeiter and was thus harmless. (State's brief, p. 12 (quoting Floyd v. State, 289 So. 3d 337, 402 (Ala. Crim. App. 2017).) The State cites McCray v. State, 88 So. 3d 1, 31 (Ala. Crim. App. 2010), and Floyd, 289 So. 3d at 403, in support of its position.

In McCray, the prosecution during its cross-examination of Heath Lavon McCray elicited testimony about his prior conviction for domestic

violence against his ex-wife, photographs of wounds he inflicted on her during the domestic-violence incident, and testimony about another uncharged incident involving his ex-wife. 88 So. 3d at 26. McCray did not object to the evidence at trial, but this Court reviewed the admission of that evidence for plain error. On appeal, McCray argued that, although the prosecution could use evidence of the prior conviction for impeachment under Rule 609, Ala. R. Evid., "use of a prior conviction for impeachment is limited to the date, name of the crime, and sentence for the conviction, and that the details of the facts underlying the conviction, the photographs of [his ex-wife's] wounds, and the testimony relating to the uncharged incident were inadmissible as impeachment." Id.

Although this Court held that the evidence went beyond permissible impeachment and was thus improperly admitted, this Court did not find plain error. 88 So. 3d at 27-29. This Court first noted that the trial court, in its instructions to the jury before the jury began deliberations, restricted the jury's consideration of that evidence to "impeachment

purposes only."[3] Id. at 28. This Court stated: "[O]ne of the last things the jurors heard, and what presumably would have been resonating in their minds when they were released from the jury box to begin deliberations, was that they could not use the prior conviction as evidence of McCray's guilt." Id. at 29.

This Court next noted that,

> "[a]lthough the improperly admitted evidence was used to attack McCray's credibility, the record show[ed] that his credibility had already been severely damaged before he ever took the stand on his own behalf. In his videotaped statement to police, McCray repeatedly lied about being at [the victim's] mobile home the night of the murder, about the cut he had on his hand, and about the scratches on his neck. Each time McCray was confronted by the officers during the interview with evidence that he had lied, he changed his story. This happened repeatedly throughout the interview. When McCray testified on his own behalf, he provided yet another story about what had happened, further calling his credibility into question. McCray's credibility was further attacked by the prosecutor's proper use of additional prior convictions, and by McCray's own inconsistencies in his trial testimony. Accordingly, McCray's credibility was thoroughly undermined without any consideration of the improper impeachment

[3]The trial court in McCray instructed the jury that it could not consider evidence of McCray's convictions " 'as evidence of guilt in this case, but [could] consider them for the purposes of his credibility.' " 88 So. 3d at 29 (quoting the trial record).

evidence."

88 So. 3d at 29-30.

Finally, this Court cited the "'virtually ironclad'" evidence of McCray's guilt:

> "The State presented an abundance of physical evidence linking McCray to the murder, and McCray admitted during his testimony that he had caused [the victim Brandy Jean] Bachelder's death. McCray, however, claimed that he had been given permission to enter the mobile home and, thus, had not committed burglary. McCray further claimed that he had been provoked and that Bachelder's death resulted from heat of passion. The State, on the other hand, presented ironclad evidence refuting McCray's claims. For instance, the State presented evidence establishing that after McCray had moved out of the mobile home, Bachelder replaced the door knobs, containing the door locks, on both doors of the mobile home and McCray had to use a screwdriver to break in to the trailer, raising the inference that McCray did not have permission to enter Bachelder's mobile home. The State's evidence also established that Bachelder was stabbed multiple times, that a dog leash was looped around her neck and used to drag her throughout the mobile home, and that a plastic bag was placed over her head to prevent her from breathing, establishing that any license McCray may have had to be in the trailer would have been revoked, and after it was revoked, he remained there unlawfully. Brown [v. State], 11 So. 3d [866,] 914 [(Ala. Crim. App. 2007)] (holding that evidence of a struggle indicates that any license the defendant had had to be in the home was revoked and satisfies the remained-unlawfully element of burglary). Additionally, McCray admitted on cross-examination that he wanted Bachelder to die so that she

> would not be able to identify him to the police, rebutting his own claim that he killed Bachelder out of heat of passion. See Palmore v. State, 253 Ala. 183, 43 So. 2d 399, 401 (1949) (explaining that a person is guilty of murder, as opposed to manslaughter, if that person 'is not moved [to kill] by the heat of passion, but by prior malice, hatred, a desire to avenge the wrong done him, or by any other motive ...' (quoting McNeill v. State, 102 Ala. 121, 15 So. 352, 354 (1894)))."

88 So. 3d at 30-31.

McCray is distinguishable for at least five reasons. First, unlike McCray, Yeiter preserved the issue for review by objecting to the challenged evidence; indeed, he objected before trial, when the evidence was offered, and at the close of the State's case. Second, unlike McCray, in which the State introduced the challenged evidence during its cross-examination of the defendant, the State used the evidence during its case-in-chief against Yeiter.

Third, unlike the evidence in McCray, which was admissible in part but not to the extent that the State offered, the challenged evidence against Yeiter was not admissible for any purpose—and the evidence simply was unnecessary to the State's case. See, e.g., Bush v. State, 695 So. 2d 70, 85 (Ala. Crim. App. 1995) ("[E]vidence of collateral crimes or

bad acts is admissible as part of the prosecutor's case if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty of the charged offense because of his past misdeeds. Nicks v. State[, 521 So. 2d 1018 (Ala. Crim. App. 1987)]; Brewer v. State, 440 So. 2d 1155 (Ala. Cr. App. 1983); C. Gamble, McElroy's Alabama Evidence, § 69.01(1) (4th ed. 1991). Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive. Averette v. State, 469 So. 2d 1371 (Ala. Cr. App. 1985)." (emphasis added)).

Fourth, the trial court in McCray limited the jury's consideration of the evidence solely to impeachment. But the trial court gave no such limitation here. And finally, as discussed below, we cannot say that the admission of the evidence against Yeiter was harmless.

In Floyd, this Court examined Cedric Jerome Floyd's plain-error challenges to the admission of evidence showing (1) that Floyd and the victim, Tina Jones, had prior altercations during their relationship and (2)

that Floyd "had previously turned himself in on outstanding warrants." 289 So. 3d at 394-95. This Court held that evidence of the prior altercations was admissible under Rule 404(b), Ala. R. Evid., to show intent and motive–the purposes proffered by the State–because "Floyd's intent and motive were both open issues, and the prior altercations between Floyd and Jones were relevant and admissible to show both." 289 So. 3d at 401. "Floyd placed his intent at issue when he asserted intoxication and evidence of motive is always admissible." 289 So. 3d at 402. This Court also noted that the trial court had "instructed the jury as to the limited purposes for which it could consider the evidence of the collateral acts." Id. Thus, this Court found no plain error.

This Court also did not find plain error in the trial court's admission of testimony from the police officer who picked Floyd up after the murder that he knew Floyd because Floyd had " 'turned himself in to serve some warrants through the City of Atmore, and I'm the one that bonded him out. I don't know what the charges were. I know that he bonded out.' " 289 So. 3d at 402. This Court stated that evidence "that Floyd had warrants for unspecified charges and had turned himself in on those

warrants at some unspecified time before the murder was clearly not admissible under any of the exceptions in Rule 404(b), Ala. R. [Evid.]" Id.

But this Court held that admission of the evidence was harmless:

> "Officer Lopez's testimony about Floyd's warrants was so innocuous that it could not have contributed substantially to the jury's verdict. The State called 30 witnesses during Floyd's trial, and Officer Lopez was the State's 13th witness. He made only a single statement about Floyd's warrants, and the warrants were never mentioned again during the three-and-a-half-week trial. This Court has held that similar fleeting references to a defendant's collateral crimes are not so egregious to rise to the level of plain error. See, e.g., Brown v. State, 11 So. 3d 866, 905 (Ala. Crim. App. 2007), aff'd, 11 So. 3d 933 (Ala. 2008) (holding that admission of testimony that defendant was in custody of city police department when he was found was not so egregious to rise to the level of plain error); Barnes v. State, 727 So. 2d 839, 842-43 (Ala. Crim. App. 1997) (holding that admission of testimony that the defendant had an outstanding warrant for burglary, although improper, did not rise to the level of plain error); Dill v. State, 600 So. 2d 343, 351-52 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992) (admission of testimony that the defendant had a parole officer was not so egregious to rise to the level of plain error).
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> "Moreover, the evidence in this case was overwhelming. Not only did Floyd confess to the murder, Floyd's blood was found at the scene, two witnesses saw Floyd at the scene just moments before Jones's body was found, and evidence was presented indicating that Floyd and Jones had a history of domestic violence and that Floyd had threatened Jones the day before the murder. See, e.g., Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993) ('[W]hen, after considering the record as a

> whole, the reviewing court is convinced that the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper [admission of evidence], the admission of such testimony is harmless error.'). After thoroughly reviewing the record, we have no trouble concluding that the jury's verdict was based on the overwhelming evidence of Floyd's guilt and not on Officer Lopez's testimony that Floyd had previously turned himself in on outstanding warrants. The admission of Officer Lopez's testimony, although error, did not affect the outcome of Floyd's trial and did not prejudice Floyd's substantial rights and, therefore, was harmless beyond a reasonable doubt."

289 So. 3d at 402-03.

Floyd is also distinguishable. First, it involved plain-error review, not review of preserved error. And some of the challenged evidence in Floyd—that of the prior altercations between Floyd and the victim—was admissible for limited purposes, and the trial court limited the jury's consideration of that evidence. That was not the case here.

The other challenged evidence in Floyd—the officer's brief reference to warrants for unspecified crimes—was inadmissible, but this Court found the reference was "innocuous" and "fleeting" and thus harmless. Citing "[t]he evidence that Yeiter shot and killed Phillips while Phillips was seated unarmed in his truck," as well as Yeiter's admissions to

shooting Phillips, the State asserts that evidence of Yeiter's guilt was undisputed and overwhelming, and the State argues that the admission of the challenged evidence was harmless. (State's brief, p. 12.)

In arguing that the error in his case is not harmless, Yeiter cites several decisions, including Riley v. State, 48 So. 3d 671, 687 (Ala. Crim. App. 2009). In Riley, a jury convicted David Dwayne Riley of capital murder for the shooting death during a robbery of Scott Michael Kirtley, an employee of a liquor store. A surveillance video from the liquor store

> " 'clearly showed [Riley] approach the counter and pull a gun on Mr. Kirtley. Mr. Kirtley fully cooperated with Mr. Riley by putting all money from the register in a paper bag along with two bottles of liquor and Newport cigarettes. During the robbery a customer arrived. Mr. Riley backed away, instructed Mr. Kirtley to "make the sale" to that customer and hid the gun. While Mr. Kirtley was waiting on that customer Mr. Riley calmly counted the money. After the customer departed, the defendant ordered Mr. Kirtley to go to the back of the store, beyond the range of the video cameras. The audio portion of the tape records a gunshot, a scream, a pause, a second gunshot, a pause and a third gunshot. Mr. Riley is then seen collecting the paper bag containing the money, liquor and cigarettes and taking the tapes from two of the three video recorders. The videos also show that [Riley] had been in the store earlier in the evening to purchase two soft drinks and show [Riley] looking in the direction of the two store cameras whose tapes were taken after the murder.' "

Riley, 48 So. 3d at 673 (quoting the trial court's order). A friend of Riley's also testified that Riley told him " 'that he had committed the robbery, that a customer had interrupted the robbery, that he took the clerk to the back of the store and that he had shot him.' " Id. at 674. During cross-examination, the prosecutor questioned Riley about his prior criminal history, which included juvenile adjudications. In his rebuttal closing argument, the prosecutor argued, " 'We tried to help this guy. He said I'm in juvenile court. Yeah, we tried to rehabilitate him. Didn't work.' " Id. at 679. The trial court did not restrict the jury's consideration of Riley's prior convictions. Id. A plurality of this Court, under plain-error review, reversed Riley's conviction and death sentence because the trial court did not give "the jury a limiting instruction regarding the proper use of evidence about Riley's prior convictions." Id. at 687.

The facts in Yeiter's case are not "on all fours" with those in Riley. The prosecutor in Yeiter's case did not specifically reference Yeiter's prior criminal history in his closing argument, but, as noted below, he directed the jury to consider a specific page of the transcribed statement and that page referenced Yeiter's prior incarceration.

Riley shows, however, that, even under plain-error review, this Court has reversed a capital-murder conviction because of the admission of improper evidence of prior convictions despite strong evidence of guilt.[4] And the error in Yeiter's case is more serious than the error in Riley because the evidence in Yeiter's case was simply inadmissible and Yeiter repeatedly objected to its admission.

Although it is undisputed that Yeiter shot Phillips, the jury had to

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[4]Among other decisions, Yeiter also cites as examples in which the admission of evidence about prior convictions or prior bad acts was not harmless Ex parte Johnson, 507 So. 2d 1351, 1357 (Ala. 1986) (holding that it was plain error to admit a fingerprint card that showed the defendant had prior arrests; based on that card, "the jury could have readily inferred, at a minimum, that [the defendant] had been arrested in the past. ... [S]uch an inference would have had an almost irreversible impact upon the minds of the jurors."); Horton v. State, 217 So. 3d 27, 59-60 (Ala. Crim. App. 2016) (finding plain error based on the admission of "substantial evidence regarding multiple collateral crimes and acts that ... painted Horton as a drug-using, drug-dealing, violent criminal"); and Spradley v. State, 128 So. 3d 774, 789-92 (Ala. Crim. App. 2011) (holding it was plain error for trial court to admit statements from defendant's fellow prisoner that the defendant was on probation and had been in jail for violating the terms of his probation; because of that evidence, "the jury surely must have been left with the impression that Spradley was a dangerous, career criminal. Such an impression would have had an 'almost irreversible impact upon the minds of the jurors.' Ex parte Johnson, 507 So. 2d at 1357.").

determine Yeiter's culpability in shooting Phillips. His defense counsel argued that Yeiter acted justifiably in self-defense after Phillips said he would get his gun, and the trial court gave the jury a limited instruction about justified use of force.[5] (R. 1740-41, 1760.) In response, the prosecutor argued that Yeiter was the "initial aggressor," and the prosecutor cited portions of Yeiter's statement in which Yeiter said he did not see a gun and that Phillips did not act "like he was going to pull a gun." (R. 1731-33, 1744-45.) The prosecutor told the jury to look at Yeiter's statement to the police, and the prosecutor emphasized his statements, "I did it," "There is no excuse for it,"[6] "I had plenty of time to think about what I did," and "I'd do it again." (R. 1735-36, 1747.) The

[5]The trial court instructed the jury: "[A] person is justified in using deadly physical force against another person if it reasonably appears that the other person is about to use deadly physical force on him." (R. 1760.) Although the State objected to this instruction at the charge conference, it did not renew that objection after the trial court instructed the jury, and the State does not argue on appeal that the instruction was improper. (R. 1725, 1760, 1772.)

[6]Yeiter's statement about having "no excuse" could refer to either the shooting or the bad relationship he and Phillips had. Yeiter stated: "I did it. Okay. There's no excuse for it. Why things led up to where they did, I have no excuse for it. It's just all over a period of time. I can tell you when it started." (R. 1605.)

prosecutor cited specific pages of the statement for the jury to consider, including page 28, where Yeiter stated that he was a "sorry mother fucker that was locked up all his damn life." (R. 1732; Supp. C. 242.)

Here, unlike the challenged evidence in Floyd, supra, and McCray, supra, we cannot say that admission of the challenged evidence was harmless. The references to Yeiter's crimes were specific and not "fleeting" or merely "innocuous." Yeiter stated he was a "sorry mother fucker that was locked up all his damn life" and said he had been arrested for drunk driving. He stated he had been to prison for 15 years first-degree theft of property and stated that he had an "armed robbery charge" from when he was 17 or 18. And although Yeiter volunteered some information about the prior convictions and prior bad acts, Yeiter also provided some information in response to direct questioning from Investigator Johnson. The admission of the challenged evidence was "inherently prejudicial [in] nature," Ex parte Minor, 780 So. 2d 796, 802 (Ala. 2000), we have no doubt that its admission had "almost an irreversible impact upon the minds of the jurors," Ex parte Drinkard, 777 So. 2d 295, 301 (Ala. 2000), and we cannot say that the evidence did not affect the jury's decision

about Yeiter's guilt.

Under the circumstances of this case, the trial court erred in admitting evidence, at the guilt phase of the trial, about Yeiter's prior convictions, and that error was not harmless. Thus, we reverse Yeiter's capital-murder conviction and death sentence, and we remand this cause for proceedings consistent with this opinion.[7]

REVERSED AND REMANDED.

Kellum and Cole, JJ., concur. McCool, J., dissents, with opinion, joined by Windom, P.J.

[7]Because we are reversing Yeiter's conviction and death sentence, we do not consider the remaining issues that Yeiter raises.

McCOOL, Judge, dissenting.

I disagree with the main opinion's decision to reverse Brett Richard Yeiter's capital-murder conviction and death sentence based on the trial court's admission of evidence concerning Yeiter's prior convictions. I believe that the admission of that evidence was, at most, harmless error. Therefore, I dissent.

First, I question whether the specific issue that the main opinion addresses on appeal was properly preserved in the trial court because Yeiter never made a specific argument concerning Rule 404(b), Ala. R. Evid., in the trial court. (C. 303-04, 396, 423-24; R. 1348-49, 1583-84, 1587, 1688.) Regardless, I believe that any error, whether preserved error or plain error, was harmless.

Rule 45, Ala. R. App. P., provides:

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

Furthermore,

> "'"After finding error, an appellate court may still affirm a conviction on the ground that the error was harmless, if indeed it was." Guthrie v. State, 616 So. 2d 914, 931 (Ala. Crim. App. 1993), citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "The harmless error rule applies in capital cases." Knotts v. State, 686 So. 2d 431, 469 (Ala. Crim. App. 1995), opinion after remand, 686 So. 2d 484 (Ala. Crim. App. 1995), aff'd, 686 So. 2d 486 (Ala. 1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997), citing Ex parte Whisenhant, 482 So. 2d 1241 (Ala. 1983). "In order for a constitutional error to be deemed harmless under Chapman, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict. In order for the error to be deemed harmless under Rule 45, the state must establish that the error did not injuriously affect the appellant's substantial rights." Coral v. State, 628 So. 2d 954, 973 (Ala. Crim. App. 1992), opinion after remand, 628 So. 2d 988 (Ala. Crim. App. 1992), aff'd, 628 So. 2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994). "The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing." Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1997), aff'd, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999).'

"McNabb v. State, 887 So. 2d 929, 976-77 (Ala. Crim. App.

2001)."

Sale v. State, 8 So. 3d 330, 347 (Ala. Crim. App. 2008).

While I acknowledge the potentially prejudicial nature of evidence of a defendant's prior convictions, I believe that, under the specific facts of this case, the admission of Yeiter's statements about his prior convictions was harmless. Those statements were passing statements that were volunteered by Yeiter during his extensive interview with law-enforcement officers, and the evidence of Yeiter's guilt was overwhelming. The main opinion appears to hold that the admission of the evidence was not harmless because it could have affected Yeiter's claim of self-defense. However, although the trial court gave a very limited jury instruction on self-defense, there was simply no evidence of self-defense in the present case. Although Yeiter had been in an argument with the victim at the church, Yeiter left the church in his truck and drove to his house. Then, Yeiter, who was a felon, got his shotgun and returned to the church. Yeiter admitted that, when he returned to the church, he approached the victim who was sitting in his truck, and, even though Yeiter did not see that the victim had a weapon, Yeiter shot the victim in the head. I believe

that it is beyond a reasonable doubt that any error did not contribute to the jury's verdict and that any error did not injuriously affect Yeiter's substantial rights. Thus, I dissent.

Windom, P.J., concurs.