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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-12-0197

Jessie Livell Phillips

v.

State of Alabama

Appeal from Marshall Circuit Court
(CC-09-596)

JOINER, Judge.

Jessie Livell Phillips was convicted of one count of capital murder for causing the death of his wife, Erica Phillips ("Erica"), and their unborn child ("Baby Doe") during "one act or pursuant to one scheme or course of conduct," see

§ 13A-5-40(a)(10), Ala. Code 1975, and the jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and after conducting a sentencing hearing, the Marshall Circuit Court ("the trial court") followed the jury's advisory recommendation and sentenced Phillips to death. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A-5-53, Ala. Code 1975. For the reasons set forth below, we affirm Phillips's conviction and remand this case to the trial court for that court to correct deficiencies in its sentencing order.

Facts

On February 27, 2009, Phillips, Erica, and their two children met Erica's brother, Billy Droze ("Billy"), at a McDonald's restaurant in Hampton Cove. According to Billy, they all arrived at the McDonald's restaurant at the same time and Phillips and Erica were driving two separate vehicles--Erica was driving a black Ford Explorer Sport Trac truck and Phillips was driving a black Nissan Maxima car. Billy explained that, before that day, he had not seen the Nissan Maxima. Thereafter, Phillips, Billy, Erica, and the two

children entered the McDonald's restaurant to eat lunch, and they stayed there for approximately 30 to 45 minutes. While at the restaurant, they decided to all drive to the car wash in Guntersville to visit Erica and Billy's brother, Lance Droze ("Lance"), who was working at the car wash that day.

According to Billy, they left the restaurant driving three separate vehicles--Erica drove the truck, Phillips drove the car, and Billy drove his vehicle--and they all arrived at the car wash at the same time. Billy explained that they parked each of their vehicles in three separate car-wash "bays." When they arrived at the car wash, Billy saw Lance washing a boat in one of the car-wash bays; he exited his vehicle, walked over to Lance, and told him that they were there to see him. Shortly thereafter, Lance finished washing the boat and hauled it away from the car wash, and Billy walked back to his vehicle.

According to Billy, as he was walking back to his vehicle, he stopped at the car-wash bay in which Erica's truck was parked. Billy stated that Erica was sitting in the driver's seat of the truck and that Phillips was sitting in the rear-passenger seat "fiddling with" a gun. (R. 505.)

Billy then spoke with Phillips and said, "You guys always need money. Why don't you let me have that gun and I'll throw it in this lake and I'll give you some money." (R. 505.) Phillips, however, declined to give Billy the gun, and Billy walked back to his vehicle. Soon after, Billy heard Erica yell, "Help me, Bill" (R. 504), and he went back to where Erica had parked her truck. According to Billy, he "got there just in time to see [Phillips] kill her." (R. 505.)

Billy explained that he saw Phillips and Erica engaged in a "struggle." According to Billy, Phillips had Erica "in a headlock, pointing [the gun] to her head." (R. 506.) Although she was able to "break free" from the headlock, within "seconds" of her doing so, Phillips fired one shot at Erica. Billy then grabbed his niece and nephew, who were both nearby when the shooting occurred,[1] and Phillips told Billy to "get out of there." (R. 506.) Billy then put his niece and nephew in his vehicle and drove to get Lance, who, Billy said, was approximately 100 yards away at the Guntersville Boat Mart returning the boat he had just washed. While putting his niece and nephew in his vehicle, Billy saw Phillips drive off

[1]According to Billy, when the "struggle" was going on, his niece was "around" Erica's feet and his nephew was with him.

in Erica's truck. Billy told Lance what had happened at the car wash, telephoned for help, and took the children away from the car wash.

Lance then ran toward the car wash and went over to Erica, who was lying on the ground. According to Lance, Erica was lying on her side with her head on her arm, her left eye was swollen, and there was a lot of blood on the ground. Lance explained that Erica could not speak and was having difficulty breathing. Lance "held her for a few minutes, and ... noticed she was choking and [then] turned her over." (R. 540.) Soon after, Doug Ware, an investigator with the Guntersville Police Department, arrived at the car wash and told Lance to move.

Investigator Ware explained that he had been dispatched to the car wash with a report that a female had been shot in the head. According to Investigator Ware, when he arrived at the car wash, he saw "three people standing to the left of the car wash on the curb and one person in the bay and someone else laying on the ground, [who] was later [determined] to be Erica. [Investigator Ware] pulled [his] car up in front of the bay that Erica was in and walked up to where [Lance] was."

(R. 580.) Investigator Ware explained that, when he arrived at the crime scene, Erica was lying "pretty much face down on the right side of her face" (R. 583) and that he

> "could not really see where blood and everything was coming from, but her left eye was swollen. [Erica] was taking very short breaths, and they were far apart. There was a large amount of blood. And at that time ... [he] advised [another officer who had arrived on scene] to '10-17' the medics, which was [to] hurry them up."

(R. 584.) According to Investigator Ware, Erica had an entry wound on the right side of her head and her condition appeared to be "very grave." (R. 585.) Once emergency medical personnel arrived, they began to treat Erica, moved her to an ambulance, and transported her to the hospital. When the ambulance left, Investigator Ware began securing the crime scene.

Erica was transported to the emergency room at Marshall Medical Center North ("MMCN"). Joann Ray, the charge nurse on duty in the emergency room, explained that Erica was unresponsive, which Ray described as having "no spontaneous movement ... [and] no verbal communication." (R. 644.) Ray further explained that Erica had a very shallow respiration--"maybe three to six [breaths] a minute." (R. 645.) According

to Ray, it was determined that Erica needed specialized care--specifically, treatment by a neurosurgeon. Because MMCN did not have a neurosurgeon on duty, Erica was transported to a hospital in Huntsville.

At some point shortly after the shooting, John Siggers, an agent with the Marshall County Drug Enforcement Unit, and Tim Abercrombie, a sergeant with the Albertville Police Department, were meeting about "drug unit business" at the Albertville police station. During that meeting, Sgt. Abercrombie received a telephone call from someone with the Guntersville Police Department informing him that they were searching for a homicide suspect and providing Sgt. Abercrombie with a description of both the suspect and the vehicle they believed he was driving. Sgt. Abercrombie then told Agent Siggers that they "were looking for a black Ford Explorer Sport Trac driven by [Phillips], and it was possibly headed to Willow Creek Apartments on Highway 205." (R. 549.) Thereafter, both Sgt. Abercrombie and Agent Siggers left the Albertville police station to assist in locating Phillips.

Almost immediately after leaving the parking lot of the Albertville police station, Agent Siggers saw a black Ford Explorer Sport Trac. Agent Siggers explained that he

> "pulled out behind [the vehicle] to run the tag, and as [he] pulled out behind it, [the vehicle] pulled over into the, up against the curb, a parking spot next to Albertville Police Department. At that time, Mr. Phillips step[ped] out of the vehicle."

(R. 551.) Agent Siggers explained that Phillips then walked over to the sidewalk "and stood and looked at [him]." (R. 553.) At that point, Agent Siggers got out of his vehicle with his weapon drawn and Phillips put his hands up, walked toward Agent Siggers, and said, "I did it. I don't want no trouble." (R. 553.) Agent Siggers then put Phillips "up against the hood of his vehicle to put [hand]cuffs on him," and, while doing so, Phillips told Agent Siggers that the "gun's in [his] back pocket." (R. 554.) Agent Siggers then retrieved the gun from Phillips's pocket and "cleared the weapon." (R. 555.) According to Agent Siggers, the gun had "one live round in the chamber and three live rounds in the magazine." (R. 555.)

Agent Siggers then walked Phillips to the front door of the Albertville police station and sat him down on a brick

retaining wall. Thereafter, Benny Womack, the chief of the Albertville Police Department, walked out and asked Agent Siggers what was going on. Agent Siggers told Chief Womack that Phillips was a "suspect" in a homicide that had occurred in Guntersville. Phillips, however, interjected and explained to Agent Siggers and Chief Womack that he "is not a suspect. [He] did it." (R. 557.) Agent Siggers and Chief Womack then "walked [Phillips] to the jail door of the Albertville Police Department at that point. [They] sat him down on a bench. [Phillips] stayed with Chief Womack. [Agent Siggers then] went to [the] investigation division of the Albertville Police Department and called Investigator [Mike] Turner with the Guntersville Police Department." (R. 558.)

Investigator Turner responded to the car wash to assist Investigator Ware in processing the crime scene. Shortly after arriving, however, Investigator Turner "found out that [Agent Siggers] had [Phillips] in custody in Albertville." (R. 619.) Investigator Turner then left the car wash and drove to the Albertville police station. Upon arriving at the Albertville police station, Investigator Turner received from Agent Siggers the gun that had been retrieved from Phillips's

pocket. Thereafter, Investigator Turner and Sgt. Abercrombie read to Phillips his Miranda[2] rights, which Phillips waived, and questioned him about the shooting at the car wash.

During that interview,[3] Phillips explained the following: Sometime before February 27, 2009, Erica had purchased a used Lexus from a car dealership in New Hope. That car, however, did not work properly, and, on February 27, 2009, Phillips and Erica returned to the car dealership to try to get their money back. The owners of the car dealership, however, refused to give them their money back and, instead, offered to exchange the Lexus for a used Nissan Maxima. Phillips explained that, rather than losing money on the Lexus that did not work properly, he agreed to the exchange and took the Nissan Maxima. According to Phillips, Erica was not happy with the exchange and began arguing with him.

After getting the Nissan Maxima, Erica and Phillips drove to a McDonald's restaurant to meet Billy. Phillips explained

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[2]Miranda v. Arizona, 384 U.S. 486 (1966).

[3]Investigator Turner conducted two interviews with Phillips. Those interviews were recorded and later transcribed. Both the audio recordings and the transcriptions of those recordings were admitted into evidence at trial as State's Exhibit 19 and 20, respectively; Phillips stipulated to their admission.

that, while eating at the restaurant, Erica continued to argue with him, saying, "'What the f*** did you get that Maxima for?' 'You dumb-ass n*****, I could have just not took nothing and just left the money there and just said f*** it.'" (C. 172.)

Phillips explained that, after eating at the McDonald's restaurant, he, Billy, and Erica decided to go to the car wash to see Lance. Phillips stated that, before leaving the McDonald's, however, he removed a gun from the glove compartment of Erica's truck and put it in his pocket. Phillips explained that he did so because neither he nor Erica had a permit for the weapon and he did not want her to be in possession of the gun "in case she got pulled over." (C. 167.) Erica, Phillips, and Billy then drove in three separate vehicles to the car wash.

According to Phillips, after arriving at the car wash, Erica "just kept on and kept on and kept on and it just happened." (C. 168.) Phillips explained that Erica was "[s]till pissed about the Maxima. Still calling [him] 'dumb' and 'stupid.' 'You shouldn't have did that.'" (C. 177.) Then, Phillips explained, the following occurred:

> "And she's still yelling and cussing and I just said, 'Why don't you shut up for a minute and just let it all sink in and calm down and everything.' And she just kept cussing and calling me names and--
>
> "....
>
> "Well, I had the pistol in my back pocket from when we left McDonald's.
>
> "....
>
> "I got the pistol in my back pocket. And she just kept on and kept on and kept on and kept on and I just shot her, got in the car and left.
>
> "[Investigator Turner]: Where were you aiming?
>
> "[Phillips]: I wasn't really I just pointed and pulled the trigger . I don't--I still don't know where it hit her. I don't--I'm guessing it did hit her because she fell."

(C. 178-80.) Phillips explained that, before he shot her, Erica asked, "'What you going to do with that?'" (C. 180.) According to Phillips, he did not point the gun at her for a long time; rather, he maintained that he "pulled the trigger, pointed and shot. Put [the gun] back in [his] pocket, got in the truck and left." (C. 180.) Phillips also explained that he had to step over Erica's body to get in the truck and leave.

Phillips stated that, after he left the car wash, he went to a Compass Bank and withdrew $160 from his bank account.

Thereafter, Phillips drove to the Albertville police station and parked his car out front and turned himself in.

When asked what the shooting was about, Phillips explained:

> "Everything. I mean, you just don't know how it feel to be married to a woman for four years and for the last, I'd say, two years, every day she's bitching at you about something. She called me a n*****. She called me a fa***t. It--I don't know, it just all just added up and I could have found a better way to end it, but--"

(C. 165.) Additionally, when asked whether he intended to kill Erica, Phillips stated:

> "Like I say, when I pulled that gun out and pointed it at her and pulled the trigger, did I want to kill her? No. Did I pull the trigger? Yes."

(C. 208-09.)

The next day--February 28, 2009--Investigator Turner conducted a second interview with Phillips. During that second interview, Phillips reiterated the events leading up to the shooting and explained that Erica

> "got out of the truck and [he] started walking around towards the end [of the truck] and that's when [he] pulled the gun out. And [Erica] said, 'What you doing with that?' And I really didn't say nothing and she turned like she was either fixing to walk off or run. I can't say for sure that she was going to do, but that's--

> "[Investigator Turner]: But she was fixing to do one or the other?
>
> "[Phillips]: Yeah, she was fixing to do one or the other. And I pulled the trigger and walked past her. I walk up to the front of the car wash and I put the gun to my chest, because I really didn't want to go to jail, but at the same time I couldn't pull the trigger because it's not in my beliefs. It's not something that I want to spend the rest of my life doing."

(C. 247-48.) Thereafter, Investigator Turner explained to Phillips that Erica had died at approximately 1:00 a.m. and that she had been approximately eight weeks pregnant. Phillips explained that he had learned of the pregnancy a couple of weeks before the shooting when Erica had gone to a doctor who had confirmed that she was pregnant.

On March 2, 2009, Dr. Emily Ward, a state medical examiner at the Huntsville Regional Laboratory of the Department of Forensic Sciences, conducted an autopsy on Erica. Dr. Ward explained that she did both an external and an internal examination of Erica's body. According to Dr. Ward, the external examination of Erica revealed that she had a "gunshot entry wound on the right side of her head above her right ear and in the scalp" and no exit wound. (R. 656.) Additionally, Dr. Ward stated that Erica's "left eye was

discolored. It was red and protruding through her eyelid." (R. 658.) Dr. Ward then explained that the internal examination of Erica revealed that

> "[t]he bullet went through the right side of her head and then the right side of her brain, and it crossed over what we call the midline and went into the left side of her brain. And then at some point, the core and the jacket separated from one another. The lead piece of metal went through the base of her skull and into her left eye."
>
> "....
>
> "Well, both sides of her brain were injured. The right side, the bullet went through the part of her brain that controls movement and then it passed into the left side. But as it did, it went very close to the brain stem. And the brain stem, of course, is the center of breathing and other vital functions. So since the bullet went very close to that, she probably was almost immediately incapacitated by the bullet."

(R. 660-61.) Dr. Ward further explained that she conducted a "urine pregnancy test" that indicated that Erica was, in fact, pregnant and that she also conducted an internal examination of Erica's "reproductive organs" that confirmed that Erica was pregnant. According to Dr. Ward, Baby Doe was "growing and alive" at the time of Erica's death, and, Dr. Ward stated, that Baby Doe could not survive Erica's death.

Standard of Review

On appeal from his conviction and sentence, Phillips raises numerous issues, including many that were not raised in the trial court. Because Phillips has been sentenced to death, however, this Court must review the trial-court proceedings for plain error, see Rule 45A, Ala. R. App. P.

> "'Plain error is defined as error that has "adversely affected the substantial right of the appellant." The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." See Ex parte Price, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1012 (1999).'"

Ex parte Brown, 11 So. 3d 933, 935-36 (Ala. 2008) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999)). See also Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007); Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997); Harris v. State, 2 So. 3d 880, 896 (Ala. Crim. App. 2007); and Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998) ("To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it

must also have an unfair prejudicial impact on the jury's deliberations."). Although the failure to object in the trial court will not preclude this Court from reviewing an issue under Rule 45A, Ala. R. App. P., it will weigh against any claim of prejudice made on appeal. See Dotch v. State, 67 So. 3d 936, 965 (Ala. Crim. App. 2010) (citing Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)). Additionally, application of the plain-error rule

> "'"is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"' Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S. Ct. 1973, 131 L. Ed. 2d 862 (1995)."

Centobie v. State, 861 So. 2d 1111, 1118 (Ala. Crim. App. 2001).

Discussion

Guilt-Phase Issues

I.

Phillips contends that, under both §§ 13A-5-40(a)(10) and 13A-5-49(9), Ala. Code 1975, the murder of "two or more persons" does not encompass the death of Baby Doe because, he

says, an unborn child is definitionally not a "person" under the capital-murder statute. Specifically, Phillips argues:

> "In the present case, the only capital offense Mr. Phillips was charged with was the murder of 'two or more persons,' Alabama Code [§] 13A-5-40(a)(10), and the only aggravating circumstance found by the trial court was that Mr. Phillips 'intentionally caused the death of two or more persons,' [§] 13A-5-49(9). However, the sole provision of the criminal code that arguably made Mr. Phillips eligible for the death penalty was a change to the definition of the word 'person'--outside of the capital murder statute--in [§] 13A-6-1. Without this change in definition, Mr. Phillips's act of shooting his wife, who was six to eight weeks pregnant, could not have been capital murder."

(Phillips's brief, pp. 14-15 (some citations omitted).) Phillips's argument is premised on his belief that the definition of the word "person" in § 13A-6-1, Ala. Code 1975, which includes an unborn child, is limited to only those "victim[s] of a criminal homicide or [an] assault" committed under "Article 1 and Article 2" of Chapter 6 in Title 13A and, therefore, cannot be used to define the word "person" in the capital-murder statute because the capital-murder statute is located in Article 2 of Chapter 5 in Title 13A.

Phillips contends that defining the word "person" in both §§ 13A-5-40(a)(10) and 13A-5-49(9), Ala. Code 1975, by using the definition of the word "person" from § 13A-6-1(a)(3), Ala.

Code 1975, violates "established principles of statutory construction and the rule of lenity" and creates a new class of capital offense--"murder of a pregnant woman" (Phillips's brief, p. 15)--and a new aggravating circumstance. To resolve Phillips's argument on appeal, we must construe §§ 13A-5-40, 13A-5-49, 13A-6-1, and 13A-6-2, Ala. Code 1975.

The following principles of statutory construction, as explained by the Alabama Supreme Court, guide our analysis:

> "In [Ex parte] Bertram, [884 So. 2d 889 (Ala. 2003),] this Court stated:
>
> > "'"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.
> >
> > "'"Penal statutes are to reach no further in meaning than their words.
> >
> > "'"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.

> "'"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."'

"884 So. 2d at 891 (quoting Clements v. State, 370 So. 2d 723, 725 (Ala. 1979) (citations omitted; emphasis added in Bertram)).

"In ascertaining the legislature's intent in enacting a statute, this Court will first attempt to assign plain meaning to the language used by the legislature. As the Court of Criminal Appeals explained in Walker v. State, 428 So. 2d 139, 141 (Ala. Crim. App. 1982), '[a]lthough penal statutes are to be strictly construed, courts are not required to abandon common sense. Absent any indication to the contrary, the words must be given their ordinary and normal meaning.' (Citations omitted.) Similarly, this Court has held that '[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.' Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301, 1305 (Ala. 1991).

"We look first for that intent in the words of the statute. As this Court stated in Ex parte Pfizer, Inc., 746 So. 2d 960, 964 (Ala. 1999):

> "'"When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning--they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature." Ex parte T.B., 698 So.

2d 127, 130 (Ala. 1997). Justice Houston wrote the following for this Court in DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270 (Ala. 1998):

> "'"In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:
>
> > "'"'"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."'
>
> "'"Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)); see also Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n, 589 So. 2d 687, 689 (Ala. 1991); Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n, 524 So. 2d 357, 360 (Ala. 1988);

> Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984); Dumas Brothers Mfg. Co. v. Southern Guar. Ins. Co., 431 So. 2d 534, 536 (Ala. 1983); Town of Loxley v. Rosinton Water, Sewer & Fire Protection Auth., Inc., 376 So. 2d 705, 708 (Ala. 1979). It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. See Ex parte T.B., 698 So. 2d 127, 130 (1997)."'

"Thus, only when language in a statute is ambiguous will this Court engage in statutory construction. As we stated in Ex parte Pratt, 815 So. 2d 532, 535 (Ala. 2001), '[p]rinciples of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.'

"As the Court of Criminal Appeals explained in Ankrom[v. State, 152 So. 3d 373 (Ala. Crim. App. 2011)], the rule of construction referenced in

> Bertram applies only where the language of the statute in question is ambiguous. ..."

Ex parte Ankrom, 152 So. 3d 397, 409-10 (Ala. 2013). See also Ex parte Hicks, 153 So. 3d 53, 58-59 (Ala. 2014) (quoting Ankrom for the purpose of explaining the rules of statutory construction).

In raising this claim, Phillips correctly recognizes that "the sole provision of the criminal code that arguably made [him] eligible for the death penalty was a change to the definition of the word 'person'--outside of the capital murder statute--in [§] 13A-6-1." (Phillips's brief, p. 15.) Phillips incorrectly argues, however, that the definition of the term "person" in § 13A-6-1(a)(3), Ala. Code 1975, is limited to only "Article 1 and Article 2" of Chapter 6 in Title 13A and "should not be applied to the separate capital-murder statute." (Phillips's brief, p. 18.)

Indeed, contrary to Phillips's assertion, a simple reading of the capital-murder statute plainly and unambiguously makes the murder of "two or more persons"--when one of the victims is an unborn child--a capital offense because the capital-murder statute expressly incorporates the intentional-murder statute codified in § 13A-6-2(a)(1), Ala.

Code 1975--a statute that, in turn, uses the term "person" as defined in § 13A-6-1(a)(3), Ala. Code 1975, which includes an unborn child as a person.

As explained above, Phillips was charged with, and convicted of, causing the death of Erica and Baby Doe, an unborn child, pursuant to § 13A-5-40(a)(10), Ala. Code 1975. That statute makes "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct" a capital offense. (Emphasis added.)

Section 13A-5-40(b), Ala. Code 1975, explains, in relevant part, that "the terms 'murder' and 'murder by the defendant' as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3)." (Emphasis added.) In other words, the term "murder" as that term is used in the capital-murder statute means "intentional murder" as defined by § 13A-6-2(a)(1), Ala. Code 1975. That section provides that intentional murder occurs when the defendant, "[w]ith intent to cause the death of another person, ... causes the death of that person or of another person." § 13A-6-2(a)(1), Ala. Code 1975 (emphasis added). The term "person," as that

term is used in § 13A-6-2(a)(1), "when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975 (emphasis added).

In other words, the capital-murder statute plainly and unambiguously requires the occurrence of an intentional murder, as defined in § 13A-6-2(a)(1), Ala. Code 1975, and an intentional murder occurs only when a defendant causes the death of a "person," which includes an unborn child.

Because an "unborn child" is a "person" under the intentional-murder statute and because the intentional-murder statute is expressly incorporated into the capital-murder statute to define what constitutes a "murder," an "unborn child" is definitionally a "person" under § 13A-5-40(a)(10), Ala. Code 1975. Thus, to the extent Phillips contends that § 13A-5-40(a)(10), Ala. Code 1975, excludes from its purview the death of an unborn child, that claim is without merit.

Phillips also argues that the term "person" as that term is used in § 13A-5-49, Ala. Code 1975, does not include an "unborn child." That section sets out the aggravating

circumstances for which the death penalty may be imposed and provides, in relevant part:

> "Aggravating circumstances shall be the following:
>
> "....
>
> "(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct. ..."

§ 13A-5-49(9), Ala. Code 1975 (emphasis added).

Section 13A-5-49, unlike § 13A-5-40, does not expressly incorporate the intentional-murder statute, and it also does not expressly incorporate the definition of the term "person" found in § 13A-6-1, Ala. Code 1975. Both § 13A-5-40 and § 13A-5-49, however, use nearly identical language and concern closely related subject matter--i.e., capital offenses and the aggravating circumstances for which a capital offense may be subject to the death penalty.

When "statutes 'relate to closely allied subjects [they] may be regarded in pari materia.' State ex rel. State Board for Registration of Architects v. Jones, 289 Ala. 353, 358, 267 So. 2d 427, 431 (1972). 'Where statutes are in pari materia they should be construed together' and 'should be resolved in favor of each other to form one harmonious plan.'

League of Women Voters v. Renfro, 292 Ala. 128, 131, 290 So. 2d 167, 169 (1974)." Henderson v. State, 616 So. 2d 406, 409 (Ala. Crim. App. 1993). Thus, like § 13A-5-40(10), we construe § 13A-5-49(9) as including unborn children as "persons."

Although Phillips argues that what defines a "person" in the capital-murder statute is different from what defines a "person" in the intentional-murder statute, we do not agree. Indeed, to read those statutes in the manner Phillips would have us read them, this Court would have to ignore the plain meaning of the capital-murder statute and its express incorporation of the intentional-murder statute, would have to read closely related statutes in an inconsistent manner, and would have to disregard the "clear legislative intent to protect even nonviable fetuses from homicidal acts." Mack v. Carmack, 79 So. 3d 597, 610 (Ala. 2011). Consequently, Phillips is not entitled to any relief on this claim.

II.

Phillips contends that the trial court erred during the jury-selection process. Specifically, Phillips contends that the trial court erred by death-qualifying the jury, by failing

to excuse certain jurors for cause, and by removing certain jurors who, Phillips says, demonstrated that they could be fair and impartial. We address each of Phillips's issues in turn.

A.

Phillips first contends that the trial court erred "by death-qualifying the jury" because, he says, doing so "produced a biased jury prone to convict [him]." (Phillips's brief, p. 98.) Phillips did not raise this issue in the trial court; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

> "In Davis v. State, 718 So. 2d 1148 (Ala. Crim. App. 1995) (opinion on return to remand), aff'd, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1117, 143 L. Ed. 2d 112 (1999), we 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).'

> "718 So. 2d at 1157. There was no error in allowing the State to death qualify the prospective jurors."

Brown v. State, 11 So. 3d 866, 891 (Ala. Crim. App. 2007).

Thus, the trial court did not commit any error--plain or otherwise--in death-qualifying the prospective jurors. Consequently, Phillips is not entitled to relief on this claim.

B.

Phillips next contends that the trial court erred when it "failed to excuse jurors for cause"--namely, prospective jurors C.A., C.G., and S.D.[4] (Phillips's brief, p. 51.) Although Phillips did not challenge these prospective jurors for cause in the trial court, Phillips argues that the trial court's failure to sua sponte remove them for cause "forced" him "to use peremptory strikes to exclude them from the jury." (Phillips's brief, p. 54.) Because Phillips did not first

[4]To protect the anonymity of the jurors in this case, we identify them by their initials.

raise this issue in the trial court, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

Although Phillips contends that the trial court should have sua sponte removed these 3 prospective jurors for cause, Phillips used 3 of his allotted 31 peremptory strikes to remove prospective jurors C.A., C.G., and S.D. from the venire.

> "Accordingly, any error in failing to remove these jurors for cause was harmless beyond a reasonable doubt. '[T]he Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike. Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1 (Ala. 2002).' Pace v. State, 904 So. 2d 331, 341 (Ala. Crim. App. 2003). Cf. Ex parte Colby, 41 So. 3d 1 (Ala. 2009) (may not be harmless when multiple challenges for cause are involved).
>
> "Moreover,
>
> "'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. 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).

"'The qualification of a juror is a matter within the discretion of the trial court. Clark v. State, 443 So. 2d 1287, 1288 (Ala. Cr. App. 1983). The trial judge is in the best position to hear a prospective juror and to observe his or her demeanor.' Ex parte Dinkins, 567 So. 2d 1313, 1314 (Ala. 1990). '"[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).' Sharifi v. State, 993 So. 2d 907, 926 (Ala. Crim. App. 2008).
>
> > "'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, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)."

Thompson v. State, 153 So. 3d 84, 115-16 (Ala. Crim. App. 2012).

Phillips first contends that, during voir dire, prospective juror C.A. "showed probable prejudice that could not be set aside" (Phillips's brief, p. 52) because, he says, C.A.

> "stated that a close family friend, an eleven-year-old child, was murdered several years

> ago. [C.A.] further said 'it's been a couple of years since the trial' and 'last night I struggled a lot with a lot of memories and emotions ... related to that.' Upon further questioning regarding her ability to be fair, [C.A.] said she would 'try to be fair,' but 'I have to honestly say I don't know. I really don't know. ... I'm not sure.'"

(Phillips's brief, p. 52 (citations omitted).)

During voir dire, Phillips's counsel and C.A. had the following exchange:

> "[Phillips's counsel]: I have, based on your questionnaires, ladies and gentlemen, I have a few follow-up questions for you. And I'd like to first direct and pick on [C.A.] up there on the upper left. And I appreciate your very candid responses. You had a traumatic event in your life, didn't you, [C.A.]?
>
> "[C.A.]: Yes, involving a murder.
>
> "[Phillips's counsel]: Excuse me?
>
> "[C.A.]: Involving a murder is what you're referring to?
>
> "[Phillips's counsel]: Yes. And certainly that was a huge event in your life?
>
> "[C.A.]: Yes.
>
> "[Phillips's counsel]: A person you knew, that is, as I recall, was an 11-year-old person.
>
> "[C.A.]: Yes. A close family friend. I was very involved with the grandmother, who was their only living relative, and closely associated with the case.

"[Phillips's counsel]: Got you. And certainly that--again, it comes through in your questionnaire, that was a very traumatic event for you?

"[C.A.]: It was, yes.

"[Phillips's counsel]: The only follow-up question I have to that, [C.A.], is whether or not you think that that experience, that based on that experience, do you think you could still be a fair and impartial juror in this case, decide the case against Mr. Phillips based on the law and the evidence?

"[C.A.]: I've had a lot of questions in my mind since filling that out, yes, sir.

"[Phillips's counsel]: That's why I asked it.

"[C.A.]: Yes. Filling that out yesterday, it's been a couple of years since the trial, since I really thought about it. I tried to kind of push it back. And I have to say last night I struggled a lot with a lot of memories and emotions--

"[Phillips's counsel]: Sure.

"[C.A.]: --related to that. <u>I do realize that each case is different, you know. There's no relationship between the two cases</u>. But as far as the fact that I was close to that, it is somewhat emotional. <u>You know, I would certainly try to be fair, recognizing that they are two separate events</u>. But there's an emotion to it. I can't deny it.

"[Phillips's counsel]: Yes. And that's--thank you for sharing. And I'm going to pick on other people in a minute.

"[C.A.]: That's okay. I expected you would have done that.

> "[Phillips's counsel]: I guess at this point, [C.A.], we deal in kind of absolutes though.
>
> "[C.A.]: Uh-huh.
>
> "[Phillips's counsel]: I mean, if there's some question in your mind as you sit there right now--
>
> "[C.A.]: Yeah.
>
> "[Phillips's counsel]: --and you know you're going to be sitting on a homicide, a murder case--
>
> "[C.A.]: Yeah. I have to honestly say I don't know. I really don't know.
>
> "[Phillips's counsel]: All right. Not sure?
>
> "[C.A.]: Yeah. I'm not sure."

(R. 174-77 (emphasis added).)

An examination of the record on appeal demonstrates that prospective juror C.A. was not due to be removed for cause under any of the statutory exclusions of § 12-16-150, Ala. Code 1975, "or related to a matter that imports absolute bias on the part of the juror. See Tomlin v. State, 909 So. 2d 213, 235-36 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003)." Sneed v. State, 1 So. 3d 104, 137 (Ala. Crim. App. 2007) (emphasis added). Indeed, although Phillips correctly points out that prospective juror C.A. recounted the murder of a close family friend, which C.A.

described as "somewhat emotional," C.A. stated that she understood that "each case is different," that "[t]here's no relationship between the two cases," and that she would "try to be fair." In other words, C.A. indicated that she had no fixed opinion about Phillips's case and had no "absolute bias." Thus, the trial court did not commit error--much less plain error--when it did not sua sponte remove prospective juror C.A. for cause.

Phillips also contends that the trial court should have sua sponte removed prospective juror C.G. for cause because, he says,

> "[w]hen asked in the juror questionnaire if he had an opinion on Mr. Phillips's guilt, [C.G.] chose yes and wrote, 'I think he is guilty.' During voir dire, [C.G.] confirmed that he had written this and explained that he believed Mr. Phillips was guilty 'from reading the paper and ... [hearing] the news.'"

(Phillips's brief, pp. 52-53.)

Phillips correctly notes that, during voir dire, C.G. admitted to answering on his juror questionnaire "I think he is guilty" (R. 276) and that his position was based on what he had read and heard in the news.[5] C.G. explained, however,

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[5]As explained more thoroughly below, the juror questionnaires used in this case could not be provided to this

that he understood that Phillips is "[b]y law presumed innocent" (R. 276-77), that he had not judged Phillips guilty at the time of voir dire (R. 277), and that he "would say [he] presume[s] [Phillips] was not guilty." (R. 277.) Additionally, C.G. stated that he had previously served on a jury in a capital-murder case and that the jury had acquitted the defendant. Thus, like prospective juror C.A., nothing in the record demonstrates that the trial court erred when it did not sua sponte remove prospective juror C.G. for cause.

Phillips also contends that the trial court should have sua sponte removed prospective juror S.D. for cause. Specifically, Phillips argues that,

> "[i]n her questionnaire, [S.D.] wrote that she would automatically vote for the death penalty, if she was convinced of Mr. Phillips's guilt. During voir dire, [S.D.] stated that, 'if [the evidence is] beyond a reasonable doubt, then yes, I am for the death penalty.' When pressed further on whether she would automatically vote for the death penalty, [S.D.] answered vaguely that she would 'just have to listen to all the evidence' but 'I'm not going to tell you ... I don't know.'"

(Phillips's brief, p. 53 (citations and footnote omitted).) Phillips further argues that S.D.'s "vague and doubtful answer

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Court by the circuit clerk. Our inability to review these questionnaires, however, does not impact our analysis of this claim.

does not indicate that [S.D.] could be impartial. At no time did [S.D.] say she would set aside her opinion that the death penalty should be automatically imposed following a capital conviction and try the case fairly." (Phillips's brief, pp. 53-54.)

Contrary to Phillips's assertion, the record does not demonstrate that S.D. indicated she would "automatically impose the death penalty" in this case; rather, the record demonstrates that S.D. was for the death penalty if guilt were proven beyond a reasonable doubt and that she would "have to listen to all the evidence ... to make that decision." (R. 228.)

During voir dire, Phillips's counsel asked S.D. about her response to a question on the juror questionnaire about automatically imposing the death penalty. Specifically, Phillips's counsel and S.D. had the following exchange:

> "[Phillips's counsel]: ... That no matter what the evidence, that you would automatically if you were convinced of the defendant's guilt, first of all, that you would automatically vote for the imposition of the death penalty, that you would vote for death; is that correct?
>
> "[S.D.]: No matter what the evidence?

> "[Phillips's counsel]: No matter what the evidence. That's what the question said.
>
> "[S.D.]: I--
>
> "[Phillips's counsel]: Feel free to change it if you want to.
>
> "[S.D.]: Well, the only thing is if, you know, <u>if beyond a reasonable doubt, then yes, I am for the death penalty</u>. So I mean--
>
> "[Phillips's counsel]: The question is--
>
> "[S.D.]: I really don't know. All that whole death questionnaire thing was just real confusing and way out there, way beyond trying to answer all that.
>
> "[Phillips's counsel]: I get it.
>
> "[S.D.]: You know.
>
> "[Phillips's counsel]: And lest you feel uncomfortable, we had the same issue with panel number one."

(R. 225-26 (emphasis added).) Thereafter, Phillips's counsel explained to S.D. the penalty-phase process and asked her the following:

> "Now I think I'd like to ask it, [S.D.], this way: Can you if we get there to that penalty phase I've talked about, can you listen to both the State's case and the defendant's case, take in conjunction with that what the judge is going to tell you how to weigh the factors, and can you or could you, do you think, return to us a recommendation of life without parole or would your mind be in such a state that you would, without

> question and without considering the evidence, vote for the death penalty? That's really the question."

(R. 228.) S.D. responded that she would "just have to listen to all the evidence ... to make that decision." (R. 228.)

Although Phillips contends that "at no time did [S.D.] say she would set aside her opinion that the death penalty should be automatically imposed following a capital conviction and try the case fairly" (Phillips's brief, pp. 53-54 (emphasis added)), S.D. explained that she was "confused" by the juror questionnaire and clarified that she would, in fact, "listen to all the evidence ... to make that decision." (R. 228.) Moreover, Phillips's argument is premised on his belief that S.D.'s statement that she is "for the death penalty" is an indication that S.D. would automatically impose the death penalty in this case. A prospective juror who is in favor of the death penalty, however, is not the equivalent of a prospective juror who would, without considering any evidence, automatically impose the death penalty. See, e.g., Revis v. State, 101 So. 3d 247, 307-08 (Ala. Crim. App. 2011) ("Here, Juror A.P. did not say that he would automatically vote in favor of the death penalty. He said that if the evidence proved that a body was dismembered then the death penalty was

a proper sentence."). Thus, as with prospective jurors C.A. and C.G., nothing in the record on appeal demonstrates that the trial court erred when it did not sua sponte remove prospective juror S.D. for cause. Accordingly, Phillips is due no relief on this claim.

C.

Phillips contends that the trial court erred "by removing jurors who could be fair and impartial"--namely, prospective jurors S.S. and D.E. (Phillips's brief, p. 48.)

Specifically, with regard to prospective juror S.S., Phillips contends that S.S. "indicated during voir dire that, while she 'believe[d] the law has a right to' impose the death penalty, it would cause her some 'personal difficulty' and it would be 'hard' for her to impose the death penalty," but "she never indicated that she would be unable to follow the trial court's instructions or that she would automatically vote for life without parole." (Phillips's brief, p. 49.)

With regard to prospective juror D.E., Phillips contends that, "[w]hen questioned in group voir dire, [D.E.] simply stated that she was 'not sure' whether she could recommend the death penalty." (Phillips's brief, p. 50 (citation omitted).)

Additionally, Phillips explains that D.E.'s "answers in her juror questionnaire indicated that she was neither strongly opposed to, nor strongly in favor of, the death penalty, as she circled a five on a one-to-ten scale, with one being '[s]trongly opposed' and ten being '[s]trongly in favor.'" (Phillips's brief, p. 50.) Phillips did not object to the trial court's removal of either of those prospective jurors; thus, we review Phillips's claims for plain error only. See Rule 45A, Ala. R. App. P.

Before addressing Phillips's claims, however, we note that, although Phillips in his brief on appeal references D.E.'s response on a juror questionnaire and the record on appeal demonstrates that juror questionnaires were completed by the jurors in this case, the record on appeal does not include the juror questionnaires used in this case.

Juror questionnaires are, by rule, excluded from the clerk's portion of the record on appeal but are to be made available to this Court "[i]f any party raises an issue on appeal that relates to information contained in a questionnaire." Rule 18.2(b), Ala. R. Crim. P. Phillips, in a footnote in his brief on appeal, asks this Court to exercise

its authority under Rule 18.2(b) to request that the trial court "supplement the record to include the juror questionnaires at issue in this case." (Phillips's brief, p. 50 n.15.)

This Court, on June 18, 2015, sent a letter to the circuit clerk requesting, under Rule 18.2(b), that all juror questionnaires in this case be delivered to this Court. On June 23, 2015, however, the circuit clerk responded to our letter, stating: "Our office only keeps [juror questionnaires] for a year and destroys them. There are no Juror Questionnaires available for this case."

The circuit clerk's policy of destroying juror questionnaires after one year is in direct contravention of Rule 18.2(b), Ala. R. Crim. P.[6] See Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007) ("Although the record indicates that the veniremembers completed jury

[6]In this case, Phillips was sentenced and gave his notice of appeal on September 6, 2012. On May, 7, 2013, Phillips filed his initial brief on appeal. The State filed its brief on appeal on September 25, 2013. Thus, given the circuit clerk's policy of destroying juror questionnaires after a year, the circuit clerk destroyed the juror questionnaires at issue in this case before the State filed its brief on appeal.

questionnaires, and although this Court requested that those questionnaires be forwarded to us for review, this Court has been informed by the circuit clerk's office that the questionnaires were destroyed after the jury was empaneled, in violation of Rule 18.2, Ala. R. Crim. P."). Although the circuit clerk's policy is in direct contravention of Rule 18.2(b), we hold that the destruction of the questionnaires at issue in this case does not rise to the level of plain error.[7] See Saunders, 10 So. 3d at 78 n.7 ("Although not argued by Saunders on appeal, we find that the error in destroying the questionnaires does not rise to the level of plain error."). Because the juror questionnaires in this case were destroyed by the circuit clerk and the destruction of those questionnaires does not rise to the level of plain error, "our review of this issue is limited to the voir dire questioning by the trial court and the parties." Id.

[7]Although the circuit clerk's policy does not rise to the level of plain error in this case, under certain circumstances such a policy could rise to the level of plain error. To avoid the possibility of such an error, circuit clerks should create retention policies in compliance with Rule 18.2, Ala. R. Crim. P.

Turning now to Phillips's specific claims, the following is well settled:

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

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

> "'"In a capital case, a prospective juror may not be excluded for cause unless the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." Drew v. Collins, 964 F.2d 411, 416 (5th Cir. 1992), cert. denied, 509 U.S. 925, 113 S. Ct. 3044, 125 L. Ed. 2d 730 (1993) (quotations omitted). "[T]his standard likewise does not require that a juror's bias be proved with unmistakable clarity. This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." [Wainwright v.] Witt, 469 U.S. [412] at 425-26, 105 S. Ct. [844] at 852-53 [(1985)].'

> "Parr v. Thaler, 481 Fed. App'x 872, 876 (5th Cir. 2012)."

Boyle v. State, 154 So. 3d 171, 196-97 (Ala. Crim. App. 2013).

Here, during voir dire, the State asked the venire whether they "would ... be able to recommend in a verdict the death penalty for Mr. Phillips." (R. 211.) Prospective juror D.E. responded, "I'm not sure." (R. 211.) Thereafter, Phillips's counsel had the following exchange with prospective juror D.E.:

> "[Phillips's counsel]: Okay. [D.E.], when [the State] was questioning you, you gave an answer with respect to the death penalty. I think I took your answer down. You said 'I'm not sure.'
>
> "[D.E.]: Yes, sir.
>
> "[Phillips's counsel]: And I forget now the context in which that came up. ... Is there, in your view, a set of circumstances under which you could vote to impose the death penalty?
>
> "[D.E.]: I'm not sure.
>
> "[Phillips's counsel]: Okay. You're just--you're absolutely not sure about that?
>
> "[D.E.]: (Shakes head.)"

(R. 231) Thereafter, the following side-bar conversation occurred with the trial court:

"[The State]: Judge, we're going to have one challenge for cause, that being [D.E.]. Just that would be our only challenge.

"[Phillips's counsel]: And I'll agree with it.

"[The State]: So in that case it won't be necessary to take her back. That's all we have. Judge.

"[The Court]: Okay.

"[Phillips's counsel]: And I don't have any, Judge.

"[The Court]: All right. State's is granted."

(R. 232 (emphasis added).)

With regard to prospective juror S.S., the following occurred:

"[The Court]: Hey, [S.S.]. You had indicated you would like to speak in private about a couple of issues.

"[S.S.]: About voting for the death penalty.

"[The Court]: About voting for the death penalty.

"[S.S.]: Like if you recommended it. I may have misunderstood that because I said--I may have misunderstood what they said, but if it came down to that about voting for the death penalty, I don't have--I know that the law has a right to do that, and I know that. But I just have a little problem with me being the one that has to vote to put somebody to death. Just me, myself but--

"[The Court]: Okay. Would it cause you a great deal of personal difficulty to cast a death penalty vote?

"[S.S.]: Yes, sir, I believe it would. You know, I believe it would because I feel like--you know, I believe the law has a right to do it, but, you know, but that may--

"[The Court]: You think the law has a right to do it, but it would be very hard for you to do it?

"[S.S.]: Me. Just me to do that.

"[The Court]: Questions?

"[The State]: I have no questions.

"[Phillips's counsel]: Thank you, [S.S.]. I don't have any questions. Appreciate your honesty.

"[The Court]: You can just wait back out there. Was there anything you wanted to mention?

"[S.S.]: No, I think that's it.

"([S.S.] exits courtroom.)

"[The State]: Judge, we challenge [S.S.] for cause.

"[Phillips's counsel]: And I'm going to agree with their challenge.

"[The Court]: Okay. ..."

(R. 379-81 (emphasis added).)

Here, both prospective jurors D.E. and S.S. expressed an inability to perform their duties as jurors--specifically,

they expressed clear reservations about their ability to recommend a death sentence. Indeed, those reservations were clear enough that Phillips's counsel agreed with the State's motion to remove those jurors for cause. Thus, the trial court did not abuse its discretion in granting the State's motion to remove prospective jurors D.E. and S.S. for cause. See, e.g., Boyle, 154 So. 3d at 197 ("The above-quoted dialogue clearly showed that juror C.S. had reservations about her ability to vote for the death penalty. The circuit court did not abuse its considerable discretion in granting the State's motion to excuse C.S. for cause. We find no error in regard to this claim."). Accordingly, no error--plain or otherwise--occurred.

III.

Phillips contends that the State "exercised its peremptory strikes to exclude all racial minorities from [his] jury in violation of Batson v. Kentucky[, 476 U.S. 79 (1986),] and state law" (Phillips's brief, p. 70), "engaged in nothing but desultory voir dire of these racial-minority veniremembers" (Phillips's brief, p. 72), and "engaged in disparate treatment of white veniremembers and veniremembers

of color who made similar statements." (Phillips's brief, p. 73.) Phillips did not first raise these claims in the trial court; thus, we review his claims for plain error only. See Rule 45A, Ala. R. App. P.

> "The plain-error analysis has been applied to death-penalty cases when counsel fails to make a Batson objection. Pace v. State, 714 So. 2d 316, 318 (Ala. Crim. App. 1995), opinion after remand, 714 So. 2d 320 (Ala. Crim. App. 1996), reversed in part on other grounds, 714 So. 2d 332 (Ala. 1997). For plain error to exist in the Batson context, the record must raise an inference that the State engaged in 'purposeful discrimination' in the exercise of its peremptory challenges. See Ex parte Watkins, 509 So. 2d 1074 (Ala. 1987)."

Lewis v. State, 24 So. 3d 480, 489 (Ala. Crim. App. 2006) (emphasis added).

Phillips alleges in his brief on appeal that the State used its peremptory strikes in a discriminatory manner when it struck "African American veniremember [T.B.] and ... Latina veniremember [C.F.]" from the jury and alleges that the State "engaged in disparate treatment of white veniremembers and veniremembers of color who made similar statements" (Phillips's brief, p. 73) and that the removal of those two potential jurors resulted in the "total exclusion of racial

minorities from the jury in this racially charged case." (Phillips's brief, p. 74.)

The record on appeal, however, does not "raise an inference that the State engaged in 'purposeful discrimination' in the exercise of its peremptory challenges." Lewis, supra. Indeed, Phillips's allegation on appeal--that prospective jurors T.B. and C.F. were racial minorities who were struck by the State--is supported only by the inclusion of six pages of handwritten notes in the record. Those notes --whose author is unknown--consist of six different grids--specifically, a separate grid for each jury panel--with each square in the grid dedicated to a single, specific juror. Inside those squares, along with the name of the prospective juror, are comments about some of those jurors. The handwritten notes for "Panel 1" indicate that prospective juror T.B. is "black," and the handwritten notes for "Panel 2" indicate that prospective juror C.F. is "Hispanic." (C. 96, 97.) No other prospective jurors' race is indicated on those handwritten notes. Additionally, neither the jury-strike list included in the record on appeal nor the transcription of voir

dire or the jury-selection process indicate the race of any prospective juror.

Having no indication of the race of each of the prospective jurors in the record on appeal, this Court is unable to engage in any meaningful plain-error review of Phillips's Batson claims. Indeed, without knowing the race of each individual prospective juror, this Court cannot determine whether the State's strikes of prospective jurors T.B. and C.F. resulted in the "total exclusion of racial minorities from the jury," cannot determine whether the State engaged in "nothing but desultory voir dire of these racial-minority veniremembers" (Phillips's brief, p. 72), and cannot determine whether the State engaged in "disparate treatment of white veniremembers and veniremembers of color who made similar statements."[8] (Phillips's brief, p. 73.)

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[8]To support his disparate-treatment claim, Phillips cites and quotes the juror questionnaires of prospective jurors T.B. and C.F. and compares those questionnaires to "white jurors ... not struck by the State" (Phillips's brief, p. 73); there is no indication in the record on appeal, however, that those comparator jurors were, in fact, white. Moreover, although Phillips cites and quotes the juror questionnaires to support his claim, as explained above, the record on appeal does not include any juror questionnaires in this case, and "this court may not presume a fact not shown by the record and make it a ground for reversal." Carden v. State, 621 So. 2d 342, 345

Accordingly, Phillips is due no relief on this claim.

IV.

Phillips contends that the trial court erred when it allowed the State to introduce evidence, he says, was inadmissible--specifically, evidence that was introduced through his statement to Investigator Turner and evidence that was introduced through the testimony of Dr. Ward. We address each of Phillips's claims in turn.

A. Evidence Introduced Through Phillips's Statement to Investigator Turner

Phillips contends that the trial court erred by allowing the State to introduce what he contends was inadmissible evidence contained within his statement to Investigator Turner. Specifically, Phillips argues that his statement to Investigator Turner included "prejudicial hearsay statements of unnamed individuals" the admission of which, he says, was "in violation of [his] rights under the confrontation clause and state law." (Phillips's brief, p. 29.) He also argues that his statement also included "inadmissible evidence of [his] prior bad acts." (Phillips's brief, p. 44.) Phillips

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(Ala. Crim. App. 1992).

further contends that the trial court erred when it failed "to limit the jury's consideration" of the prior-bad-act evidence. (Phillips's brief, p. 44.)

Initially, we note that Phillips did not object at trial to either the introduction or admission of his statement to Investigator Turner. In fact, not only did Phillips not object to the admission of his statement, Phillips stipulated to the admission of his statement at trial.

Specifically, during trial, the trial court asked Phillips's counsel whether there was going to be any objection to Phillips's statement to Investigator Turner; Phillips's counsel responded:

> "There is not, Your Honor. And we have filed no motion to suppress, and we're going to not make any objection to the admission of this statement. In fact, we are going to join in it."

(R. 564 (emphasis added).) Additionally, when the State moved to admit the audio recording of Phillips's statement and the transcription of that statement, Phillips informed the trial court that "we agree that it should come in." (R. 633.) Additionally, when the State asked the trial court for permission to play the audio recording of Phillips's statement for the jury, Phillips did not object. Instead, Phillips

implored the trial court to ensure that each juror receive a copy of the transcripts so they could "follow along." (R. 634.)

Although Phillips now takes the position on appeal that it was error for the trial court to allow the State to introduce his statement to Investigator Turner,

> "'"[a] party cannot assume inconsistent positions at trial and on appeal, and a party cannot allege as error proceedings in the trial court that were invited by him or were a natural consequence of his own actions." Fountain v. State, 586 So. 2d 277, 282 (Ala. Cr. App. 1991). "The invited error rule has been applied equally in both capital cases and noncapital cases." Rogers v. State, 630 So. 2d 78 (Ala. Cr. App. 1991), rev'd on other grounds, 630 So. 2d 88 (Ala. 1992). "An invited error is waived, unless it rises to the level of plain error." Ex parte Bankhead, 585 So. 2d 112, 126 (Ala. 1991).'

"Williams v. State, 710 So. 2d 1276, 1316 (Ala. Cr. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S. Ct. 2325, 141 L. Ed. 2d 699 (1998). See also Melson v. State, 775 So. 2d 857, 874 (Ala. Cr. App. 1999) ('"It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice." Murrell v. State, 377 So. 2d 1102, 1105, cert. denied, 377 So. 2d 1108 (Ala. 1979), quoting Aldridge v. State, 278 Ala. 470, 474, 179 So. 2d 51, 54 (1965).'). ..."

Whitehead v. State, 777 So. 2d 781, 806-07 (Ala. Crim. App. 1999). Because the alleged errors as to the admission of Phillips's statement to Investigator Turner were invited by Phillips, he can obtain relief only if those complained-of errors rise to the level of plain error.

> "In Ex parte Brown, 11 So. 3d 933 (Ala. 2008), the Alabama Supreme Court 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:
>
> > > "'"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."
>
> "'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)).'
>
> "11 So. 3d at 938. 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999). Thus, although [Phillips's] failure to object will not bar this Court from reviewing [this] issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)."

Turner v. State, 115 So. 3d 939, 943 (Ala. Crim. App. 2012). After reviewing the record on appeal and the claims Phillips raises regarding the admission of his statement, we cannot conclude that the admission of Phillips's statement to Investigator Turner affected Phillips's "substantial rights," had any "unfair prejudicial impact on the jury's deliberations," was a "particularly egregious error" that

"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," or resulted in the "miscarriage of justice."

Indeed, on appeal, Phillips first argues that his statement to Investigator Turner included "prejudicial hearsay statements of unnamed individuals." Specifically, Phillips takes issue with the following portion of his statement:

> "[Investigator Turner]: When you pulled it out and you pointed it at her, what, what did she say?
>
> "I mean, did she have time to see the gun?
>
> "[Phillips]: She just said, 'What are you doing with that?'
>
> "[Investigator Turner]: And what did you say?
>
> "[Phillips]: Nothing.
>
> "[Investigator Turner]: Are you sure? Do you go by 'Jessie[?]' Is that what you go by?
>
> "[Phillips]: (No audible response.)
>
> "[Investigator Turner]: Are you sure, Jessie?
>
> "[Phillips]: (No audible response.)
>
> "[Investigator Turner]: The reason I ask you that is because <u>the people kind of next door may have heard a little bit of the argument</u>. And I know when this happened it's been pretty traumatic for you. Like I said, you've been as honest as honest can be with me so far. I just want you to think and make sure.

"[Phillips]: If they heard any arguing they heard her yelling at me, they heard Billy telling, telling her to shut up, and once the shot was fired they heard Billy screaming. They was screaming he was screaming for Lance. And I left.

"[Investigator Turner]: You didn't tell her, 'Hey, I'm going to shoot you?' 'Hey, I've got a weapon?' I mean--

"[Phillips]: No.

"[Investigator Turner]: Are you sure?

"[Phillips]: I'm just about positive.

"[Investigator Turner]: Okay. How many times did you shoot?

"[Phillips]: I just shot once."[9]

(C. 186-87 (emphasis added).)

Phillips argues that

"[b]ecause these unnamed witnesses never testified at trial, the introduction of this inadmissible hearsay violated Mr. Phillips's right to confront the witnesses against him. The out-of-court statements of the unnamed witnesses, were offered to prove the truth of the matter asserted therein--that Mr. Phillips said to [Erica], prior to shooting, that he was going to shoot her and therefore intended to kill her."

[9]As explained above, the State introduced, as State's Exhibit 20, transcripts of Phillips's two statements to Investigator Turner. The above-quoted portion of Phillips's statement is taken from those transcripts.

(Phillips's brief, p. 30.) In other words, Phillips reads this portion of his statement as Investigator Turner's saying that "unnamed individuals" told him that Phillips said, "Hey, I'm going to shoot you," or, "Hey, I've got a weapon," before shooting Erica, which, Phillips says, is inadmissible hearsay and violates his rights under the Confrontation Clause.

This Court has explained:

> "'The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."' Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, 'the Sixth Amendment [prohibits the admission of] testimonial hearsay [statements offered for the truth of the matter asserted], ... and interrogations by law enforcement officers fall squarely within that class.' Crawford, 541 U.S. at 53; see also id. at 59 n.9; (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) (explaining that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted')). Similarly, under the Alabama Rules of Evidence:
>
> > "'"Hearsay is not admissible except as provided by [the Alabama Rules of Evidence], or by other rules adopted by the Supreme Court of Alabama or by statute." Rule 802, Ala. R. Evid. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid.'

> "Hillard v. State, 53 So. 3d 165, 167 (Ala. Crim. App. 2010)."

Turner, 115 So. 3d at 943-44. Here, the admission of the statements of the "unnamed individuals," even if improperly admitted, was, at worst, harmless error.

> "The correct inquiry to use in determining whether the error in this case is harmless was set out by the United States Supreme Court in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In that case, the Supreme Court stated:
>
> > " 'In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence or argument, though legally forbidden, finds its way into a trial in which the question of guilty or innocence is a close one.
> >
> > "'... We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 [(1963)]. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86-87, 84 S. Ct. at 230. ... Certainly error, constitutional error, in illegally admitted highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error

> either to prove that there was not injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in Fahy v. State of Connecticut about "whether there is a reasonable possibility that the evidence complained of did not contribute to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard....'

"Chapman v. California, 386 U.S. at 23-24, 87 S. Ct. at 827-28 (footnotes omitted). This harmless error standard has been applied in hearsay cases. United States v. Cruz, 765 F.2d 1020, 1025 (11th Cir. 1985).

"There are numerous factors which can be considered in assessing harmless error, including 'the importance of the [declarant's] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the [declarant] on material points, ... and the overall strength of the prosecution's case.' Delaware v. Van Arsdall, 475 U.S. [673] at 684, 106 S. Ct. 1431 [(1986)]."

James v. State, 723 So. 2d 776, 781-82 (Ala. Crim. App. 1998). See also Smith v. State, 898 So. 2d 907, 917 (Ala. Crim. App. 2004) ("[V]iolations of the Confrontation Clause are subject to harmless-error analysis.").

Here, examining the record on appeal, the complained-of statements made by the "unnamed individuals" had no bearing on the State's case against Phillips. Indeed, the only time the complained-of statements were mentioned during Phillips's trial was when the jury listened to Phillips's statement to Investigator Turner--an audio recording that is approximately an hour and a half in length in which Phillips admitted several times to shooting Erica at close range. Additionally, although Phillips argues that the complained-of statements helped the State establish intent, the State, at no point during its opening statement or closing argument, used the statements as a basis for establishing Phillips's intent. Rather, the State argued that Phillips's actions before, during, and after the shooting--specifically, Phillips's putting a loaded gun in his pocket, shooting Erica from close range, and stepping over her body without checking on her

condition to get into the truck to flee the scene--established Phillips's intent to kill.

Moreover, the complained-of statements were directly contradicted by the State's witnesses, Billy and Lance, who were both nearby when the altercation occurred at the car wash. Specifically, Billy testified:

> "[Prosecutor]: And how long did you sit there [at the car wash] and talk to your brother?
>
> "[Billy]: Briefly.
>
> "[Prosecutor]: Was there anybody else around at this point where y'all were?
>
> "[Billy]: No, sir.
>
> "....
>
> "[Prosecutor]: At some point in time while you were standing there talking to your brother, did you hear a loud voice?
>
> "[Billy]: Not at that time, no, sir.
>
> "....
>
> "[Prosecutor]: Did you ever at any point in time hear loud voices?
>
> "[Billy]: Little later."

(R. 501-02 (emphasis added).) Billy then explained that the only statement he heard was his sister yelling, "Help me, Bill." (R. 504.) Additionally, Lance testified that,

although he could hear both Phillips and Erica talking loudly, he "[c]ouldn't distinguish the words." (R. 534.)

Because the complained-of statements were not mentioned by the State and, in fact, were contradicted by the State's witnesses, we cannot conclude that the admission of the complained-of statements "might have contributed to [Phillips's] conviction." James, supra. Thus, if any error occurred, it was, at worst, harmless beyond a reasonable doubt and certainly did not rise to the level of plain error. Furthermore, error, if any, was invited by Phillips when he stipulated to the admission of his statement.

Phillips also contends that his statement to Investigator Turner included inadmissible prior-bad-act evidence. Specifically, Phillips takes issue with the following portions of his statement to Investigator Turner:

> "[Sergeant Abercrombie]: Do you remember (inaudible)? Did you go to jail that day?
>
> "[Phillips]: Uh-uh.
>
> "[Sergeant Abercrombie]: You just got into it?
>
> "[Phillips]: Yeah.
>
> "[Sergeant Abercrombie]: How long ago has that been?

"[Phillips]: That's been a while. At least two years or more because we had my little boy and she was pregnant with my little girl. So it's been over two years.

"[Investigator Turner]: Pretty much her arguing has been kind of constant?

"[Phillips]: Yes, sir. And I just don't understand why. Because I do everything I possibly can to make sure we're going to have a smooth day. I don't know, for the last three or four months, the only thing she do is sit upstairs and watch TV. She'll cook. But for the majority of the time she's sitting upstairs watching TV.

"....

"And I don't know--to be married to somebody and to hear them call you a n***** and you won't let no other white person call you a n*****, that kind of hurts. My momma got AIDS and she, she always got something to say about that. Always. Always. Always.

"....

"[Investigator Turner]: How long have y'all been together?

"[Phillips]: About four or five years.

"[Investigator Turner]: How many, how many domestic situations have y'all had in four or five years? Several?

"[Phillips]: What you mean?

"[Investigator Turner]: Like, how many times has the police been out to y'alls house or the police been out to talk to you?

"[Phillips]: I don't think none. Maybe one. Then we was outside talking. We wasn't arguing or nothing. That's when we stayed in Brookwood. I think it was Brookwood. We stayed, I think it was Brookwood. We stayed over there. And we was just outside talking and somebody called the police and said there was a lot of loud noise and everything and two people outside arguing, but we was just outside talking. I guess every now and then one of us will raise our voice, but besides that, that was it. I went to jail one night. Not because of us. It was because I had an old warrant in Gadsden."

(C. 189-92) and:

"[Investigator Turner]: How often did y'all argue?

"[Phillips]: I--me, personally, I didn't argue much. But she usually argued--it was every day.

"[Investigator Turner]: And when she argued, she argued with you?

"[Phillips]: Uh-huh. Yes, sir.

"[Investigator Turner]: What would happen? I mean--

"[Phillips]: What you mean what would happen?

"[Investigator Turner]: In other words, you'd just listen to her, not say nothing back or--

"[Phillips]: Sometimes I listened to her, not to say nothing back. Sometimes I would say something back. It would just depend on what she was yelling about.

"[Investigator Turner]: Did it ever become violent between y'all two before today?

"[Phillips]: Have I ever hit her? No. Have I ever, like, pushed her down? Yeah. She said I tried to break her neck, but I didn't try to break her neck. I just tried to keep her from hitting. And I was--got behind her and just kind of held on to her so she wouldn't stop--so she would stop. She said I tried to break her neck, so I, like, 'Okay, I tried to break your neck. Just let it go. Either get over it or tell me to get out.' Because every time she ever say anything about it, that's what I would always tell her.

"[Investigator Turner]: When she said that, when you got behind her did you have her, like, in a headlock behind around her neck? How did you have her?

"[Phillips]: Kind of like a choke.

"[Investigator Turner]: A choke-hold from behind?

"[Phillips]: I guess that's why she said I tried to break her neck.

"[Investigator Turner]: Did she fight hard or--

"[Phillips]: Uh-huh. I let her go and told her to just leave and leave me the f-alone. That was when we was staying on Lombardy.

"....

"[Investigator Turner]: Okay. Did she call the police or file a report on you or anything that day?

"[Phillips]: Uh-uh. I think the only time she ever filed a report was I don't remember the date. It was one day she let me keep the kids. We was at the park. I told her I was going to Wal-Mart. She got mad, start screaming and cussing. Told me to give her the kids and do this or do that and I,

like, 'I'm just going to take them to Wal-Mart.' And she said, 'Well, pull over at Fred's so I can give them a hug and a kiss and I can go on about my business. As long as you bring them back.' I pulled over. She jumped in the truck with me. She had a friend in the truck with her, because we was in two different cars.

"She had a friend in the truck with her. Her friend called the police. The police came out there. Pulled me out of the car and told her to go. And they stood there and talked to me for a minute and she filed some kind of--she said she well, I know she did because I had to go to court about it.

"[Investigator Turner]: How long ago has that been?

"[Phillips]: I want to say it was in October.

"[Investigator Turner]: Okay.

"[Phillips]: I believe it was, like, either October or November.

"[Investigator Turner]: Is she--would you classify her as a violent person?

"[Phillips]: I would classify her as a violent person toward me. Towards anybody else, no, not really. She's was just very--it was just towards me. Towards anybody else, no.

"Never seen her get in any fight. Never seen her really cuss nobody out. I seen her cuss people out over the phone."

(C. 218-22.)

Addressing a nearly identical situation in Stephens v. State, 982 So. 2d 1110 (Ala. Crim. App. 2005), this Court explained:

> "Evidence tending to establish motive is always admissible. Perkins v. State, 808 So. 2d 1041, 1084 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), vacated on other ground, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002). See also 1 Charles W. Gamble, McElroy's Alabama Evidence § 70.01(12)(e) (5th ed. 1996). In discussing motive, the Alabama Supreme Court has stated:
>
> > "'"Motive is an inducement, or that which leads or tempts the mind to do or commit the crime charged." Spicer v. State, 188 Ala. 9, 26, 65 So. 972, 977 (1914). Motive is "that state of mind which works to 'supply the reason that nudges the will and prods the mind to indulge the criminal intent.'" C. Gamble, Character Evidence, [A Comprehensive Approach (1987)] at 42. "Furthermore, testimony offered for the purpose of showing motive is always admissible. It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense." (Emphasis in original, citations omitted.) Bowden v. State, 538 So. 2d 1226, 1235 (Ala. 1988).'
>
> "Ex parte Register, 680 So. 2d 225, 227 (Ala. 1994). 'If the prior bad act falls within [the motive] exception, and is relevant and reasonably necessary to the State's case, and the evidence that the accused committed that act is clear and conclusive, it is admissible.' Boyd v. State, 715 So. 2d 825, 838 (Ala. Crim. App. 1997), aff'd, 715 So. 2d 852

(Ala.), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

"It has long been the rule in Alabama that former acts of cruelty, hostility, or violence by the accused toward the victim are admissible in order to establish a motive to commit the charged homicide. See, e.g., Bennefield v. State, 281 Ala. 283, 202 So. 2d 55 (1967) (evidence of husband's prior assaults on wife admissible to establish motive in prosecution for murder because acts 'tended to show ill feeling between the parties'); Patterson v. State, 243 Ala. 21, 8 So. 2d 268 (1942) (proof that husband had previously been convicted of assaulting his wife admissible to establish motive in prosecution for murder); Doane v. State, 351 So. 2d 648, 653 (Ala. Crim. App. 1977) (testimony concerning premarital fight between defendant and victim admissible to establish motive and malice in prosecution for manslaughter). Indeed, Professor Gamble has noted:

> "'One of the most common cases where motive is shown is that where the wife allegedly is murdered by the husband. In these cases a whole host of circumstances, existing between the two parties, are admitted for the purpose of showing that one spouse had a motive for killing the other.
>
> "'Former acts of hostility or cruelty by the accused upon the victim are very commonly the basis for the prosecution's proof that the accused had a motive to commit the charged homicide.'

"1 C. Gamble, McElroy's Alabama Evidence § 45.01(8).

"Here, evidence was admitted concerning a history of marital difficulties between Stephens and Annie. As a result, Annie and the couple's three

> children had moved out of the marital residence several months earlier and were living with Annie's father at the time the homicides occurred. Although Annie returned to the couple's mobile home to do laundry, she did so when Stephens was not present, most likely to avoid a confrontation. Annie's father testified that in 1992 Stephens had shot Annie following an argument, resulting in his conviction for second-degree assault. During closing argument, the State argued that the evidence demonstrated that Stephens's motive for killing Annie was in all likelihood rage. Thus, evidence of the 1992 shooting was admitted to support the State's theory that Stephens had stabbed his wife in a fit of rage, following an argument or some other type of confrontation."

982 So. 2d at 1127-28 (some emphasis added), rev'd on other grounds, Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006).

Here, like in Stephens, evidence detailing the "history of marital difficulties between" Phillips and Erica was admissible to establish motive; thus, the trial court did not commit any error--much less plain error--when it allowed the State to introduce that evidence through the admission of Phillips's statement to Investigator Turner.

Moreover, to the extent that Phillips contends that the trial court erred when it failed "to limit the jury's consideration" of the prior-bad-act evidence (Phillips's brief, p. 44), that claim is without merit. As set out above, at trial, Phillips stipulated to the introduction of the

prior-bad-act evidence and did not ask the trial court to read to the jury a limiting instruction regarding the State's use of that evidence. This Court has explained that "a trial court has no duty to sua sponte give a limiting instruction when the prior bad act evidence is offered as substantive evidence of guilt." Boyle, 154 So. 3d at 211 (citing Johnson v. State, 120 So. 3d 1119 (Ala. 2006)). Because, here, the evidence of the marital difficulties between Phillips and Erica was admissible to establish motive and could be used "as substantive evidence of guilt and not for impeachment purposes. ...[,] the circuit court committed no plain error in failing to sua sponte give a limiting instruction on the use of the Rule 404(b) evidence." Id.

B. Evidence Introduced Through the Testimony of Dr. Ward

Phillips contends that the trial court erred when it allowed the State to introduce evidence, through the testimony of Dr. Ward, that, he contends, was inadmissible. Before addressing Phillips's claims, however, we note that Phillips stipulated that Dr. Ward was an expert in forensic pathology and that he raised no objections during Dr. Ward's testimony. Because the challenges to the evidence admitted through Dr.

Ward's testimony were not first raised in the trial court, we review Phillips's claims for plain error only. See Rule 45A, Ala. R. App. P.

1.

Phillips first contends that the trial court erred when it admitted Dr. Ward's "testimony ... regarding whether [Erica] was pregnant." (Phillips's brief, p. 84.) Specifically, Phillips argues that, although he "stipulated that Dr. Ward was an expert in forensic pathology, that expertise does not extend to obstetrics" (Phillips's brief, p. 86 (citations omitted)) and, therefore, Dr. Ward's testimony "fell well outside the scope of [her] expertise." (Phillips's brief, p. 86.) In other words, Phillips contends that Dr. Ward was not qualified to express an expert opinion as to whether Erica was pregnant at the time of her death.

> "A witness may be qualified as an expert by evidence of that person's 'knowledge, skill, experience, training, or education' in the area of expertise. Rule 702, Ala. R. Evid. The determination of whether a person is qualified to testify as an expert is well within the discretion of the trial court; we will not disturb the trial court's ruling on that issue unless there has been an abuse of that discretion. See Bailey v. State, 574 So. 2d 1001, 1003 (Ala. Crim. App. 1990). Moreover, a challenge to the qualifications of an expert go to the weight, not the admissibility, of the expert's testimony.

> See Smoot v. State, 520 So. 2d 182, 189 (Ala. Crim. App. 1987)."

Kennedy v. State, 929 So. 2d 515, 518 (Ala. Crim. App. 2005) (emphasis added).

At trial, Dr. Ward testified that she is a State Medical Examiner in the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences and has been in that position for 15 years. Dr. Ward testified that, as a State Medical Examiner, she is charged with conducting autopsies to determine both the cause and manner of death. According to Dr. Ward, she, on average, conducts 250 autopsies a year and has been conducting autopsies for 24 years--in other words, Dr. Ward has conducted approximately 6,000 autopsies.

Although Phillips concedes that Dr. Ward is an expert in the field of forensic pathology, Phillips argues that Dr. Ward's expertise does not extend to the field of obstetrics. Thus, Phillips argues, Dr. Ward was not qualified to express an expert opinion as to whether Erica was pregnant at the time of her death. Because Phillips's argument on appeal challenges only Dr. Ward's qualifications to express an expert opinion, his challenge goes "to the weight, not the admissibility, of [Dr. Ward's] testimony." See Kennedy,

supra. Moreover, because Phillips raised no objection to Dr. Ward's expert opinion and, as he points out in his brief on appeal, Erica's pregnancy was "undisputed" (see Phillips's brief, p. 75), we cannot say that the trial court committed any error--much less plain error--by allowing Dr. Ward to provide her expert opinion as to Erica's pregnancy. Thus, Phillips is not entitled to relief on this claim.

2.

Phillips also contends that the trial court erred when it allowed Dr. Ward to testify to the results of a urine pregnancy test that was conducted during Erica's autopsy. Specifically, Phillips contends (1) that the State failed to "show that Dr. Ward's methods of proving [Erica's] pregnancy were 'generally accepted in the scientific community'" (Phillips's brief, p. 87); (2) that admission of the results of the "urine pregnancy test" was improper because, he says, the State "presented no chain of custody whatsoever for the urine sample used to conduct the pregnancy test performed as part of the autopsy" (Phillips's brief, pp. 37-38); and (3) that Dr. Ward's testimony regarding the "performance of a pregnancy test on [Erica] violated [his] rights under the

confrontation clause and state law." (Phillips's brief, p. 41.) As stated above, Phillips raised no objections during Dr. Ward's trial testimony; thus, we review Phillips's claims for plain error only. See Rule 45A, Ala. R. App. P.

Phillips first argues that the State failed to "show that Dr. Ward's methods of proving [Erica's] pregnancy were 'generally accepted in the scientific community.'" (Phillips's brief, p. 87.) Specifically, Phillips argues:

> "The State presented no evidence that the methods Dr. Ward used for creating her opinion that [Erica] was pregnant were generally accepted within the scientific community as reliable. The use of a urine pregnancy hCG test is not generally considered the most reliable method of establishing pregnancy. In addition, while corpus luteum cysts may present during pregnancy, they can also occur outside of pregnancy, which makes this an unacceptable method of diagnosing pregnancy."

(Phillips's brief, pp. 87-88 (footnotes omitted).)

Even if the admission of this evidence was improper (and we do not conclude that it was), its admission was, at worst, harmless. Indeed, Dr. Ward's testimony regarding tests she performed that indicated that Erica was pregnant was cumulative to other lawfully admitted evidence indicating that Erica was, in fact, pregnant. See, e.g., Shanklin v. State, [Ms. CR-11-1441, Dec. 19, 2014] ___ So. 3d ___, ___ (Ala.

Crim. App. 2014) ("Assuming, without deciding, that the circuit court erred in allowing Chief Bobo to read those reports into the record, the admission of those reports was harmless beyond a reasonable doubt because those reports were cumulative to other lawfully admitted evidence.").

Specifically, Dr. Ward not only testified to the results of the urine pregnancy test and to the presence of a "corpus luteum cyst," she also testified that during an internal examination of Erica's uterus she saw the "products of conception" and was able to determine that "the embryo or unborn child was growing and alive at the time of [Erica's] death." Additionally, Dr. Ward testified on cross-examination that her internal examination of Erica revealed that Erica was in the first trimester of pregnancy "probably ... somewhere closer to ... around six to eight weeks. ... [T]he best way to find out is to measure the embryo. And it would be better to look at an ultrasound than for [her] to make a judgment looking at [the embryo] with [her] eyes." (R. 666.) In other words, Dr. Ward testified that, in addition to the tests that confirmed Erica's pregnancy, she actually observed Baby Doe when conducting an internal examination of Erica.

Furthermore, the admission of the complained-of evidence was cumulative to Phillips's statement to Investigator Turner, in which Phillips told investigator Turner that he had "found out ... a couple of weeks ago" that Erica was pregnant. (C. 253.) Moreover, as noted above, although Phillips argues in his brief on appeal that the admission of the results of the urine pregnancy test was error, Phillips also explains in his brief on appeal that "[t]he fact of [Erica's] pregnancy was undisputed." (Phillips's brief, p. 75.) Thus, any error in allowing this testimony was, at worst, harmless.

Phillips next contends that admission of the results of the urine pregnancy test was improper because, he says, the State "presented no chain of custody whatsoever for the urine sample used to conduct the pregnancy test performed as part of the autopsy." (Phillips's brief, pp. 37-38.) Specifically, Phillips contends that the State failed to establish a proper chain of custody for the urine pregnancy test because, he says,

> "[t]he State presented no evidence regarding where the urine used for testing came from, who extracted the urine, the method of extraction used, how the person who extracted the sample was able to avoid contamination, whether any policies were implemented for safekeeping of the urine sample, whether the

> urine sample was handled by more than one individual, whether the sample was kept in a temperature-controlled environment prior to testing, or even at what time the urine sample was extracted. Moreover, the State presented no evidence regarding who performed the test, whether the urine was sealed when it was received for testing, whether that person followed procedures to ensure the test was performed with accuracy, and how that person ensured that the test was not tampered with."

(Phillips's brief, p. 38.) Phillips did not raise a chain-of-custody objection to the admission of the results of the urine pregnancy test at trial; thus, this claim is reviewed for plain error only. See Rule 45A, Ala. R. App. P.

Regarding chain-of-custody claims, the Alabama Supreme Court has explained:

> "In Ex parte Holton, [590 So. 2d 918 (Ala. 1991),] this Court stated:
>
> > "'[T]he State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence. Ex parte Williams, 548 So. 2d 518, 520 (Ala. 1989). Proof of this unbroken chain of custody is required in order to establish sufficient identification of the item and continuity of possession, so as to assure the authenticity of the item. Id. In order to establish a proper chain, the State must show to a "reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain." McCray v. State, 548 So. 2d 573, 576 (Ala. Crim.

> App. 1988). Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.
>
> "'The chain of custody is composed of "links." A "link" is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: "(1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition." Imwinklereid, The Identification of Original, Real Evidence, 61 Mil. L. Rev. 145, 159 (1973).
>
> "'If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a "missing" link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the "link," as to one or more criteria or as to one or more links, the result is a "weak" link. When the link is "weak," a question of credibility and weight is presented, not one of admissibility.'

"590 So. 2d at 919-20.

"In Ex parte Cook, [624 So. 2d 511 (Ala. 1993)], the defendant, who had been convicted of murder, contended that the trial court committed reversible error in admitting, over the defendant's objection, several items of physical evidence--specifically, cigarette butts, a knife scabbard, blood-soaked gauze, socks, and jeans. This Court held that the cigarette butts, scabbard, gauze, and socks should not have been admitted over the defendant's objection. 624 So. 2d at 512-14. In particular, this Court stated:

> "'A link was also missing in the chain of custody of the cigarette butts, scabbard, gauze, and socks. Although [Officer] Weldon testified that she directed and observed the collection, the State did not establish when these items were sealed or how they were handled or safeguarded from the time they were seized until Rowland[, a forensic serologist,] received them [and tested them]. This evidence was inadmissible under [Ex parte] Holton[, 590 So. 2d 918 (1991)].
>
> "'The cigarette butts were prejudicial to [the defendant], because they established that someone with her blood type was in [the victim's] house. Likewise, the socks found in [the defendant's] mobile home were prejudicial, because they were stained with blood that matched [the victim's] type. The erroneous admission of these items probably injuriously affected [the defendant's] substantial rights, and she is entitled to a new trial. See Rule 45, Ala. R. App. P.'

"624 So. 2d at 514.

"In Birge[v. State], [973 So. 2d 1085 (Ala. Crim. App. 2007)], the victim was thought to have

died of natural causes and had been transported to Indiana for burial. 973 So. 2d at 1087. However, after law enforcement began to investigate, the victim's body was exhumed, and an autopsy was performed in Indiana. At trial, there was testimony that the victim had died from an overdose of prescription drugs. That cause-of-death testimony was based on the results of testing of samples taken from the victim's body during the autopsy. 973 So. 2d at 1088-89.

"Citing missing links in the chain of custody, the defendant in Birge objected to the introduction of the toxicology results and the cause-of-death testimony based on those results. The doctor who performed the autopsy testified at trial and stated that he had watched his assistant place the samples in a locked refrigerator. The doctor testified that the next day his assistant would have delivered the samples to a courier, who then would have delivered them to an independent lab for testing. However, neither the doctor's assistant who secured the samples, nor the courier who transported the samples to the lab, nor the analyst who tested the samples testified at trial. The doctor also testified that there may have been several people who had handled the specimens during that time. Additionally, there were significant discrepancies between the doctor's notes about the specimens in his autopsy report and the description of those specimens in the toxicology report from the independent lab that had tested them. The Court of Criminal Appeals ultimately concluded that there were numerous missing links in the chain of custody and that, because those missing links related to the crux of the case against the defendant, the trial court had committed reversible error in admitting the evidence over the defendant's objection. 973 So. 2d at 1094-95, 1105.

"In contrast to Ex parte Cook and Birge, however, the State here offered sufficient evidence on each link in the chain of custody of the evidence

Mills complains of. Investigator Smith first discovered the evidence in the trunk. Officer McCraw recovered the evidence pursuant to a search warrant, inventoried it, bagged it, secured it, and delivered it to the custody of the DFS [Department of Forensic Sciences] employee who logged the evidence and gave McCraw a receipt for it. Bass, who examined and tested the evidence at DFS, testified generally about the protocols used to test items at DFS, and he testified specifically about the testing he performed on the evidence.

"Although the 'tall' DFS employee to whom McCraw submitted the items was never identified and did not testify at trial, McCraw's testimony was sufficient direct evidence indicating that the items were secured until they were delivered to DFS. As to whether there was sufficient circumstantial evidence indicating that the items remained secure until Bass tested them, the State cites Lee v. State, 898 So. 2d 790, 847-48 (Ala. Crim. App. 2001), in which the Court of Criminal Appeals stated:

> "'"'The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence.'" Jones v. State, 616 So. 2d 949, 951 (Ala. Crim. App. 1993) (quoting Williams v. State, 505 So. 2d 1252, 1253 (Ala. Crim. App. 1986), aff'd, 505 So. 2d 1254 (Ala. 1987)).
>
> > "'"'"'Tangible evidence of crime is admissible when shown to be "in substantially the same condition as when the crime was committed." And it is to be presumed that the integrity of evidence

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

> in the light of surrounding circumstances.'"'
>
> "'"Moorman v. State, 574 So. 2d 953, 956-7 (Ala. Cr. App. 1990)."
>
> "'Blankenship v. State, 589 So. 2d 1321, 1324-25 (Ala. Crim. App. 1991).'
>
> "(Emphasis added.)"

Ex parte Mills, 62 So. 3d 574, 595-98 (Ala. 2010).

Here, although Phillips contends that the State failed to establish a proper chain of custody for the urine pregnancy test, Phillips has not established a "minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering" as to that evidence. Moreover, contrary to Phillips's assertion, the State established that Dr. Ward ordered the test to be performed and that she, as explained more thoroughly below, assisted in performing the test. Additionally, at trial, Dr. Ward identified "the little white plastic container that houses the test" (R. 662) as the urine pregnancy test that was performed during the autopsy. In other words, the State established a chain of custody that both began and ended with Dr. Ward.

Regardless, even if the State had failed to properly establish a chain of custody for the urine pregnancy test, the admission of the results of that test into evidence would be, at worst, harmless error. As explained above, the admission of the complained-of evidence was cumulative to Dr. Ward's testimony that she personally observed the "products of conception" and to Phillips's statement to Investigator Turner. Accordingly, the trial court did not commit any error--much less plain error--when it allowed the State to introduce the results of the urine pregnancy test.

Finally, Phillips contends that Dr. Ward's testimony regarding the "performance of a pregnancy test on [Erica] violated [his] rights under the confrontation clause and state law." (Phillips's brief, p. 41.) Specifically, Phillips argues:

> "In order to testify, as she did at trial, that this was a pregnancy test performed on [Erica] that indicated she was pregnant (R. 661-62), [Dr. Ward] had to rely on several out-of-court statements from the individual who performed the test, including that urine was removed from [Erica's] body, that this urine was used to perform the test, and that the test was administered properly."

(Phillips's brief, p. 41.) Phillips did not raise this claim in the trial court; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

Initially, we note that Phillips's claim turns on his belief that someone other than Dr. Ward performed the urine pregnancy test and that Dr. Ward did not participate in performing the test. Phillips's beliefs, however, are refuted by the record. Indeed, although she testified that she ordered a urine pregnancy test to be performed--a statement that Phillips reads as meaning that someone other than Dr. Ward performed the pregnancy test--Dr. Ward testified that she assisted in performing the test. Specifically, Dr. Ward testified as follows:

> "[Prosecutor]: Now, Dr. Ward, as you were conducting the autopsy, did you also, prior to beginning, did you have some information that Erica might also have been pregnant when she was killed?
>
> "[Dr. Ward]: We did.
>
> "[Prosecutor]: In light of that--and as you were doing the autopsy, did you have at your disposal or did you have a test or other method, diagnostic or what have you, by which you could use urine or some other bodily fluid of hers to determine whether or not she was pregnant?
>
> "[Dr. Ward]: Yes, we did. We did a urine pregnancy test.

"[Prosecutor]: And is that I believe what is called an HCG test?

"[Dr. Ward]: It is, yes.

"[Prosecutor]: And could you tell the ladies and gentlemen just in brief what that is and how it works?

"[Dr. Ward]: It's a hormone, human gonadotrophic hormone, and it's secreted by the placenta and sometimes by the products of conception that were in her uterus.

"[Prosecutor]: Yes. And Dr. Ward, I'll now show you what I've got marked here as State's Exhibit 17, and I'll ask you to look at that real quickly.

"[Dr. Ward]: Yes, sir.

"[Prosecutor]: Do you recognize what that is in State's Exhibit 17?

"[Dr. Ward]: Yes.

"[Prosecutor]: What is that?

"[Dr. Ward]: This is the little white plastic container that houses the test, and so <u>we put several drops of urine on the right side of this plastic</u>. And you can see two red lines. One has a C under it, and the other has a T under it. C stands for control and T stands for the test. So if the control is positive, then we know that the test is functioning properly. And if the T is positive, then we can be sure that she's pregnant.

"[Prosecutor]: And the T is showing in this case, would that be an indicator that [Erica] was, in fact, pregnant at the time of her death?

"[Dr. Ward]: Yes.

> "[Prosecutor]: And is this the test that you, I guess ordered to be administered to her?
>
> "[Dr. Ward]: Yes."

(R. 661-62 (emphasis added).) Because Dr. Ward's testimony established that she, at least, assisted in administering the urine pregnancy test and because she was subject to cross-examination, the trial court's admission of the results of the urine pregnancy test was not a violation of the Confrontation Clause. See, e.g., Ex parte Ware, [Ms. 1100963, Jan. 17, 2014] ___ So. 3d ___, ___ (Ala. 2014) ("The United States Supreme Court has not squarely addressed whether the Confrontation Clause requires in-court testimony from all the analysts who have participated in a set of forensic tests, but Bullcoming[v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d. 610 (2011),] and Williams[v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012),] suggest that the answer is 'no.'").

Regardless, as noted above, "violations of the Confrontation Clause are subject to harmless-error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)." Smith, 898 So. 2d at 917. As explained above, even if the trial court erred in admitting

the results of the urine pregnancy test, that error would be, at worst, harmless because it was cumulative to Dr. Ward's testimony that she actually observed the "products of conception" and to Phillips's statement to Investigator Turner. Accordingly, Phillips is due no relief as to this claim.

3.

Phillips contends that the trial court erred when it failed to exclude what he describes as "gruesome autopsy photographs"--specifically, a photograph of Erica's "mutilated uterus, ovaries, and fallopian tubes, removed from her body, carved open, and placed on a table, still dripping blood." (Phillips's brief, p. 75.) Phillips argues that the admission of that photograph "rendered his trial fundamentally unfair and violated his rights to due process, a fair trial, an impartial jury, and a reliable conviction and sentence." (Phillips's brief, p. 77.) Phillips did not object to the admission of the complained-of photograph at trial; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

The following is well settled:

> "'Generally, photographs are admissible into evidence in a criminal prosecution "if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge." Magwood v. State, 494 So. 2d 124, 141 (Ala. Cr. App. 1985), aff'd, 494 So. 2d 154 (Ala. 1986), cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). See also Woods v. State, 460 So. 2d 291 (Ala. Cr. App. 1984); Washington v. State, 415 So. 2d 1175 (Ala. Cr. App. 1982); C. Gamble, McElroy's Alabama Evidence § 207.01(2) (3d ed. 1977).'"

Sneed v. State, 1 So. 3d 104, 131-32 (Ala. Crim. App. 2007) (quoting Bankhead v. State, 585 So. 2d 97, 109 (Ala. Crim. App. 1989)). Moreover, "photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors." Ex parte Siebert, 555 So. 2d 780, 784 (Ala. 1989) (citing Hutto v. State, 465 So. 2d 1211, 1212 (Ala. Crim. App. 1984)).

> "With regard to autopsy photographs, this Court has explained:
>
> > "'"This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries." Ferguson v. State, 814 So. 2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001). "'[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome,

> cumulative, or relate to an undisputed matter.'" Jackson v. State, 791 So. 2d 979, 1016 (Ala. Crim. App. 2000), quoting Perkins v. State, 808 So. 2d 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002), on remand to, 851 So. 2d 453 (Ala. 2002). ...'

"Brooks v. State, 973 So. 2d 380, 393 (Ala. Crim. App. 2007)."

Shanklin, ___ So. 3d at ___.

At trial, Dr. Ward identified the complained-of photograph--which was admitted as State's Exhibit 18--and explained that it depicted Erica's

> "uterus, which contains the products of conception. We can see the placenta within the uterus, and on either side of the uterus is one ovary and then the other and the fallopian tubes. And the ovary on the right side of the photograph--excuse me, the left side of the photograph has a cyst in it that is the corpus luteum cyst. It's what we see in the ovary of people who are pregnant, women who are pregnant."

(R. 663.)

Although Phillips argues that the complained-of photograph was gruesome, the trial court did not commit plain error in allowing the photograph to be admitted. Here, Phillips was charged with capital murder for causing the death of both his wife and an unborn child pursuant to one scheme or

course of conduct. Thus, as part of its burden of proof, the State was required to establish both that Erica was pregnant and that Baby Doe died. Although Erica's pregnancy was an undisputed fact (see Phillips's brief, p. 75) and the complained-of photograph is gruesome, the complained-of photograph was admissible, and Phillips is due no relief on this claim. See Shanklin, supra.

V.

Phillips contends that the trial court erred when it "permitted the jurors to consider prejudicial victim-impact testimony at the guilt phase" of his trial. (Phillips's brief, p. 93.) Specifically, Phillips argues that it was improper for Billy "to testify that his sister had been 'murdered' and that, since the incident, he has heard [Erica] calling his name, crying for help, '[e]very day for three years.'" (Phillips's brief, p. 93 (citations omitted).) At trial, Phillips did not object to this complained-of testimony; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

> "'"It is well settled that victim-impact statements 'are admissible during the guilt phase of a criminal trial only if the

> statements are relevant to a material issue of the guilt phase. Testimony that has no probative value on any material question of fact or inquiry is inadmissible.' Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993), citing Charles W. Gamble, McElroy's Alabama Evidence, § 21.01 (4th ed. 1991). However, 'when, 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 victim-impact testimony, the admission of such testimony is harmless error.' Crymes, 630 So. 2d at 126."

"'Jackson v. State, 791 So. 2d 979, 1011 (Ala. Crim. App. 2000).'

"Gissendanner v. State, 949 So. 2d 956, 965 (Ala. Crim. App. 2006). '[T]he introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error if the record indicates that it probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of the defendant based on the admissible evidence and the applicable law.' Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995). However, 'a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant.' Id. at 1005."

Shanklin, ___ So. 3d at ___.

Before addressing Phillips's claim, however, we note that the complained-of testimony was not elicited by the State during the direct examination of Billy; rather, the complained-of testimony was elicited by Phillips during cross-examination. Specifically, the complained-of testimony occurred during the following exchange:

> "[Phillips's counsel]: All right. Now so you know when you heard 'Help me, Bill.' All right. You remember that, your sister saying that?
>
> "[Billy]: (Nods head.)
>
> "[Phillips's counsel]: You have to answer out.
>
> "[Billy]: Every day for three years.
>
> "[Phillips's counsel]: I understand, [Billy]. This day?
>
> "[Billy]: Yes, sir."

(R. 522 (emphasis added).)

Assuming, without deciding, that Billy's testimony on cross-examination was inappropriate victim-impact testimony, after examining the record as a whole, we cannot conclude that Billy's testimony "probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of [Phillips] based on the admissible evidence and the

applicable law," Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995); rather, the record "conclusively shows that the admission of [Billy's testimony] during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of [Phillips]." Id. at 1005.

Here, the complained-of testimony was brief and was in response to a question on cross-examination that addressed Billy's ability to recall Erica's request for help. Considering the brief nature of the testimony and that the testimony was in response to a question asked by Phillips, and comparing the complained-of testimony to the overwhelming evidence of Phillips's guilt--including both Billy's testimony that he saw Phillips shoot Erica and Phillips's confession to shooting Erica--we cannot conclude that the admission of that testimony "prejudiced a substantial right of [Phillips]." Ex parte Rieber, 663 So. 2d at 1005.

Moreover, Billy's testimony, at worst, conveyed to the jury that, as her brother, hearing Erica's request for help and arriving in time to see Phillips shoot her had some impact on him.

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would

> elevate form over substance for us to hold, based on the record before us, that [Phillips] did not receive a fair trial simply because the jurors were told what they probably had already suspected--that [Erica] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on her children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S. Ct. 2597, 2615, 115 L. Ed. 2d 720 (1991))."

Ex parte Rieber, 663 So. 2d at 1006. Accordingly, Phillips is not entitled to relief on this claim.

VI.

Phillips contends that the State engaged in prosecutorial misconduct during the guilt phase of his trial by the prosecutors' "referr[ing] to themselves as the victims' representatives" (Phillips's brief, p. 89) and by "urging the jurors to find 'truth' rather than consider the possibility of reasonable doubt." (Phillips's brief, p. 91.) According to Phillips, the State's actions "rendered [his] trial fundamentally unfair and requires reversal."[10] (Phillips's brief, p. 88.) Phillips did not object to these complained-of

[10]In raising this issue in his brief, Phillips also includes allegations of penalty-phase prosecutorial misconduct. We address Phillips's penalty-phase misconduct claims in Part IX of this opinion.

comments at trial; thus, we review his claims for plain error only. See Rule 45A, Ala. R. App. P.

> "'While the failure to object will not bar our review of [Phillips's] claims of prosecutorial misconduct, it will weigh against any claim of prejudice that [Phillips] makes on appeal "'"because of its suggestion that the defense did not consider the comments in question to be particularly harmful."'" Ferguson v. State, 814 So. 2d 925, 945 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001), cert. denied, 535 U.S. 907, 122 S. Ct. 1208, 152 L. Ed. 2d 145 (2002), quoting Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala. 1991).'

"Calhoun v. State, 932 So. 2d 923, 962 (Ala. Crim. App. 2005).

"Also, many of the instances involve challenges to arguments made by the prosecutor in his opening or closing statements.

> "'"In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict." Smith v. State, 698 So. 2d 189, 202-03 (Ala. Cr. App. 1996), aff'd, 698 So. 2d 219 (Ala. 1997), cert. denied, 522 U.S. 957, 118 S. Ct. 385, 139 L. Ed. 2d 300 (1997) (citations omitted); Bush v. State, 695 So. 2d 70, 131(Ala. Cr. App. 1995), aff'd, 695 So. 2d 138 (Ala. 1997), cert. denied, 522 U.S. 969, 118 S. Ct. 418, 139 L. Ed. 2d 320

> (1997) (citations omitted). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So. 2d 360, 364 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991), cert. denied, 503 U.S. 974, 112 S. Ct. 1594, 118 L. Ed. 2d 310 (1992). "Prosecutorial misconduct is subject to a harmless error analysis." Bush v. State, 695 So.2d at 131 (citations omitted); Smith v. State, 698 So.2d at 203 (citations omitted).'

"Simmons v. State, 797 So. 2d 1134, 1161-62 (Ala. Crim. App. 1999) (opinion on return to remand). We must view the challenged arguments in the context of the entire trial and not in the abstract. See Duren v. State, 590 So. 2d 360 (Ala. Crim. App. 1990); Whitlow v. State, 509 So. 2d 252 (Ala. Crim. App. 1987). It is proper for a prosecutor to argue any legitimate inference that may be drawn from the evidence. See Snyder v. State, 893 So. 2d 488 (Ala. Crim. App. 2003)."

Belisle v. State, 11 So. 3d 256, 302-03 (Ala. Crim. App. 2007). We address each alleged instance of misconduct in turn.

First, Phillips contends that the State engaged in prosecutorial misconduct by the prosecutors' "referr[ing] to

themselves as the victims' representatives." (Phillips's brief, p. 89.) Specifically, Phillips takes issue with the State's opening statement, in which the prosecutor explained:

> "Ladies and gentlemen, you haven't heard from me yet. But again, my name is Steve Marshall, and I have the privilege of serving as your district attorney. You've met Everette Johnson, our chief assistant. You'll soon meet Ed Kellett. And it is our privilege and honor to represent the State of Alabama and the family of the victims, Erica and Baby Doe, in the presentation of this important case."

(R. 469 (emphasis added).) Phillips also takes issue with the closing remarks of the State's opening statement, in which the prosecutor explained:

> "It's from those facts that I told you, ladies and gentlemen, that we will prove to you this defendant's guilt beyond a reasonable doubt. And once you determine those facts with the law that the judge is going to tell you to apply to those facts, we are absolutely confident that you will return a verdict of guilty of capital murder. On behalf of the State of Alabama and the family of Erica and Baby Doe, I want to thank you in advance for your service. And I want to tell you how much we appreciate the fact that you are willing to be here today to allow us to seek justice."

(R. 478 (emphasis added).)

Although the State did appear to represent to the jury during its opening statement that the prosecutors spoke on behalf of the victims' family, "'[w]e have held that it is not

reversible error for a prosecutor to suggest that he is speaking on behalf of the victim's family.' Burgess v. State, 723 So. 2d 742, 754 (Ala. Cr. App. 1997), aff'd, 723 So. 2d 770 (Ala. 1998). See also George v. State, 717 So. 2d 849 (Ala. Cr. App. 1997), aff'd, 717 So. 2d 858 (Ala.), cert. denied, 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 462 (1998)." Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999). Thus, the State did not commit misconduct, and Phillips is not entitled to relief on this claim.

Phillips next contends that the State committed misconduct because, he says, the "prosecutor misstated the law by telling the jurors that their job was 'not to find doubt' but 'to find the truth,' that 'Verdict in Latin means truth,' and that 'the truth in this case is that Mr. Phillips ... intended to cause the death of Erica ... and Baby Doe.'" (Phillips's brief, pp. 90-91 (citation omitted).) Additionally, Phillips contends that "urging the jurors to find 'truth' rather than consider the possibility of reasonable doubt improperly shifted the burden of proof." (Phillips's brief, p. 91.)

The complained-of comments occurred during the State's guilt-phase closing argument and, in context, are as follows:

> "I also asked each of you during juror questioning--because you will hear the term later on in argument or you'll hear this argument later on in argument about exactly what reasonable doubt means. We talked a little bit about that.
>
> "Judge Riley's going to give you a definition of that in his instructions. And again I'll say he can define it better than I ever could. But I know one of the things he's going to tell you is that it's not beyond all doubt, and it's not proof to an absolute certainty. It's just proof beyond a reasonable doubt. If we were required to prove the guilt of the defendant beyond all doubt and to an absolute certainty, never could do that. Be never enough proof of that.
>
> "But your job in this case, folks, is not to find doubt. Your job is to find the truth, to ascertain from what you've heard here in the courtroom what the truth is about this case, about the facts.
>
> "Verdict in Latin means truth. And when you come back from your deliberations from the jury room and Judge Riley says have you reached a verdict, he's going to ask you have you reached the truth? Have you found the truth? And the truth in this case is that Mr. Phillips, with one act, with one bullet from this gun intended to cause the death of Erica Phillips and Baby Doe. And he succeeded.
>
> "I want to thank you for your, again for your service this week and for the service that you're about to do. On behalf of [the State], we appreciate your time and attention you've given to all of us in this case. Do what's right."

(R. 722-23.)

Although Phillips contends that the prosecutor's comments were a misstatement of the law, the prosecutor's comment to the jury that their job "is to find the truth" is consistent with the burden-of-proof instruction included in the Alabama Pattern Jury Instructions--specifically, that "[a] reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case." See Alabama Pattern Jury Instructions, Instruction I.4. Moreover, we have held that a similar statement did not shift the burden of proof. See, e.g., Revis, 101 So. 3d at 313 ("Here, the trial court was informing the jury as to its duty as a fact-finder in arriving at a true verdict. The instruction did not refer to Revis or shift the burden of proof."). Thus, there was no error--much less plain error--resulting from the complained-of comments.

VII.

Phillips contends that the trial court erred "by failing to declare a mistrial following two instances of juror misconduct and by failing to conduct a careful inquiry into the misconduct." (Phillips's brief, p. 77.) Specifically,

Phillips alleges that jurors J.A. and S.M. committed misconduct, which, he says, required the trial court to grant a mistrial when juror J.A. posted a comment to J.A.'s Facebook social-networking Web site and when juror S.M. had a conversation with "the mother of Mr. Phillips's ex-girlfriend." (Phillips's brief, p. 80.)

Phillips contends that, before

> "the conclusion of the guilt phase of trial[,] juror [J.A.] made a public statement to his 359 friends on Facebook about Mr. Phillips's case. He said '[d]ont [sic] know why God would put me in this position. I don't [sic] want to be here. I don't [sic] want no part of this.' At least five individuals publicly responded to this statement by [J.A.] on Facebook, though the record only indicates what two of these individuals said. At least one individual also reached out to [J.A.] privately to ask if these comments were about Mr. Phillips's case and [J.A.] affirmed that they were. Defense counsel moved for a mistrial based on this misconduct and the trial court denied defense counsel's motion."

(Phillips's brief, p. 79.)

With regard to juror S.M., Phillips contends that,

> "following the jury's guilty verdict, but prior to the beginning of the penalty phase, defense counsel informed the trial court that the foreman of the jury, [S.M.], 'ha[d] been having conversations' with the mother of Mr. Phillips's ex-girlfriend about whether he could sentence Mr. Phillips to death. [S.M.'s] engagement in any contact with the mother of Mr. Phillips's ex-girlfriend was in direct

violation of the trial court's order and was misconduct."

(Phillips's brief, pp. 80-81 (citation and footnote omitted).)

This Court has explained:

> "'"A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice." Hammonds v. State, 777 So. 2d 750, 767 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 777 (Ala. 2000) (citing Ex parte Thomas, 625 So. 2d 1156 (Ala. 1993)). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So. 2d 130, 135 (Ala. Crim. App. 1991). "'The granting of a mistrial is addressed to the broad discretion of the trial judge, and his ruling will not be revised on appeal unless it clearly appears that such discretion has been abused.'" Grimsley v. State, 678 So. 2d 1197, 1206 (Ala. Crim. App. 1996) (quoting Free v. State, 495 So. 2d 1147, 1157 (Ala. Crim. App. 1986)).'

"Baird v. State, 849 So. 2d 223, 247 (Ala. Crim. App. 2002). '"[T]he granting of a mistrial in cases of private communications between jurors and third persons is largely within the discretion of the trial judge, and his decision is subject to reversal only where that discretion has been abused."' Cox v. State, 394 So. 2d 103, 105 (Ala. Crim. App. 1981), quoting Woods v. State, 367 So. 2d 974, 980 (Ala. Crim. App.), rev'd on other grounds, 367 So. 2d 982 (Ala. 1978). 'In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion "where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the remark."' Holland v. State, 588 So. 2d 543, 546

(Ala. Crim. App. 1991), quoting Bascom v. State, 344 So. 2d 218, 222 (Ala. Crim. App. 1977).

"'"Any communication or contact outside the jury room about the matters at trial between a juror and another person is forbidden where that contact 'might have unlawfully influenced that juror.'"' Knox v. State, 571 So. 2d 389, 390-91 (Ala. Crim. App. 1990), quoting Ebens v. State, 518 So. 2d 1264, 1267 (Ala. Crim. App. 1986), quoting in turn Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). However:

> "'An unauthorized contact between the jurors and a witness [or other person] does not necessarily require the granting of a mistrial. It is within the discretion of the trial court to determine whether an improper contact between a juror and a witness [or other person] was prejudicial to the accused.'

"Ex parte Weeks, 456 So. 2d 404, 407 (Ala. 1984).

> "'The prejudicial effect of communications between jurors and others, especially in a criminal case, determines the reversible character of the error. Whether there has been a communication with the juror and whether it has caused prejudice are fact questions to be determined by the Court in the exercise of sound discretion.'

"Gaffney v. State, 342 So. 2d 403, 404 (Ala. Crim. App. 1976).

"....

"In order to show prejudice in a case such as this one involving misconduct by a non-juror in speaking to a juror, a defendant must establish only

that the verdict might have been affected by the juror's outside contact with the other person. See Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932) ('The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.'). See also Ex parte Dobyne, 805 So. 2d 763, 771 (Ala. 2001) (citing Roan in the context of juror misconduct, specifically the failure of a juror to properly respond to questions on voir dire). However, this might-have-influenced-the-verdict standard nevertheless requires more than a mere showing that the juror was exposed to outside influences. See Ex parte Apicella, 809 So. 2d 865 (Ala. 2001). In Ex parte Apicella, the Alabama Supreme Court, addressing a juror-misconduct claim (a juror spoke with an attorney not associated with the case), explained the standard as follows:

> "'On its face, this standard would require nothing more than that the defendant establish that juror misconduct occurred. As Apicella argues, the word "might" encompasses the entire realm of possibility and the court cannot rule out all possible scenarios in which the jury's verdict might have been affected.
>
> "'However, as other Alabama cases establish, more is required of the defendant. In Reed v. State, 547 So. 2d 596, 598 (Ala. 1989), this Court addressed a similar case of juror misconduct:
>
>> "'"We begin by noting that no single fact or circumstance will determine whether the verdict rendered in a given case might have been unlawfully

> influenced by a juror's [misconduct]. Rather, it is a case's own peculiar set of circumstances that will decide the issue. In this case, it is undisputed that the juror told none of the other members of the jury of her experiment until after the verdict had been reached. While the question of whether she might have been unlawfully influenced by the experiment still remains, the juror testified at the post-trial hearing on the defendant's motion for a new trial that her vote had not been affected by the [misconduct]."

"'It is clear, then, that the question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case. In this case, as in Reed, the effect of the misconduct was confined to the juror who committed the misconduct. The Reed Court stated:

> "'"We cannot agree with the defendant that the verdict rendered might have been unlawfully influenced, where the results of the [misconduct] were known only to the one juror who [committed the misconduct] and that juror remained unaffected by the [misconduct]."

"'547 So. 2d at 598. Because no evidence indicates that [the juror] shared the content of his conversation with the other

> members of the jury and because no evidence indicates that [the juror's] own vote was affected, we cannot say the trial court abused its discretion in finding no actual prejudice.'

"809 So. 2d at 871."

Minor v. State, 914 So. 2d 372, 411-14 (Ala. Crim. App. 2004).

Here, the trial court, after being told by Phillips of possible juror misconduct, brought both juror J.A. and juror S.M. into the courtroom to question them regarding the allegations of misconduct.[11] Juror J.A. admitted to making a statement on Facebook--specifically, J.A. explained that he posted a comment that he did not "know why God would put [him] in this position. [He didn't] want to be here. [He didn't] want no part of this." (C. 270.) J.A. explained, however, that, other than that general comment, he made no comments about Phillips's trial, made no comments about his opinion of the trial, and made no comments on how the case was going to come out. Additionally, contrary to Phillips's allegation, although J.A. admitted that people "commented" on his statement, J.A. stated that he did not respond to anyone's

[11]The trial court brought J.A. and S.M. into the courtroom and questioned them at separate times. Additionally, these proceedings were conducted outside the presence of the other jurors.

comment and that no one else had attempted to contact him privately to make a comment about Phillips's case. J.A. further explained that, although he would rather not be in a position to make a decision in a death-penalty case, he had no fixed opinion as to what should be done in this case and that he could follow the trial court's instructions.

With regard to the allegations of misconduct raised about juror S.M., S.M. explained that, although he had had a "few people come up and [say] are you still on jury duty, yes or no, and that's been it" (R. 817), nobody else had approached him to talk about the case or how he might vote on the case. S.M. explained that he had not told anyone how he planned to vote in the case and that his decision would be based only on the facts in the case and what the trial court told him about the law.

After J.A. and S.M. addressed the allegations of juror misconduct, Phillips moved for a mistrial based on the violation of "clear orders of [the trial] court." (R. 819.) The trial court denied Phillips's motion.

Although J.A.'s decision to post a comment to Facebook appears to be in violation of the trial court's order to

refrain from commenting about the case, J.A. did not make any direct, specific comment about the case and did not directly speak with or respond to anyone about Phillips's case. Moreover, nothing indicates that either J.A.'s comment or the five individuals who responded to his comment had any impact on his vote in this case. Furthermore, although Phillips argues that S.M. engaged in misconduct by communicating with the mother of Phillips's ex-girlfriend, S.M. denied ever having had a conversation with the mother of Phillips's ex-girlfriend. Thus, the trial court did not abuse its discretion when it denied Phillips's motion for a mistrial.

Additionally, to the extent that Phillips contends that, "[e]ven if the evidence presented to the trial court was not sufficient to require the trial court to grant a mistrial, the trial court's failure to conduct a thorough inquiry into the instances of juror misconduct was erroneous" (Phillips's brief, p. 81), that claim is without merit.

According to Phillips, the trial court should have questioned J.A. about the "five individuals [who] communicated with [him] on Facebook regarding the case" (Phillips's brief, p. 81) and should have questioned "the mother of [Phillips's]

ex-girlfriend, who was available to testify to the conversations between her and [S.M.]." (Phillips's brief, p. 82.) Phillips did not object to the trial court's handling of the investigation into Phillips's juror-misconduct claims, nor did he ask the trial court if he could proffer any additional testimony or present any additional evidence to support his claims; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

With regard to a trial court's duty to conduct an investigation into a juror-misconduct claim, this Court has explained:

> "'[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.' Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). However, 'the trial judge has a duty to conduct a "reasonable investigation of irregularities claimed to have been committed" before he concludes that the rights of the accused have not been compromised.' Holland v. State, 588 So. 2d 543, 546 (Ala. Crim. App. 1991) (emphasis added).
>
> > "'What constitutes a "reasonable investigation of irregularities claimed to have been committed" will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.

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

"'Woods v. State, 367 So. 2d 974, 980 (Ala. Cr. App.), reversed on other grounds, 367 So. 2d 982 (Ala. 1978), partially quoted in Cox v. State, 394 So. 2d 103, 105 (Ala. Cr. App. 1981). As long as the court makes an inquiry that is reasonable under the

> circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry.'
>
> "Sistrunk v. State, 596 So. 2d 644, 648-49 (Ala. Crim. App. 1992). See also Gamble v. State, 791 So. 2d 409 (Ala. Crim. App. 2000); Price v. State, 725 So. 2d 1003 (Ala. Crim. App. 1997); Clemons v. State, 720 So. 2d 961 (Ala. Crim. App. 1996); Hamilton v. State, 680 So. 2d 987 (Ala. Crim. App. 1996); Riddle v. State, 661 So. 2d 274 (Ala. Crim. App. 1994); and Hayes v. State, 647 So. 2d 11 (Ala. Crim. App. 1994).
>
> "'The trial court's decision as to how to proceed in response to allegations of juror misconduct or bias will not be reversed absent an abuse of discretion.' United States v. Youts, 229 F.3d 1312, 1320 (10th Cir. 2000). '[I]t is within the trial court's discretion to determine what constitutes an "adequate inquiry" into juror misconduct.' State v. Lamy, 158 N.H. 511, 523, 969 A.2d 451, 462 (2009)."

Shaw v. State, [Ms. CR-10-1502, July 18, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2014).

As set out above, after being informed of possible juror misconduct, the trial court questioned both J.A. and S.M. After questioning each juror, the trial court provided both Phillips and the State the opportunity to question both jurors--Phillips questioned J.A.; he declined, however, to question S.M. Although Phillips argues on appeal that the trial court should have "conducted a different or a more

extensive inquiry," the trial court's investigation of the allegations of juror misconduct was, under the circumstances of this case, reasonable and does not rise to the level of plain error. Accordingly, Phillips is due no relief on this claim.

VIII.

Phillips contends that the trial court committed reversible error in its jury instructions in the guilt phase of his trial. Specifically, Phillips contends that the trial court erred (1) when it failed "to instruct [the jury] on the lesser included offense of reckless manslaughter" (Phillips's brief, p. 6); (2) when it instructed the jury that Phillips "could be convicted of murder of 'two or more persons' if the jury found he had specific intent to kill only [Erica]" (Phillips's brief, p. 24); (3) when the trial court instructed the jury on reasonable doubt, which, he says, "impermissibly eased the State's burden of proof" (Phillips's brief, p. 94); (4) when the trial court "improperly instructed the jury that to find [Phillips] had the requisite specific intent to kill, [the jury] only needed to find that [Phillips] acted knowingly" (Phillips's brief, p. 37); and (5) when the trial

court's instruction on transferred intent improperly amended his indictment. (Phillips's brief, p. 82.)

The following is well settled:

> "When reviewing a trial court's jury instructions, we keep in mind the following:
>
> > "'"'A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. Raper v. State, 584 So. 2d 544 (Ala. Cr. App. 1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, Stewart v. State, 601 So. d 491 (Ala. Cr. App. 1992), aff'd in relevant part, 659 So. 2d 122 (Ala. 1993), and we must evaluate instructions like a reasonable juror may have interpreted them. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); Stewart v. State.'"
>
> "'Griffin v. State, 790 So. 2d 267, 332 (Ala. Crim. App. 1999), quoting Ingram v. State, 779 So. 2d 1225, 1258 (Ala. Crim. App. 1999). "This court has consistently held that a trial court's oral charge to the jury must be viewed in its entirety and not in 'bits and pieces.' Parks v. State, 565 So. 2d 1265 (Ala. Cr. App. 1990); Williams v. State, 538 So. 2d 1250 (Ala. Cr. App. 1988); Lambeth v. State, 380 So. 2d 923 (Ala.), on remand, 380 So. 2d 925 (Ala. Cr. App. 1979), writ denied, 380 So.

> 2d 926 (Ala. 1980)." Smith v. State, 585 So. 2d 223, 225 (Ala. Crim. App. 1991).'
>
> "Smith v. State, 908 So. 2d 273, 295 (Ala. Crim. App. 2000), cert. quashed, 908 So. 2d 302 (Ala. 2005), cert. denied, Smith v. Alabama, 546 U.S. 928, 126 S. Ct. 148, 163 L. Ed. 2d 277 (2005).
>
> "'"A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case." Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999) (citing Raper v. State, 584 So. 2d 544 (Ala. Crim. App. 1991)). Moreover, this Court does not review jury instructions in isolation, instead we consider the instruction as a whole. Stewart v. State, 601 So. 2d 491 (Ala. Crim. App. 1992).'
>
> "Living v. State, 796 So. 2d 1121, 1130-31 (Ala. Crim. App. 2000)."

Whatley v. State, 146 So. 3d 437, 468-69 (Ala. Crim. App. 2010). With these principles in mind, we address each of Phillips's jury-instruction claims.

A.

Phillips contends that the trial court erred when it failed to instruct the jury on reckless manslaughter as a lesser-included offense of capital murder. Specifically, Phillips argues that, based on the assertions he made in his statement to Investigator Turner, the "jury could have

inferred ... that he did not intend to kill [Erica], but instead 'consciously disregarded a substantial and unjustifiable risk that his conduct would cause that result.'" (Phillips's brief, p. 11 (quoting Ex parte Weems, 463 So. 2d 170, 172 (Ala. 1984)).)

During the jury-charge conference, Phillips requested that the trial court instruct the jury on reckless manslaughter pursuant to § 13A-6-3(a)(1), Ala. Code 1975, and the following exchange occurred:

> "[Phillips's counsel]: Judge, I think my client's own statement warrants a charge with respect to recklessness, as we discussed before. He--his testimony was that he pulled out the gun and fired, which is reckless. And reckless being when a person is aware of and consciously disregards, the risk. And that the--and that his conduct is basically a gross deviation from the standard of care, and it can be, in my view, distinguished from intent. I think whether or not, based on my client's statement, whether his act was intentional or reckless is a question for the jury.
>
> "[The Court]: Any other reply by the State?
>
> "[Prosecutor]: Judge, we don't think [the] facts support it in this case, and we object to that charge.
>
> "[The Court]: A person acts recklessly with respect to a result or to a circumstance when he is aware and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exist. And option B is a

person acts recklessly when he is aware of or consciously disregards a substantial and unjustifiable risk, such as shooting at Erica Phillips, will occur or has exists. By his statements, how does that fit with his statement on when he said he aimed and shot at her but does not know what he intended? How does that--

"[Phillips's counsel]: Judge, his statement does not say that he aimed and shot at her.

"[The Court]: It says he pointed and shot.

"[Phillips's counsel]: He said--Mr. Turner asked him, 'Where were you aiming?' And he says, 'I wasn't really. I just pointed and pulled the trigger. I still don't know where it hit her.' Judge, that's recklessness.

"[Prosecutor]: And again, Judge, we don't think that shows any recklessness. You have an intentional act. Now whether or not it resulted in the intended consequences is a matter of argument, but it was an intentional act. Maybe it got consequences Mr. Phillips don't want, but that doesn't make it reckless, Judge.

"[Phillips's counsel]: Judge, I think it's the essence of recklessness when a person says I didn't aim at that person. I took out a gun and fired. And that, under anybody's definition, would be a conscious disregard that the result, which we knew happened, might happen. I think it fits. Judge, may I?

""[The Court]: Go ahead.

"[Phillips's counsel]: I think it would be error not to give it."

(R. 692-94.) The trial court denied Phillips's request for an instruction on reckless manslaughter as a lesser-included offense of capital murder; the trial court did, however, grant Phillips's request to charge the jury on intentional murder as a lesser-included offense of capital murder.

This Court has held:

> "'A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses.' MacEwan v. State, 701 So. 2d 66, 69 (Ala. Crim. App. 1997). An accused has the right to have the jury charged on '"any material hypothesis which the evidence in his favor tends to establish."' Ex parte Stork, 475 So. 2d 623, 624 (Ala. 1985). '[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[] weak, insufficient, or doubtful in credibility,' Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978), 'even if the evidence supporting the charge is offered by the State.' Ex parte Myers, 699 So. 2d 1285, 1290-91 (Ala. 1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998). However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A-1-9(b), Ala. Code 1975. 'The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S. Ct. 2675, 153 L. Ed. 2d 847 (2002). '"A court may properly refuse to charge on a lesser

> included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury."' Williams v. State, 675 So. 2d 537, 540-41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So. 2d 580, 582 (Ala. Crim. App. 1987)."

Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2000). Thus, we must determine whether, under the circumstances of this case, there exists "a rational basis for a verdict convicting" Phillips of reckless manslaughter as a lesser-included offense of capital murder.

As set out above, Phillips was charged with one count of murder made capital for causing the death of Erica and Baby Doe during "one act or pursuant to one scheme or course of conduct." See § 13A-5-40(a)(10), Ala. Code 1975. Phillips requested, among other things, a jury instruction on reckless manslaughter as a lesser-included offense of capital murder.

"A person commits the crime of manslaughter if ... [h]e recklessly causes the death of another person." § 13A-6-3(a)(1), Ala. Code 1975.

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or

> that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

§ 13A-2-2(3), Ala. Code 1975.

As Phillips correctly contends, under certain circumstances, reckless manslaughter may be a lesser-included offense of capital murder. See, e.g., McLaughlin v. State, 586 So. 2d 267, 271 (Ala. Crim. App. 1991) ("Reckless manslaughter may be a lesser included offense of intentional murder. Gray v. State, 574 So.2d 1010 (Ala. Cr. App. 1990); Paige v. State, 494 So. 2d 795 (Ala. Cr. App. 1986)."); but see Howard v. State, 85 So. 3d 1054 (Ala. 2011) (holding that Howard was not entitled to "a manslaughter charge as a lesser-included offense to capital murder because Howard was determined to follow through on a course of action that would create a grave risk of death to a person other than himself, and thereby cause the death of another person").

The Alabama Supreme Court, in Ex parte Weems, 463 So. 2d 170 (Ala. 1984), explained:

> "Recklessly causing another's death may give rise to the lesser included offense of manslaughter. A defendant who recklessly causes another's death commits manslaughter if he 'consciously

> disregard[ed] a substantial and unjustifiable risk that his conduct would cause that result.' Model Penal Code and Commentaries, § 210.03, Comment 4 (1980). The difference between the circumstances which will support a murder conviction and the degree of risk contemplated by the manslaughter statute is one of degree, not kind. From a comparison of Sections 210.03 and 210.02 of the Model Code, it appears that the degree of recklessness which will support a manslaughter conviction involves a circumstance which is a 'gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation,' but is not so high that it cannot be 'fairly distinguished from' the mental state required in intentional homicides. Compare Comment 4 to § 210.02 with Comment 4 to § 210.03."

463 So. 2d at 172.

According to Phillips, several of his assertions in his statement to Investigator Turner demonstrate that he acted "recklessly" when he shot Erica. Specifically, Phillips argues that, "despite the fact that [Investigator Turner] repeatedly pushed [him] to admit to intending to kill [Erica], [he] continually denied any such intent. [Investigator Turner] asked [him] where he was aiming and he responded 'I wasn't really--I just pointed and pulled the trigger. I don't--I still don't know where it hit her. I don't--I'm guessing it did hit her because she fell.'" (Phillips's brief, pp. 9-10.) Additionally, Phillips references the following assertions

made in his statement as a basis for the trial court's giving him a lesser-included-offense instruction on reckless manslaughter: (1) "[I]t just happened." (C. 167); (2) "I just pointed and pulled the trigger." (C. 179); (3) "I don't even know if I had a thought. I don't know." (C. 185-86); (4) "I don't know what I was thinking." (C. 196); (5) "[W]hen I pulled that gun out and pointed it at her and pulled the trigger, did I want to kill her? No." (C. 208); (6) "It's not something I planned. It's not even something I wanted to do." (C. 209); (7) "I just pulled [the gun] up and she said, 'What you going to do with that?' as I was pulling it up. And she turned and I shot." (C. 261); and (8) "I'm not even clear what I was thinking." (C. 262.)

To support his argument, Phillips cites Thomas v. State, 681 So. 2d 265 (Ala. Crim. App. 1996), for the proposition that pointing and shooting a gun in the direction of a person or persons but "not aiming anywhere in particular" is sufficient evidence entitling a defendant charged with capital murder to a jury instruction on the lesser-included offense of manslaughter.

In Thomas, Thomas testified that he and Bernard Jones

> "were attempting to buy a gun that Thomas Ambers and Clifton Ambers, his brother, were selling. The transaction was taking place in an automobile. They began to argue over the price, and [Thomas] got out of the car. [Thomas] was standing on the driver's side of the car when Mr. Jones and Thomas Ambers began to 'tussle' on the passenger side of the car."

681 So. 2d at 266. Thomas testified that he told Jones to run and that, because he knew there was at least one gun in the car, Thomas pulled out his own gun. Thomas testified that he "shot three times in the car," and then the following exchange occurred:

> "'[Thomas's counsel]: Did you aim at anybody?
>
> "'[Thomas]: No, sir, I didn't know if he had the gun or not, and I was just trying--I didn't want to get shot in the back, so I just shot so I could run.'"

Id. at 267 (emphasis added). Based on Thomas's assertions, this Court held:

> "Because evidence was presented from which the jury might have found that the acts that resulted in the shooting of Thomas Ambers were reckless rather than intentional, there was a rational basis for an instruction on reckless manslaughter, and the failure to give that instruction was not harmless. ... Consequently, it was error to refuse to give the charge on reckless manslaughter."

Id. at 268.

Although Phillips argues that his statement that he was not "aiming" makes his case analogous to Thomas, here, unlike in Thomas, Phillips told Investigator Turner that he "pulled that gun out and pointed it at [Erica] and pulled the trigger." In other words, while Thomas was not aiming at "anybody," Phillips's statement clearly demonstrates that he pointed the gun at a specific person. Phillips's assertions to Investigator Turner do not demonstrate "recklessness"; rather, they demonstrate that Phillips acted intentionally. See § 13A-2-2(1), Ala. Code 1975 ("A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to cause that result or to engage in that conduct." (emphasis added)); and Hill v. State, 507 So. 2d 554 (Ala. Crim. App. 1986) ("Here, the appellant admitted taking the gun from a dresser drawer, pointing it at the head of the decedent and shooting him in the head repeatedly. Her actions were not consistent with a finding of recklessness. Since there was no evidence in the present case that would support an instruction on reckless manslaughter, the trial court did not err in denying the appellant's charge."). See also Ferrera v. State, 709 So. 2d

507 (Ala. Crim. App. 1997) (holding that, because Ferrera's conduct was intentional, Ferrera was not entitled to an instruction on reckless manslaughter as a lesser-included offense of intentional murder).

In addition to his assertion that he pointed the gun at Erica, Phillips's other assertions demonstrate that his conduct was intentional--not reckless. Specifically, as set out above, Phillips told Investigator Turner that he and Erica were engaged in a prolonged, heated argument; that before he left the McDonald's restaurant he removed the gun from the glove compartment of Erica's vehicle and put it in his back pocket; that, before he shot her, Erica asked him "What are you going to do with that?"; that he "pulled the trigger pointed and shot"; that, after he shot her, he stepped over her body and, without checking on her condition, got into Erica's vehicle and left the car wash. Thus, a reckless-manslaughter instruction was not warranted under the circumstances of this case. Compare Bunn v. State, 581 So. 2d 559, 561 (Ala. Crim. App. 1991) ("We think that the unexpected nature of the confrontation, the appellant's efforts to avoid the confrontation, his lack of familiarity with the pistol,

his concern for the victim after the victim was shot, coupled with his testimony that the pistol 'went off,' that he did not remember pulling the hammer back, and that he told certain persons shortly after the shooting that it was accidental, considered together, give rise to an interpretation of the evidence which would have supported a jury verdict of reckless manslaughter."). Accordingly, the trial court did not err when it denied Phillips's request for a jury instruction on reckless manslaughter as a lesser-included offense of capital murder.[12]

Moreover, even if we were to read Phillips's claim in a manner consistent with Thomas, Phillips would still not be entitled to a jury instruction on reckless manslaughter as a lesser-included offense of capital murder.

> "[T]he Alabama Supreme Court has recognized that, in certain situations, an accused's self-serving statement may not be sufficient, by itself, to warrant an instruction on a lesser-included offense. See Ex parte McWhorter, 781 So. 2d 330 (Ala. 2000), cert. denied, 532 U.S. 976, 121 S. Ct. 1612, 149 L.

[12]Phillips's assertions, at most, demonstrate that he did not have the specific intent to kill Erica. In other words, Phillips's assertions, at most, entitled him to a jury instruction of intentional murder as a lesser-included offense of capital murder--an instruction the trial court did, in fact, give.

Ed. 2d 476 (2001). In McWhorter, the appellant had given a statement to the police in which he initially stated that he was so intoxicated that he did not remember the crime. As the interview with police continued, however, the appellant began to remember, in detail, how the crime was committed, and he confessed. On appeal, he argued that the trial court had erred in not instructing the jury on a number of lesser-included offenses (including felony murder, intentional murder, and manslaughter), based on his statement to the police that he had been intoxicated. In finding that the trial court had not erred in not instructing the jury on the lesser-included offenses, the Supreme Court stated:

> "'The evidence offered by McWhorter as to his alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events occurring at the crime scene. No evidence substantiated his claim to have been intoxicated at the time of the killing, and, indeed, the other evidence as to his condition at the time of the crime was totally consistent with the proposition that he was sober. We hold that McWhorter's self-serving statements suggesting he was intoxicated at the time of the killing, statements made in his internally inconsistent interview by Detective Maze, is, as a matter of law, insufficient to satisfy the rigorous standard of showing that the intoxication relied upon to negate the specific intent required for a murder conviction amounted to insanity.'

"Ex parte McWhorter, 781 So. 2d at 342 (emphasis added)."

Clark, 896 So. 2d at 641-42.

Here, like in McWhorter, the only evidence supporting Phillips's request for an instruction on reckless manslaughter as a lesser-included offense of capital murder is his own self-serving statement to Investigator Turner. Phillips's statement to Investigator Turner is, at best, internally inconsistent. Indeed, even if we were to read his assertion that he "did not aim" as Phillips's engaging in reckless conduct, that assertion is inconsistent with his assertion that he pointed the gun at Erica and pulled the trigger. Thus, the trial court did not err in refusing to instruct the jury on reckless manslaughter as a lesser-included offense of capital murder.

B.

Phillips contends that the trial court erred when it instructed the jury that Phillips "could be convicted of murder of 'two or more persons' if the jury found he had specific intent to kill only [Erica]." (Phillips's brief, p. 24). Specifically, Phillips contends:

> "In the present case, the State argued that the doctrine of transferred intent applied and specifically requested two additional instructions, which the trial court gave, that diverged from the pattern instructions and eliminated the requirement of specific intent to kill each victim. The trial

> court improperly instructed the jury that 'the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe.' The trial court further instructed the jury that 'if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder.' The trial court then emphasized that it is sufficient if Mr. Phillips 'is proven beyond a reasonable doubt to have caused the death of an intended as well as an unintended victim by a single act.' Defense counsel objected to these instructions.
>
> "During deliberations, the jury sent out a note specifically asking if there 'ha[s] to be intent to kill 2 people for it to be capital murder' or 'is it the result of the murder the second person was killed without intent.' Following this question, the trial court re-instructed the jury on capital murder, including specifically informing the jury again that the State was only required to prove that Mr. Phillips 'intended to kill Erica Phillips and also killed an unintended victim.'
>
> "Because Alabama law requires a defendant to have the specific intent to kill each victim, the application of the doctrine of transferred intent to Mr. Phillips was erroneous as it permitted the jury to convict him of capital murder of 'two or more persons' based solely on his intent to kill [Erica]. The trial court's instruction on transferred intent improperly lowered the State's burden of proving each element of capital murder beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970); see also Sandstrom v. Montana, 442 U.S. 510 (1979)."

(Phillips's brief, pp. 25-26 (some citations omitted).)

Although Phillips correctly contends that "Alabama law is clear that in order to be guilty of capital murder, a defendant ha[s] to have the specific intent to kill" (Phillips's brief, p. 24), Phillips incorrectly argues that "Alabama law requires a defendant to have the specific intent to kill each victim." (Phillips's brief, p. 26 (emphasis added).) Indeed, our caselaw clearly holds otherwise.

This Court, in Smith v. State, [Ms. CR-97-1258, Dec. 22, 2000] ___ So. 3d ___ (Ala. Crim. App. 2000), aff'd in part, rev'd in part on other grounds, and remanded, Ex parte Smith, [Ms. 1010267, Mar. 14, 2003] ___ So. 3d ___ (Ala. 2003), addressed this issue.

Specifically, in Smith, Smith was charged with capital murder for causing the death of two or more persons "by one act or pursuant to one scheme or course of conduct." Id. at ___ (quoting § 13A-5-40(a)(10), Ala. Code 1975). On appeal, Smith argued that the trial court's instructions were erroneous because, he said, "the court's instructions allowed the jury to convict him of having committed the capital offense without finding intent as to two victims." Id. at ___. This Court rejected that claim, holding:

"Section 13A-5-40(b) specifies that murder, as a component of the capital offense, means 'murder' as defined in § 13A-6-2(a)(1): 'A person commits the crime of murder if ... [w]ith intent to cause the death of another person, he causes the death of that person <u>or another person</u> ....' (Emphasis added.)

> "'By its language, § 13A-6-2(a)(1) clearly invokes the doctrine of transferred intent in defining the crime of murder. For example, if Defendant fires a gun with the intent to kill Smith but instead kills Jones, then Defendant is guilty of the intentional murder of Jones.
>
> "'... Section 13A-5-40(b) refers to § 13A-6-2(a)(1) for the definition of "murder"; and § 13A-6-2(a)(1) codifies the doctrine of transferred intent in that definition.'

"<u>Ex parte Jackson</u>, 614 So. 2d 405, 407 (Ala. 1993).

"Thus, <u>depending on the facts of a case, it is conceivable that the offense of murder wherein two or more persons are murdered by one act or pursuant to one scheme or course of conduct could arise from the intent to kill one person</u>. The court in <u>Living v. State</u>, [796 So. 2d 1121] (Ala. Crim. App. 2000), reckoned with such possibility. In <u>Living</u> the court stated:

> "'On appeal, ... Living argues that the jury could have found that he intentionally killed Jennifer, but that he did not intend to kill Melissa. Therefore, according to Living, the jury could have found him guilty of murder with regard to Jennifer and guilty of reckless manslaughter with regard to Melissa.

> "'Under the doctrine of transferred intent, however, if Living intended to kill Jennifer he would be criminally culpable for murder with regard to the unintended death of Melissa. See Harvey v. State, 111 Md. App. 401, 681 A.2d 628 (1996) (the doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed; it makes no difference whether the intended victim is missed; hit and killed; or hit and only wounded). Several jurisdictions have held that the doctrine of transferred intent is applicable when a defendant kills an intended victim as well as an unintended victim. See, e.g., State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); Ochoa v. State, 115 Nev. 194, 981 P.2d 1201, 1205 (1999); Mordica v. State, 618 So. 2d 301, 303 (Fla. Dist. Ct. App. 1993); and State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990).
>
> "'.... If Living intended to kill Jennifer, his specific intent would transfer to the killing of Melissa.'

"796 So. 2d at [1131].

"Accordingly, the appellant's contention is based on the incorrect assumption that the prosecution is required to prove subjective intent to kill as to each victim: that is not required by law."

Smith, ___ So. 3d at ___ (emphasis added; footnote omitted). Thus, contrary to Phillips's argument on appeal, the State is not required to demonstrate that Phillips had the specific intent to kill both Erica and Baby Doe. Rather, the State

needed to establish only that Phillips had the specific intent to kill Erica and that Baby Doe died as a result of that one act--regardless of whether Baby Doe was an intended or unintended victim.

Because the trial court's instruction on transferred intent is consistent with Alabama law, the trial court did not err when it instructed the jury that "if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder."[13]

C.

Phillips contends that the trial court improperly instructed the jury on reasonable doubt, which, he says,

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[13]Notably, although the State requested an instruction on transferred intent, the State consistently argued to the jury that Phillips specifically intended to kill both Erica and Baby Doe. Additionally, the evidence presented by the State was sufficient to establish that Phillips had the specific intent to kill both Erica and Baby Doe. Moreover, it is unclear whether the jury convicted Phillips based on a theory of Phillips's specific intent to kill both Erica and Baby Doe or whether it relied on a theory of transferred intent. Indeed, the jury-verdict form signed by the jury foreperson indicates only that the jury "find[s] the defendant guilty of Capital Murder, the murder of two or more persons by a single act." (C. 134.)

"impermissibly eased the State's burden of proof." (Phillips's brief, p. 94.) Specifically, Phillips contends:

> "In [his] case, the trial court instructed the jury that the reasonable doubt which entitled [him] to an acquittal 'is not a mere fanciful, a vague, a conjectural or a speculative doubt.' The trial court also equated reasonable doubt with an 'abiding conviction.' Moreover, the trial court instructed the jury to '[s]earch for a consistent story.' By emphasizing that not all doubts are sufficient to require acquittal and permitting Mr. Phillips to be convicted merely on the jury's belief in his guilt rather than evidentiary proof that excluded all reasonable doubt, this instruction lessened the State's burden of proof. A reasonable likelihood exists that the jury understood the court's instructions to permit a conviction based on insufficient proof."

(Phillips's brief, p. 94 (citations omitted).) Phillips did not object to the trial court's reasonable-doubt instruction; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

This Court has explained:

> "'The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. Hopt v. Utah, 120 U.S. 430, 440-441, 7 S. Ct. 614, 618-20, 30 L. Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see Jackson v. Virginia,

> 443 U.S. 307, 320, n.14, 99 S. Ct. 2781, 2789, n. 14, 61 L. Ed. 2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. Taylor v. Kentucky, 436 U.S. 478, 485-486, 98 S. Ct. 1930, 1934-1935, 56 L. Ed. 2d 468 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 137, 99 L. Ed. 150 (1954).'

"Victor[v. Nebraska], 511 U.S. [1] at 5 [(1994)]."

Thompson v. State, 153 So. 3d at 154.

In this case, the totality of the trial court's reasonable-doubt instruction was as follows:

> "Convict the defendant if the State meets its burden of proof. If after considering all the evidence in this case you have an abiding conviction of the truth of the charges, then you are convinced beyond a reasonable doubt, and it would be then your duty to find the defendant guilty.
>
> "Acquit or not guilty if the State fails to meet its burden. But if after considering all the evidence in this case, your minds are left in such a condition that you cannot say that you have an abiding conviction of the defendant's guilt, then you are not convinced beyond a reasonable doubt and the defendant would be entitled to be found an acquittal, to an acquittal, that is, not guilty. An acquittal is not guilty.
>
> "What is beyond a reasonable doubt? The burden of proof is on the State of Alabama to prove the guilt of the defendant beyond a reasonable doubt.

The phrase beyond a reasonable doubt is a somewhat subjective term and the efforts to define it may not always help. A reasonable doubt is sometimes said to be a reason for a doubt. Most people know intuitively what the law means when it says that the State has to prove the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is a doubt for which you can assign a reason.

"A doubt arising from evidence or lack of evidence. Is there a doubt either arising from evidence or from a lack of evidence as to any element of the offense that the State has been charged or has been charged [(sic)]? Is there--if there is a doubt of that type, the defendant is entitled to be found the benefit of that doubt [(sic)].

"Defendants may rely on reasonable doubt all through the trial. An accused person has a right to rely upon the failure of the prosecution to establish such proof of beyond a reasonable doubt. If you have a reasonable doubt about the accused's guilt arising out of any part of the evidence or any lack of evidence, then you should find the accused not guilty.

"This is not a forced doubt or a capricious doubt. A reasonable doubt is not a forced or capricious doubt. It is not necessary that the State must prove the guilt of the defendant beyond all doubt, but that it prove the guilt of the defendant beyond a reasonable doubt.

"A fair doubt. A reasonable doubt is a fair doubt based upon reason and logic, not based upon mere speculation. The reasonable doubt ... which entitles an accused to an acquittal is not a mere fanciful, a vague, a conjectural or a speculative doubt. But it must be a reasonable doubt arising from the evidence or from the lack of evidence or from some part of the evidence, and it remains after

> careful consideration of all the evidence by you such as a fair-minded and conscientious people would entertain under all circumstances.
>
> "The State of Alabama must prove each and every element of the case. The burden is upon the State of Alabama to prove the accused's guilt beyond all reasonable doubt of every essential element of the crime charged."

(R. 749-52.)

Here, an examination of the trial court's reasonable-doubt instruction, taken as a whole, demonstrates that the instruction "correctly conve[yed] the concept of reasonable doubt to the jury." Thompson, supra. This Court, in Revis, 101 So. 3d at 314, determined that a similar reasonable-doubt instruction was proper and "did not impermissibly shift the burden of proof" from the State to the defendant. Specifically, in Revis, the trial court instructed the jury on reasonable doubt as follows:

> "'It does not mean beyond all doubt, but simply beyond a reasonable doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense and to which you can assign a reason based on the evidence, the lack of evidence or a conflict in the evidence. A reasonable doubt is not a mere guess or surmise. It is a doubt based on reason and logic and not upon speculation, and as I said before, it is a reasonable doubt, not beyond all doubt, but a

> reasonable doubt is a doubt that you can assign a reason to based on the evidence, the lack of evidence or a conflict in the evidence. If after considering all the evidence in this case you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt, and it would be your duty to convict the defendant. The reasonable doubt which entitles an accused to an acquittal is not a mere fanciful, vague, conjectural or speculative doubt, but a reasonable substantial doubt arising from the evidence or from the lack of evidence that remains after a careful consideration of the testimony. As I've said before, the State's not required to convince you of the defendant's guilt beyond all doubt and to a mathematical certainty, nor beyond a shadow of a doubt, but simply beyond a doubt.'"

101 So. 3d at 313-14 (emphasis added).

Moreover, the complained-of language in the trial court's reasonable-doubt instruction--that reasonable doubt "is not a mere fanciful, a vague, a conjectural or a speculative doubt" --is identical to language that appears in the Alabama Pattern Jury Instructions on "Burden of Proof." See Alabama Pattern Jury Instructions, Instruction I.4. This Court has explained that "'[a] trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error.' Price v. State, 725 So. 2d 1003, 1058 (Ala. Cr. App. 1997), aff'd, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1012 (1999)."

Wilson v. State, 777 So. 2d 856, 885 (Ala. Crim. App. 1999). Thus, the trial court committed no error--much less plain error--in its instruction on reasonable doubt.

Moreover, in this section of his brief on appeal, Phillips contends that the trial court's instruction on the credibility of witnesses was error. Although he correctly notes that the trial court, when instructing the jury about the credibility of witnesses, instructed the jury to "[s]earch for a consistent story" (R. 769), Phillips's argument is without merit because a similar instruction has been upheld by this Court. See, e.g., Marshall v. State, 20 So. 3d 830, 838 (Ala. Crim. App. 2008) (instructing the jury that it could consider the "consistency or inconsistency of [a witness's] testimony as well as its reasonableness or unreasonableness in light of all the evidence in this case"). Thus, the trial court committed no error with regard to this complained-of instruction.

D.

Phillips contends that the trial court "improperly instructed the jury that to find [Phillips] had the requisite specific intent to kill, they only needed to find that he

acted knowingly." (Phillips's brief, p. 33.) Phillips did not object to this instruction at trial; thus, we review this claim for plain error only. See Rule 45A, Ala. R. Crim. P.

Phillips contends that the following instruction was error:

> "Intent. Going to talk about intent now. Intent, under the law, is the definition of knowingly. I charge you, members of the jury, that a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct and is aware of the nature of the circumstances that exist. The person knows something.
>
> "What a person actually does. Of course you can consider what a person actually does as being a circumstance bearing on what a person intended to do. Intent is usually established by circumstantial evidence. Intent to do something is usually a matter that has to be determined by circumstantial evidence. What you have to ascertain is whether the defendant was aware that he was carrying out a particular act. That's what I meant, and that's what I mean by intent. Was the defendant aware that they were carrying out a particular act? That's what we mean when we say intent."

(R. 752.)

Phillips, in his brief on appeal, correctly explains that this instruction "improperly conflates the definition of knowledge and intent." (Phillips's brief, pp. 33-34.) See also § 13A-2-2(1) and (2), Ala. Code 1975.

We have explained:

> "'Alabama appellate courts have repeatedly held that, to be convicted of capital offense and sentenced to death, a defendant must have had a particularized intent to kill and the jury must have been charged on the requirement of specific intent to kill. E.g., Gamble v. State, 791 So. 2d 409, 444 (Ala. Crim. App. 2000); Flowers v. State, 799 So. 2d 966, 984 (Ala. Crim. App. 1999); Duncan v. State, 827 So. 2d 838, 848 (Ala. Crim. App. 1999).'

"Ziegler v. State, 886 So. 2d 127, 140 (Ala. Crim. App. 2003)."

Brown v. State, 72 So. 3d 712, 715 (Ala. Crim. App. 2010). Thus, the trial court's instruction conflating "knowingly" and "intentionally" was error. That error, however, does not rise to the level of plain error.

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

"Williams v. State, 710 So. 2d 1276, 1306 (Ala. Crim. App. 1996). 'The absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the defendant's failure to object does weigh against his claim of

> prejudice.' Ex parte Boyd, 715 So. 2d 852, 855 (Ala. 1998)."

Thompson v. State, 153 So. 3d at 152.

Although the trial court initially improperly instructed the jury on intent, "we do not review the jury instruction in isolation. Instead we consider the jury charge as a whole, and we consider the instructions like a reasonable juror may have interpreted them." Ziegler v. State, 886 So. 2d 127, 140 (Ala. Crim. App. 2003) (citing Smith v. State, 795 So. 2d 788, 827 (Ala. Crim. App. 2000)). Examining the trial court's instructions as a whole, we are convinced that the trial court fully instructed the jury on intent and that a reasonable juror would have interpreted the trial court's instructions as requiring the State to prove beyond a reasonable doubt that Phillips had the specific intent to kill.

Specifically, the trial court, after reading Phillips's indictment to the jury, instructed the jury as follows:

> "Now I'm going to give you some specific information about that charge. That charges capital--that is a capital murder charge. Alabama Code Section 13A-5-40(a)(10), murder of two or more persons by a single act. The defendant is charged with capital murder. The [(sic)] states that an intentional murder of two more persons is capital murder. A person commits intentional murder of two or more persons if he causes the death of two or

> more people, and in performing the act that caused the death of those people, he intended to kill each of those people.
>
> "To convict, the State must prove beyond a reasonable doubt each of the following elements of intentional murder of two or more persons: ... that in committing the act that caused the deaths of both [Erica] and Baby Doe, the defendant intended to kill the deceased or another person.
>
> "A person acts intentionally when it is his purpose to cause the death of another person. Let me reread that. A person acts intentionally when it is his purpose to cause the death of another person. <u>The intent to kill must be real and specific</u>."

(R. 761-62 (emphasis added).) Thereafter, the trial court instructed the jury on the State's requested jury charges as follows:

> "Requested jury charge number one. The defendant, Jessie Phillips, is charged with capital murder. The law states that intentional murder of two or more persons is capital murder. A person commits the crime of an intentional murder of two or more persons, and in performing the act that caused the death of those people, he intends to kill each of those people.
>
> "To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder of two or more persons: One, Erica Phillips is dead; two, that Baby Doe is dead; three, that the defendant Jessie Phillips caused the deaths of Erica Phillips and Baby Doe by one act, by shooting them; and that in committing the act which caused the deaths of both Baby--excuse me, Erica Phillips and Baby Doe, the defendant intended to kill the deceased or another person.

> "A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill another person must be real and specific. ...
>
> "....
>
> "Requested jury charge number two. In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder."

(R. 765-67 (emphasis added).)

Thus, it is clear that, although the trial court initially conflated the concepts of "knowingly" and "intentionally," the trial court fully and adequately instructed the jury on the specific-intent-to-kill requirement. Thus, although the trial court's initial instruction on intent was erroneous, it does not rise to the level of plain error.

E.

Phillips contends that the trial court "improperly amended the indictment" when it instructed the jury on

transferred intent because, he says, "the indictment, as written, required a finding of individualized and specific intent to kill both [Erica] and [Baby Doe]." (Phillips's brief, p. 82.) Phillips did not object to the trial court's transferred-intent instruction on this basis; thus, we review this claim for plain error only. See Rule 45A, Ala. R. App. P.

Rule 13.5(a), Ala. R. Crim. P., provides:

> "A charge may be amended by order of the court with the consent of the defendant in all cases, except to charge the offense or to charge new offenses not contemplated by the original indictment. The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced."

(Emphasis added.) The Alabama Supreme Court has explained:

> "Rule 13.5(a), Ala. R. Crim. P., forbids amending an indictment 'to change the offense or to charge a new offense not contemplated by the original indictment.' This rule preserves the implementation of Article I, § 6, Alabama Constitution of 1901, guaranteeing '[t]hat in all criminal prosecutions, the accused has a right ... to demand the nature and cause of the accusation; and to have a copy thereof ...' and Article I, § 8, as amended by Amendment 37, Alabama Constitution of 1901, guaranteeing that contested felonies will be charged by grand jury indictment, State ex rel. Baxley v. Strawbridge, 52 Ala. App. 685, 687, 296 So. 2d 779, 781 (1974); and Thorn v. State, 39 Ala.

> App. 227, 227, 98 So. 2d 859, 860 (1957); see also Kennedy v. State, 39 Ala. App. 676, 690, 107 So. 2d 913, 926 (1958). The fundamental constitutionally guaranteed benefits of an indictment to an accused are '"that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence."' Gayden v. State, 262 Ala. 468, 477, 80 So. 2d 501, 504 (1955)(quoting United States v. Simmons, 96 U.S. 360, 371, 24 L. Ed. 819 (1877))."

Ash v. State, 843 So. 2d 213, 216 (Ala. 2002), overruled on other grounds by Ex parte Seymour, 946 So. 2d 536 (Ala. 2006).

Additionally,

> "an indictment can be informally 'amended' by actions of the court or of the defendant. The trial court's act of instructing the jury on charges other than those stated in the indictment effects an 'amendment' of the indictment. Ash v. State, 843 So. 2d at 216."

Wright v. State, 902 So. 2d 738, 740 (Ala. 2004). With regard to a trial court's jury instructions effectively amending an indictment, we have noted:

> "'"[A] material variance will exist if the indictment charges an offense committed by one means and the trial court's jury charge addresses a separate and contradictory means."' Gibson v. State, 488 So. 2d 38, 40 (Ala. Crim. App. 1986) (emphasis added). However, '[t]he one apparent exception to this rule of variance where the statute contains alternative methods of committing the offense is where the alternative methods are not contradictory and do not contain separate and distinct elements of proof.' Id."

McCray v. State, 88 So. 3d 1, 84 n.34 (Ala. Crim. App. 2010).

Here, Phillips's indictment charged him as follows:

> "The GRAND JURY of [Marshall] county charge that, before the finding of this INDICTMENT, JESSIE LIVELL PHILLIPS, whose name to the Grand Jury is otherwise unknown, did by one act or pursuant to one scheme or course of conduct, intentionally cause the death of ERICA CARMEN PHILLIPS, by shooting her with a pistol, and did intentionally cause the death of BABY DOE, by shooting ERICA CARMEN PHILLIPS with a pistol while the said ERICA CARMEN PHILLIPS was pregnant with BABY DOE, in violation of Section 13A-5-40(a)(10) of the Code of Alabama (1975), as last amended, against the peace and dignity of the State of Alabama."

(C. 24 (capitalization in original).) After charging the jury on the allegations in the indictment, the trial court charged the jury on transferred intent, as follows:

> "In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder."

(R. 766-67.)

Although we question whether Phillips is correct in his contention that his "indictment, as written, required a finding of individualized and specific intent to kill both [Erica] and [Baby Doe]" (Phillips's brief, p. 82), the trial court's transferred-intent instruction did not amend Phillips's capital-murder indictment because the instruction neither charged a new or different offense nor "address[ed] a separate and contradictory means" of proving that offense. Instead, the transferred-intent instruction charged the jury on the same offense as charged in the indictment--murder of two or more persons--and, although it addressed a different means of proving that offense, it did not address a contradictory means of proving that offense. Thus, no error--much less plain error--occurred.

Penalty-Phase Issues

IX.

Phillips contends that the State engaged in prosecutorial misconduct during the penalty phase of his trial. Specifically, Phillips contends that the prosecution engaged in misconduct when (1) the district attorney "improperly vouched for the State's case by informing the jury that he was

there to ensure that justice was done" and explained "that justice could only be achieved through the death penalty, a recommendation he did not make 'lightly,'" (Phillips's brief, pp. 88-89 (emphasis in original)); (2) the prosecution "improperly referred to themselves as the victims' representatives" (Phillips's brief, p. 89); (3) the district attorney "improperly denigrated Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance'" (Phillips's brief, p. 90); (4) the district attorney "misstated the law and attempted to shift the burden of proof ... by arguing that the defense was 'trying to establish' extreme mental or emotional disturbance as a statutory mitigating circumstance but the evidence 'didn't come close to it'" (Phillips's brief, p. 91); (5) the district attorney "misstated the law on aggravation and mitigation, telling jurors if they 'believe the mitigators ... outweigh the aggravators ... the result then becomes life without'" the possibility of parole (Phillips's brief, p. 91 (ellipses in original)); and (6) the district attornery "misrepresented the facts in evidence by telling jurors that Mr. Phillips was

'caught red-handed' and took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell[ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).) At trial, Phillips made no objections to the above-listed statements; thus, we review his claims for plain error only. See Rule 45A, Ala. R. App. P.

As set out above:

> "'While the failure to object will not bar our review of [Phillips's] claims of prosecutorial misconduct, it will weigh against any claim of prejudice that [Phillips] makes on appeal "'"because of its suggestion that the defense did not consider the comments in question to be particularly harmful."'" Ferguson v. State, 814 So. 2d 925, 945 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001), cert. denied, 535 U.S. 907, 122 S. Ct. 1208, 152 L. Ed. 2d 145 (2002), quoting Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala. 1991).'

"Calhoun v. State, 932 So. 2d 923, 962 (Ala. Crim. App. 2005).

"Also, many of the instances involve challenges to arguments made by the prosecutor in his opening or closing statements.

> "'"In reviewing allegedly improper prosecutorial argument, we must first

> determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict." Smith v. State, 698 So. 2d 189, 202-03 (Ala. Cr. App. 1996), aff'd, 698 So. 2d 219 (Ala. 1997), cert. denied, 522 U.S. 957, 118 S. Ct. 385, 139 L. Ed. 2d 300 (1997) (citations omitted); Bush v. State, 695 So. 2d 70, 131 (Ala. Cr. App. 1995), aff'd, 695 So. 2d 138 (Ala. 1997), cert. denied, 522 U.S. 969, 118 S. Ct. 418, 139 L. Ed. 2d 320 (1997) (citations omitted). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So. 2d 360, 364 (Ala. Cr. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991), cert. denied, 503 U.S. 974, 112 S. Ct. 1594, 118 L. Ed. 2d 310 (1992). "Prosecutorial misconduct is subject to a harmless error analysis." Bush v. State, 695 So.2d at 131 (citations omitted); Smith v. State, 698 So.2d at 203 (citations omitted).'

"Simmons v. State, 797 So. 2d 1134, 1161-62 (Ala. Crim. App. 1999) (opinion on return to remand). We must view the challenged arguments in the context of the entire trial and not in the abstract. See Duren v. State, 590 So. 2d 360 (Ala. Crim. App. 1990); Whitlow v. State, 509 So. 2d 252 (Ala. Crim. App. 1987). It is proper for a prosecutor to argue any

> legitimate inference that may be drawn from the evidence. See Snyder v. State, 893 So. 2d 488 (Ala. Crim. App. 2003)."

Belisle, 11 So. 3d at 302-03. With these principles in mind, we turn to Phillips's specific claims of penalty-phase prosecutorial misconduct.

A.

Phillips first contends that the State engaged in penalty-phase prosecutorial misconduct when, he says, the prosecutor "improperly vouched for the State's case by informing the jury that he was there to ensure that justice was done" and explained "that justice could only be achieved through the death penalty, a recommendation he did not make 'lightly.'" (Phillips's brief, pp. 88-89 (emphasis in original).) According to Phillips, those comments were improper because, he says, it is improper for the prosecutor to "repeatedly tell the jury that he personally believed death was the only appropriate sentence in this case." (Phillips's brief, p. 89.)

The complained-of comments, in context, are as follows:

> "May it please the Court, [and defense counsel.] I don't know about y'all, but I did not have the most restful sleep last night. On your end, you were probably partly thinking about what today is going

> to be about, understanding that you've already received your verdict. For me, I was kind of laying there thinking what I was going to tell you now. And as I was sort of kind of figuring out what it is that I can tell you to help you in being able to make this decision, I really thought a lot about this idea of justice and what justice is in this case. I don't think for a moment that any of y'all spend your idle time thinking about the concept of justice. I really think that's kind of why y'all have me. That's really my role and that is my function in what y'all have me do for this community.
>
> "But I will tell you that there are some that think of justice as this idea, sort of this word inscribed on some marble-coated building. It really doesn't have any meaning or very cynical about this concept of justice. I think y'all know better. Because those people that don't understand it should have sat in this courtroom over the last couple of days and seen what you've done. Y'all allowed justice to happen through your verdict. Because if you think about what you did, you spoke to find the person responsible for the deaths of Erica and Baby Doe. And that's part of justice is making sure that those who commit crimes against society are held responsible.
>
> "But I will tell you, I think that justice has to go a little bit farther. Because we're not just worried about holding people responsible. It's also about holding people accountable. In the guilt phase you found him responsible. Now I'm asking you for your recommendation to hold him accountable. We're asking you to hold him accountable by recommending death."

(R. 855-56.) Thereafter, the prosecutor discussed with the jury the instructions they would receive from the trial court

about weighing aggravating and mitigating factors and then stated:

> "Y'all, I don't tell you for a minute that I'm sitting here saying this is simple. We're talking about the ultimate punishment that our society can give to somebody. I don't sit here and think that you take that responsibility that you're about to do lightly. You shouldn't. And if you do, you shouldn't be sitting there. But I'll also tell you that I don't stand up here today and recommend to you death lightly either. The reason we're about to do that is because, ladies and gentlemen, the aggravator in this case far outweighs anything that you're going to hear in the nature of mitigation."

(R. 858.) The prosecutor then recounted the case to the jury and closed his argument by stating:

> "All of those combined you can consider as it relates to the gravity of the offense. And I submit to you that it's those facts that will dictate your conclusion in this case. I'm going to be quiet for a minute. I get to come back, and I'm going to respond briefly to what [Phillips's counsel] says in the nature of mitigation. We'll see whether or not they've really proven those things. He may argue to you that Mr. Phillips was a loving father who doted on his kids. I don't know. Remember, what I tell you and what he tells you isn't facts, isn't evidence. It's whether or not you believe the testimony of those that you heard testify. This case right now is about accountability. It's about weighing those factors one against one another and then making the decision about what needs to happen. Y'all, I really don't think the choice is even close. When you think about all that you've heard and all the law in this case, I don't think you have but one decision, and that is to recommend to [the trial court] death in this case."

(R. 867.)

In rebuttal to Phillips's closing argument, the prosecutor argued:

> "The factors that I agree they've proved, y'all, come nowhere close to the gravity of this offense. The weight of those aggravating factors far exceeds anything in the nature of mitigation. You are not sitting there and voting about whether or not you believe the death penalty is appropriate in this case. Your vote is whether or not the aggravator outweighs the mitigator, and that dictates what your vote should be. I submit to you that you only have one choice, and that is this group recommend death."

(R. 878.)

In Vanpelt v. State, 74 So. 3d 32 (Ala. Crim. App. 2009), we addressed similar comments, holding:

> "In our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate. See Hall v. State, 820 So. 2d 113, 143 (Ala. Crim. App. 1999). On the other hand, it is impermissible for a prosecutor to urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. See Guthrie[v. State], 616 So. 2d [914] at 931-32 [(Ala. Crim. App. 1993)] (holding that a prosecutor's statement that '"[w]hen I first became involved in this case, from the very day, the State of Alabama, the law enforcement agencies and everybody agreed that this was a death penalty case, and we still stand on that position"' improperly '[led] the jury to believe that the whole governmental establishment had already determined that the sentence should be death and [invited] the jury to adopt the conclusion of

> others, ostensibly more qualified to make the determination, rather than deciding on its own').
>
> "When the prosecutor's comments are viewed in context, it is clear that he was properly arguing in favor of a sentence of death and properly reminding the jury of the gravity of its penalty-phase role. For instance, in stating that, 'if this case does not call for the death penalty, what does,' the prosecutor was properly arguing that a death sentence is appropriate and appealing to the jury to do justice. See Hall, 820 So. 2d at 143. Also, the prosecutor's comment that his office does not seek a death sentence lightly was not an improper request for the jury to ignore its penalty-phase duty. Instead, this comment merely reminded the jury of the gravity of its penalty-phase decision by informing the jury that in making its penalty phase decision it has an awesome responsibility--one that the State does not lightly ask a jury to shoulder. Cf. Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000) (holding that a 'prosecutor['s] [comment to] the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision[, was] a permissible line of commentary').
>
> "Because the prosecutor's comments did not urge the jury to ignore its penalty-phase role, Vanpelt has not established that these comments were improper or that they so infected the trial with unfairness that Vanpelt was denied due process. See Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Therefore, Vanpelt has failed to show that plain error occurred and is not entitled to any relief."

74 So. 3d at 91-92.

Likewise, here, the prosecutor's comments regarding "justice" and that he did not recommend the death penalty

"lightly" were not, as Phillips contends, improper. Moreover, those comments did not so infect the trial with unfairness to deny Phillips due process. Thus, there was no error--much less plain error--and Phillips is due no relief on this claim.

B.

Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecution "improperly referred to themselves as the victims' representatives." (Phillips's brief, p. 89.) Specifically, Phillips takes issue with the following comment during the State's penalty-phase opening statement:

> "The best thing I can do right now is actually sit down because there's a lot more for us to talk about in the end. There's no reason for me to talk about that at the moment. But I tell you on behalf of the prosecutors and the family and law enforcement, we thank you for what you did yesterday."

(R. 834.)

Although Phillips correctly explains that the State did appear to represent to the jury that it spoke on behalf of the victims' family, "'[w]e have held that it is not reversible error for a prosecutor to suggest that he is speaking on behalf of the victim's family.' Burgess v. State, 723 So. 2d

742, 754 (Ala. Cr. App. 1997), aff'd, 723 So. 2d 770 (Ala. 1998). See also George v. State, 717 So. 2d 849 (Ala. Cr. App. 1997), aff'd, 717 So. 2d 858 (Ala.), cert. denied, 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 462 (1998)." Frazier, 758 So. 2d at 604. Thus, there was no error--much less plain error--and Phillips is due no relief on this claim.

C.

Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecutor "improperly denigrated Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance.'" (Phillips's brief, p. 90.)

The complained-of comment, in context, is as follows:

> "Mr. Phillips's mother got up there and said he was a good and loving father even though she had never met one of the children and the only other one she had seen was at a very, very young age. She wasn't around. She didn't know. She said he loved his kids? Well, he shot their mother right in front of them. That's what kind of father he was. His mother got up there and told you that he really is a loving and kindhearted man. Based upon the nature of this crime, you figure out whether or not you think that's true.
>
> "She got up there--and I don't pretend to know what she's feeling as well--and she begged you to

> spare his life in the nature of a recommendation of life without. I can guarantee you [Erica's mother] would have liked to have got up in front of [Phillips] when he had that gun pointed at her daughter and unborn grandchild and said the same thing to him, but she didn't get that chance. They're asking for mercy. I ask you to give him as much mercy as [he] showed Erica and Baby Doe."

(R. 877-78.)

Contrary to Phillips's assertion on appeal, the prosecutor's comment, when viewed in context, did not "denigrate[] Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance'" (Phillips's brief, p. 90); rather, it was nothing more than an argument that Phillips's mitigation evidence and plea for mercy should be given no weight and that the jury should sentence Phillips to death.

We have explained that

> "'"[a] prosecutor may present an argument to the jury regarding the appropriate weight to afford the mitigating factors offered by the defendant."' Vanpelt v. State, 74 So. 3d 32, 90 (Ala. Crim. App. 2009) (quoting Malicoat v. Mullin, 426 F.3d 1241, 1257 (10th Cir. 2005)). That is, 'the prosecutor, as an advocate, may argue to the jury that it should give the defendant's mitigating evidence little or no weight.' Mitchell [v. State], 84 So. 3d [968]at 1001 [(Ala. Crim. App. 2010)]. See also State v. Storey, 40 S.W.3d 898, 910-11 (Mo. 2001) (holding

> that no error resulted from the prosecutor's characterization of mitigation as excuses because the 'State is not required to agree with the defendant that the evidence offered during the penalty phase is sufficiently mitigating to preclude imposition of the death sentence[, and] the State is free to argue that the evidence is not mitigating at all')."

McCray, 88 So. 3d at 49. Thus, no error occurred, and Phillips is not entitled to relief on this claim.

D.

Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecutor misstated both the law and the facts in this case. Specifically, Phillips argues that the prosecutor "misstated the law and attempted to shift the burden of proof ... by arguing that the defense was 'trying to establish' extreme mental or emotional disturbance as a statutory mitigating circumstance but the evidence 'didn't come close to it'" (Phillips's brief, p. 91); "misstated the law on aggravation and mitigation, telling jurors if they 'believe the mitigators ... outweigh the aggravators ... the result then becomes life without'" the possibility of parole (Phillips's brief, p. 91 (ellipses in original)); and "misrepresented the facts in evidence by telling jurors that Mr. Phillips was 'caught red-handed' and

took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell[ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).)

We first address Phillips's contention that the State engaged in misconduct by misstating the law in its penalty-phase argument. Even assuming that the State did, in fact, misstate the law during its penalty-phase argument, Phillips is not entitled to relief on his claims. Indeed, this Court has explained that no plain error occurs if a prosecutor misstates the law and, thereafter, the trial court properly advises the jury that its sentencing determination should be based on the law provided to it by the trial court and the trial court provides complete instructions to the jury as to the complained-of misstatements of law. See, e.g., Taylor v. State, 808 So. 2d 1148, 1187 (Ala. Crim. App. 2000) ("We note that the trial court properly advised the jury that the arguments of counsel were not to be considered as evidence and instructed the jury to disregard any argument not supported by the court's instructions on the law, and subsequently gave

complete instructions on the law of corroboration of an accomplice's testimony. (R. 1389-92; 1482-83.) The jury is presumed to abide by the trial court's instructions. Thus, we cannot say that the prosecutor's argument concerning corroboration 'so infected the trial with unfairness ... that the appellant was denied due process.' Jenkins v. State, 627 So. 2d 1034, 1050 (Ala. Cr. App. 1992), aff'd, 627 So. 2d 1054 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1388, 128 L. Ed. 2d 63 (1994). There is no plain error here.").

Here, the trial court instructed the jury that its sentencing "determination should be based solely on the evidence presented and the law as [it] ha[s] explained it to you." (R. 886.) Additionally, the trial court properly instructed the jury regarding the penalty-phase burden of proof as to mitigation. Specifically, the trial court instructed the jury:

> "The defendant is allowed to offer any evidence in mitigation; that is, the evidence that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without eligibility for parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence in mitigation.
>
> "....

> "If the factual existence of any evidence offered by the defendant is in dispute, the State shall have the burden of proving or disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence."

(R. 883-85.) Additionally, the trial court properly instructed the jury regarding the weighing of aggravating and mitigating circumstances as follows:

> "The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable doubt; and if so, whether the aggravating circumstances outweigh the mitigating circumstances."

(R. 881.) The trial court also instructed the jury as follows:

> "The process of weighing aggravating circumstances and mitigating circumstances against each other is not a mathematical process. In other words, you do not merely count the total number of aggravating circumstances and compare that to the total number of mitigating circumstances. The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might outweigh a large number of mitigating circumstances. The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might not outweigh one or even a few mitigating circumstances."

(R. 886.)

Because the trial court properly and completely instructed the jury as to burden of proof and the weighing of aggravating and mitigating circumstances, and because "[t]he jury is presumed to abide by the trial court's instructions[] ..., we cannot say that the prosecutor's argument concerning [burden of proof and the weighing of aggravating and mitigating circumstances] 'so infected the trial with unfairness ... that [Phillips] was denied due process.' Jenkins v. State, 627 So. 2d 1034, 1050 (Ala. Cr. App. 1992), aff'd, 627 So. 2d 1054 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1388, 128 L. Ed. 2d 63 (1994)." Taylor, 808 So. 2d at 1187. Thus, no plain error occurred.

Phillips also contends that the State engaged in misconduct during its penalty-phase closing argument when it "misrepresented the facts in evidence by telling jurors that Mr. Phillips was 'caught red-handed' and took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell[ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).)

This Court has explained that, "'"[d]uring closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference."' Reeves v. State, 807 So. 2d 18, 45 (Ala. Crim. App. 2000), cert. denied, Reeves v. Alabama, 534 U.S. 1026, 122 S. Ct. 558, 151 L. Ed. 2d 433 (2001), quoting Rutledge v. State, 523 So. 2d 1087, 1100 (Ala. Crim. App. 1987), reversed on other grounds, Ex parte Rutledge, 523 So. 2d 1118 (Ala. 1988)." Whatley, 146 So. 3d at 491-92.

Here, the State's argument that Phillips was "caught red-handed" and that Phillips, before he "'left the McDonald's,' went to his truck by himself and got the weapon without 'tell[ing] anybody else what he was doing,'" are legitimate inferences based on the facts presented at trial. Indeed, the State's evidence demonstrated that Billy watched Phillips shoot Erica--in other words, he was caught in the act. Further, according to Phillips's own statement, before he left the McDonald's restaurant he removed the gun from the glove compartment of Erica's vehicle and put it in his back pocket; nothing in his statement indicated that anyone saw him do so.

Thus, the State's arguments in this regard were appropriate, and no error--plain or otherwise--occurred.

With regard to the State's argument that Phillips "took 'two hours' to give a statement" (Phillips's brief, p. 92), that argument occurred during the State's penalty-phase closing argument and, in context, was as follows:

> "What about the crime? We've heard, and I guess [Phillips's counsel] acknowledges this, that there is no justification for what happened, and I submit to you there ain't no explanation either. I'll be curious to see what he says, and maybe I'll talk about that in a minute. But there is no explanation. What it was, is excuses. Got caught red-handed, and then two hours later is giving a statement. What is he doing? Trying to make himself look as good as he can. Y'all heard that statement. Did you ever hear remorse? [Phillips's counsel's] going to say he said it. I want you to ask him where it is, because I didn't hear it, and I sure didn't hear him say I'm sorry. And I never once heard him accept responsibility and say, yeah, that's what I intended to do. He just said I fired the gun. I don't know what I was doing. That ain't accepting responsibility. We already had witnesses, and we knew he did that."

(R. 866.)

Phillips contends that the prosecutor's characterization that "two hours later" Phillips gave a statement is incorrect because, he says, the evidence presented at trial established that "Mr. Phillips drove to the police department [and] <u>turned</u>

himself in within 15 minutes of the incident." (Phillips's brief, p. 92 (emphasis added).) Contrary to Phillips's argument on appeal, however, the prosecutor's argument was not a reference to how long it took Phillips to turn himself in; rather, it was a reference to how much time had elapsed between the incident and when Phillips gave his statement to Investigator Turner. Examining the prosecutor's comment through the lens of what he was referencing--that is, the time that had elapsed between the incident and the statement--it appears that the comment may have indeed been incorrect.

Here, the evidence presented at trial did not affirmatively establish the time of day that Erica was shot by Phillips; rather, the evidence established that Phillips, Erica, and Billy drove to the car wash after they ate lunch and that Phillips shot Erica sometime after arriving at the car wash. The evidence presented at trial did, however, establish that Investigator Ware received a telephone call about the shooting at 2:06 p.m. (R. 579) and that Phillips gave his statement to Investigator Turner at 3:06 p.m. (C. 160.)

Although it appears that the prosecutor's argument may have been incorrect, given the uncertainty of when the incident occurred, we cannot say that the prosecutor's comment was improper. In other words, we cannot say that, examining the complained-of argument in the context of the proceedings, "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" See Belisle, supra. Indeed, it was undisputed that Phillips turned himself in to law enforcement shortly after the shooting had occurred and that Phillips gave a statement to Investigator Turner in which he confessed to shooting Erica.

Moreover, the prosecutor's argument, when viewed in context, was not an attempt to argue to the jury that it should impose the death penalty because Phillips took two hours to make a statement; rather, the prosecutor was arguing that the jury should disregard Phillips's "cooperation" with law enforcement because Phillips showed no remorse in his statement. Thus, Phillips is not entitled to relief on this claim.

X.

Phillips contends that "the application of the 'two or more persons' capital offense and aggravating circumstance to [him] for shooting [Erica] fails to 'genuinely narrow' the class of death-eligible offenses." (Phillips's brief, p. 65.) Specifically, Phillips argues that he "was eligible for the death penalty and sentenced to death solely because the jury found that he intentionally shot his wife who was six to eight weeks pregnant" and that applying the "'two or more persons' capital offense and aggravating circumstance to [him] because he intentionally killed <u>one individual</u> in the early stages of pregnancy fails to 'genuinely narrow the class of persons eligible for the death penalty'" because, he says, the "intentional killing of a <u>single individual</u>, without any other aggravating circumstance, is broader than any of the aggravating circumstances previously created by the legislature and approved by this Court." (Phillips's brief, pp. 65-66 (emphasis added).) Additionally, Phillips argues that he

> "is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy. The rarity of such sentences indicates that this is not the type of

> offense that society's evolving standards of decency permit to be punished with death."

(Phillips's brief, p. 66-67.) Because Phillips did not raise these arguments in the trial court, we review his claims for plain error only. See Rule 45A, Ala. R. App. P.

It is well settled that, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983); cf. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). "[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses ... so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." Id. at 246.

Although it is not clear, it appears that Phillips's argument is premised on his belief that his death sentence was imposed based on an aggravating circumstance that does not exist--namely, "intentionally kill[ing] one individual in the early stages of pregnancy." (Phillips's brief, p. 66 (emphasis added).) As explained above, however, Phillips's death sentence was based on the statutory aggravating circumstance of causing the death of two persons--Erica and Baby Doe--"by one act or pursuant to one scheme or course of conduct." See § 13A-5-49(9), Ala. Code 1975.

Although Phillips correctly explains that one of the persons he killed was an unborn child, as explained in Part I of this opinion, an unborn child is a "person" who, "regardless of viability," can be a "victim of a criminal homicide," see § 13A-6-1(a)(3), Ala. Code 1975, and is, therefore, also a "person" under the capital-murder statute. Thus, contrary to Phillips's assertion, his death sentence was imposed under the statutory aggravating circumstance of causing "the death of two or more persons by one act or pursuant to one scheme or course of conduct," see § 13A-5-49(9), Ala. Code 1975, which aggravating circumstance the jury

unanimously found to exist beyond a reasonable doubt. Thus, Phillips is not entitled to relief on this claim.

Additionally, Phillips argues that he "is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy," which, he says, demonstrates "that this is not the type of offense that society's evolving standards of decency permit to be punished with death." (Phillips's brief, pp. 66-67.) This claim is without merit.

Although Phillips's assertion that he is the only person on death row for intentionally killing a pregnant woman may be correct,[14] as stated above, Phillips's death sentence was imposed not because he intentionally killed a pregnant woman, but because he killed two people pursuant to one act. Even if a death sentence for killing a pregnant woman is rare, a death sentence for killing two or more persons pursuant to one act is not. See, e.g., Stephens, 982 So. 2d at 1147-48, rev'd on

[14]Because Phillips's claim is premised on his mistaken belief that his death sentence was imposed for killing "one individual," the accuracy of this statement need not be addressed.

other grounds, Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). See also Shaw, ___ So. 3d at ___; Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007). Thus, Phillips is not entitled to relief on this claim.

XI.

Phillips contends that "the jury considered non-statutory aggravation in sentencing [him] to death" (Phillips's brief, p. 67) because, he says, the trial court "failed to instruct the jury that it 'may not consider any aggravating circumstances other than the [two or more persons] aggravating circumstance[] on which I have instructed you.'" (Phillips's brief, p. 68.) Additionally, Phillips contends that the State "exacerbated this error by arguing non-statutory aggravation to the jury during closing arguments, including that the jury should sentence ... Phillips to death to help deter crime and to protect domestic violence victims." (Phillips's brief, p. 68.)

Phillips did not object to the trial court's penalty-phase instructions or to the State's comments during its penalty-phase closing argument; consequently, we review

Phillips's argument for plain error. See Rule 45A, Ala. R. App. P.

First, with regard to the trial court's instruction on aggravating circumstances, although Phillips correctly explains that the trial court "failed to instruct the jury that it 'may not consider any aggravating circumstances other than the [two or more persons] aggravating circumstance[] on which I have instructed you,'" the trial court's instruction on aggravating circumstances was not improper. Moreover, that instruction did not allow the jury to consider nonstatutory aggravating circumstances.

Specifically, during its penalty-phase instructions the trial court explained to the jury the following:

> "An aggravating circumstance is a circumstance specified by law that indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment with parole. The issue at this sentencing hearing considers the existence of aggravating and mitigating circumstances which you should weigh against each other to determine the punishment that you recommend.
>
> "Your verdict recommending a sentence should be based upon the evidence that you have heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these

> proceedings. The trial judge must consider your verdict recommending a sentence in making a final decision regarding the defendant's sentence. In other words, I will consider your recommendation in making my final sentence that I will have to impose.
>
> "The defendant has been convicted of capital murder, namely, the murder of two or more persons by one act or pursuant to one scheme or course of conduct. This offense necessarily includes as an element the following aggravating circumstance as proved by the law of this State. The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.
>
> "By law, your verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting, by law, you to consider death as an available punishment. This aggravating circumstance therefore should be considered by you in deciding whether to recommend a sentence of life imprisonment without eligibility for parole or death."

(R. 881-82.) Thereafter, the trial court instructed the jury on statutory and nonstatutory mitigating circumstances.

The trial court's instruction on aggravating circumstances, when viewed in its entirety, properly conveyed to the jury that aggravating circumstances are "specified by law" and that they jury had only one aggravating circumstance to consider when arriving at its sentencing recommendation.

Additionally, this instruction "would not have led to any confusion by the jury as was the case in Ex parte Stewart, 659 So. 2d [122] at 125-26 [(Ala. 1993)], where the Alabama Supreme Court pointed out numerous comments by the trial court referencing other aggravating circumstances for the jury's consideration. Cf. George v. State, 717 So. 2d 849, 855-56 (Ala. Crim. App. 1997) ... (holding that by itself the instruction did not pose any potential confusion to the jury as was the case in Ex parte Stewart)." Johnson v. State, 120 So. 3d 1130, 1186 (Ala. Crim. App. 2009). Thus, no error--plain or otherwise--occurred.

Moreover, Phillips's argument that the State "exacerbated this error by arguing non-statutory aggravation to the jury during closing arguments, including that the jury should sentence ... Phillips to death to help deter crime and to protect domestic violence victims" (Phillips's brief, p. 68), is without merit. Indeed, we have recognized that such an argument does not impermissibly urge the jury to consider a nonstatutory aggravating circumstance. Specifically, we have explained:

> "The Alabama Supreme Court has stated: '[U]rging the jury to render a verdict in such a manner as to

> punish the crime, protect the public from similar offenses, and deter others from committing similar offenses is not improper argument.' Ex parte Walker, 972 So. 2d 737, 747 (Ala. 2007), quoting Sockwell v. State, 675 So. 2d 4, 36 (Ala. Crim. App. 1993). We are bound by precedent established by the Alabama Supreme Court and find no error in the prosecution's comment."

Woodward v. State, 123 So. 3d 989, 1047 (Ala. Crim. App. 2011). Thus, no error--plain or otherwise--occurred.

XII.

Phillips contends that the "jury was incorrectly informed that its penalty phase verdict was merely a recommendation" in violation of Darden v. Wainwright, 477 U.S. 168 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); and Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004). (Phillips's brief, p., 95.) Specifically, Phillips argues:

> "In the present case, the prosecutor emphasized in closing argument that the jury's verdict was simply a recommendation and that jurors were not 'the executioner.' (See R. 857; see also R. 831, 860-62, 867, 878.) In addition, the trial court repeatedly informed the jury that its verdict was merely advisory or referred to it as a recommendation. (See R. 880, 881, 882, 886, 887, 888, 889.) These comments by the prosecutor and trial court were erroneous, as they 'misle[]d the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'"

(Phillips's brief, p. 95 (some citations omitted).) Phillips neither objected to the State's comments during its opening statement or closing argument, nor did he object to the trial court's penalty-phase instructions. Thus, we review this claim only for plain error. See Rule 45A, Ala. R. App. P.

Although Phillips correctly recognizes that both the State and the trial court informed the jury that its penalty-phase verdict was a "recommendation," this Court has consistently held that informing a jury that its penalty-phase role is "advisory" or to provide a "recommendation" is not error.

> "In Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011), this Court wrote:
>
> > "'First, the circuit court did not misinform the jury that its penalty phase verdict is a recommendation. Under § 13A-5-46, Ala. Code 1975, the jury's role in the penalty phase of a capital case is to render an advisory verdict recommending a sentence to the circuit judge. It is the circuit judge who ultimately decides the capital defendant's sentence, and, "[w]hile the jury's recommendation concerning sentencing shall be given consideration, it is not binding upon the courts." § 13A-5-47, Ala. Code 1975. Accordingly, the circuit court did not misinform the jury regarding its role in the penalty phase.

> "'Further, Alabama courts have repeatedly held that "the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation' and that the trial court would make the final decision as to sentence does not violate Caldwell v. Mississippi[, 472 U.S. 320 (1985)]." Kuenzel v. State, 577 So. 2d 474, 502 (Ala. Crim. App. 1990) (quoting Martin v. State, 548 So. 2d 488, 494 (Ala. Crim. App. 1988)). See also Ex parte Hays, 518 So. 2d 768, 777 (Ala. 1986); White v. State, 587 So. 2d 1236 (Ala. Crim. App. 1991); Williams v. State, 601 So. 2d 1062, 1082 (Ala. Crim. App. 1991); Deardorff v. State, 6 So. 3d 1205, 1233 (Ala. Crim. App. 2004); Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007). Such comments, without more, do not minimize the jury's role and responsibility in sentencing and do not violate the United States Supreme Court's holding in Caldwell. Therefore, the circuit court did not err by informing the jury that its penalty-phase verdict was a recommendation.'

"96 So. 3d at 210. Because '"[t]he prosecutor's comments and the trial court's instructions 'accurately informed the jury of its sentencing authority and in no way minimized the jury's role and responsibility in sentencing,'"' Hagood v. State, 777 So. 2d 162, 203 (Ala. Crim. App. 1998) (quoting Weaver v. State, 678 So. 2d 260, 283 (Ala. Crim. App. 1995)), aff'd in part, rev'd in part on unrelated grounds, Ex parte Hagood, 777 So. 2d 214 (Ala. 1999), Riley is not entitled to any relief as to this claim."

Riley v. State, 166 So. 3d 705, 764-65 (Ala. Crim. App. 2013). Thus, neither the State nor the trial court misinformed the jury when explaining that its penalty-phase verdict was a recommendation.

Additionally, the State's comment during its penalty-phase opening statements that the jury was not "the executioner" was not a comment that "minimize[d] the jury's role and responsibility in sentencing and [did] not violate the United States Supreme Court's holding in Caldwell." See Riley, 166 So. 3d at 765. We addressed a similar comment in Taylor v. State, 666 So. 2d 36 (Ala. Crim. App. 1994), as follows:

> "We condemn the prosecutor's comment during his opening remarks at the penalty phase that the jury should not 'personally feel like that [they are] making a decision on someone's life' because that particular comment tends to encourage irresponsibility on the part of the jury in reaching its sentencing recommendation. However, the condemnation in Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), is that 'it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.' 472 U.S. at 328-29, 105 S. Ct. at 2639. We fully support that principle, yet under Alabama law, the trial judge--not the jury--is the 'sentencer.' '[W]e reaffirm the principle that, in Alabama, the "judge, and not the

> jury, is the final sentencing authority in criminal proceedings." Ex parte Hays, 518 So. 2d 768, 774 (Ala. 1986); Beck v. State, 396 So. 2d [645] at 659 [(Ala. 1980)]; Jacobs v. State, 361 So. 2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979).' Ex parte Giles, 632 So. 2d 577, 583 (Ala. 1993), cert. denied, 512 U.S. 1213, 114 S. Ct. 2694, 129 L. Ed. 2d 825 (1994). 'The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only.' Bush v. State, 431 So. 2d 555, 559 (Ala. Crim. App. 1982), aff'd, 431 So. 2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983). See also Sockwell v. State, [675] So. 2d [4] (Ala. Cr. App. 1993). 'We have previously held that the trial court does not diminish the jury's role or commit error when it states during the jury charge in the penalty phase of a death case that the jury's verdict is a recommendation or an "advisory verdict." White v. State, 587 So. 2d 1218 (Ala. Cr. App. 1990), aff'd, 587 So. 2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S. Ct. 979, 117 L. Ed. 2d 142 (1992).' Burton v. State, 651 So. 2d 641 (Ala. Cr. App. 1993).
>
> "Considering the prosecutor's statements in the context of the entire trial, in the context in which those statements were made, and in connection with the other statements of the prosecutor and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard."

Taylor, 666 So. 2d at 50-51 (footnote omitted).

Likewise, here, examining the State's comment in this case "in the context of the entire trial, in the context in which [that] statement[] [was] made, and in connection with

the other statements of the [State] and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard." Id. at 51. Thus, Phillips is not entitled to relief on this claim.

XIII.

Phillips contends that "double-counting murder of 'two or more persons' at both the guilt phase and the penalty phase violated state and federal law." (Phillips's brief, p. 96.) Phillips's claim has been consistently rejected by both this Court and the Alabama Supreme Court.

Specifically, in Ex parte Windsor, 683 So. 2d 1042 (Ala. 1996), the Alabama Supreme Court explained:

> "'The practice of permitting the use of an element of the underlying crime as an aggravating circumstance is referred to as "double-counting" or "overlap" and is constitutionally permissible. Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); Ritter v. Thigpen, 828 F.2d 662 (11th Cir. 1987); Ex parte Ford, 515 So. 2d 48 (Ala. 1987), cert. denied, 484 U.S. 1079, 108 S. Ct. 1061, 98 L. Ed. 2d 1023 (1988); Kuenzel v. State, 577 So. 2d 474 (Ala. Cr. App.), aff'd, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991).

> "'Moreover, our statutes allow "double-counting" or "overlap" and provide that the jury, by its verdict of guilty of the capital offense, finds the aggravating circumstance encompassed in the indictment to exist beyond a reasonable doubt. See §§ 13A-5-45(e) and -50. "The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence." § 13A-5-50.'

"Coral v. State, 628 So. 2d 954, 965-66 (Ala. Cr. App. 1992). See also Burton v. State, 651 So. 2d 641 (Ala. Cr. App. 1993). The trial court correctly considered the robbery as an aggravating circumstance."

683 So. 2d at 1060. See also Ex parte Woodard, 631 So. 2d 1065, 1069-70 (Ala. 1993); Ex parte Trawick, 698 So. 2d at 178; Shanklin, ___ So. 3d at ___; McCray, 88 So. 3d at 74; McMillan v. State, 139 So. 3d 184, 265-66 (Ala. Crim. App. 2010); Reynolds v. State, 114 So. 3d 61, 157 (Ala. Crim. App. 2010); Morris v. State, 60 So. 3d 326, 380 (Ala. Crim. App. 2010); Vanpelt, 74 So. 3d at 89; Newton v. State, 78 So. 3d 458 (Ala. Crim. App. 2009); Brown v. State, 11 So. 3d 866, 929 (Ala. Crim. App. 2007); Mashburn v. State, 7 So. 3d 453 (Ala. Crim. App. 2007); Harris, 2 So. 3d at 926-27; Jones v. State,

946 So. 2d 903, 928 (Ala. Crim. App. 2006); Barber v. State, 952 So. 2d 393, 458-59 (Ala. Crim. App. 2005); and McGowan v. State, 990 So. 2d 931, 996 (Ala. Crim. App. 2003). Because "double-counting" is constitutionally permitted and statutorily required, Phillips is not entitled to relief on this claim. See § 13A-5-45(e), Ala. Code 1975.

Additionally, to the extent that Phillips argues that "double-counting" fails "to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty," that claim has also been consistently rejected. See, e.g., McMillan, 139 So. 3d at 266 ("Although McMillan argues that the use of robbery as an aggravating circumstance at sentencing and as aggravation at the guilt phase resulted in the arbitrary imposition of the death penalty because it failed to narrow the class of cases eligible for the death penalty, this issue has also been determined adversely to McMillan."); and McGowan, 990 So. 2d at 996 (finding that the argument that "double-counting fail[s] to narrow the class of cases eligible for the death penalty" has "been repeatedly rejected" and citing Lee v. State, 898 So. 2d 790, 871-72 (Ala. Crim. App. 2003); Smith v.

State, 838 So. 2d 413, 469 (Ala. Crim. App.), cert. denied, 537 U.S. 1090 (2002); Broadnax v. State, 825 So. 2d 134, 208-09 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964 (2002); Ferguson v. State, 814 So. 2d 925, 956-57 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001), cert. denied, 535 U.S. 907 (2002); Taylor, 808 So. 2d at 1199, aff'd, 808 So. 2d 1215 (Ala. 2001); Jackson v. State, 836 So. 2d 915, 958-59 (Ala. Crim. App. 1999), remanded on other grounds, 836 So. 2d 973 (Ala. 2001), aff'd, 836 So. 2d 979 (Ala. 2002); and Maples v. State, 758 So. 2d 1, 70-71 (Ala. Crim. App. 1999), aff'd, 758 So. 2d 81 (Ala. 1999)). Accordingly, Phillips is not entitled to relief on this claim.

XIV.

Phillips contends that his death sentence "violates state and federal law" because, he says, "it is grossly disproportionate in comparison to similar cases involving murders of pregnant women." (Phillips's brief, p. 97.) To support his position, Phillips cites Taylor v. State, 574 So. 2d 885 (Ala. Crim. App. 1990); Sanders v. State, 426 So. 2d 497 (Ala. Crim. App. 1982); Shorts v. State, 412 So. 2d 830

(Ala. Crim. App. 1981); and Woods v. State, 346 So. 2d 9 (Ala. Crim. App. 1977).

Although Phillips correctly recognizes that, in Taylor, Sanders, Shorts, and Woods, the "murders of pregnant women" did not result in the imposition of the death penalty, those cases predate the 2006 amendment to § 13A-6-1, Ala. Code 1975.[15] As explained in Part I of this opinion, § 13A-6-1(a)(3), Ala. Code 1975, defines the word "person" for the purpose of determining the "victim[s] of a criminal homicide" to mean a "human being including an unborn child in utero at any stage of development, regardless of viability." See § 13A-6-1(a)(3), Ala. Code 1975.

Thus, contrary to Phillips's position, it is not the "murder of a pregnant woman" that subjects him to the imposition of the death penalty; rather, it is the murder of "two or more persons" that subjects him to the death penalty. See § 13A-5-49(9), Ala. Code 1975. Sentences of death have been imposed for similar crimes in Alabama, and, therefore,

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[15]"Before its amendment in 2006, this article defined the term 'person' as 'a human being who had been born and was alive at the time of the homicidal act.' § 13A-6-1(2), Ala. Code 1975." Mack v. Carmack, 79 So. 3d 597, 600 (Ala. 2011).

his sentence is not "grossly disproportionate" in comparison to similar cases. Indeed, this Court has recognized:

> "Similar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So. 2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So. 2d 1148 (Ala. Crim. App.), opinion on return to remand 913 So. 2d 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So. 2d 841 (Ala. Crim. App. 2000), aff'd, 809 So. 2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S. Ct. 824, 151 L. Ed. 2d 706 (2002) (five deaths); Samra v. State, 771 So. 2d 1108 (Ala. Crim. App. 1999), aff'd, 771 So. 2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S. Ct. 317, 148 L. Ed. 2d 255 (2000) (four deaths); Williams v. State, 710 So. 2d 1276 (Ala. Crim. App.), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S. Ct. 2325, 141 L. Ed. 2d 699 (1998) (four deaths); Taylor v. State, 666 So. 2d 36 (Ala. Crim. App.), on remand, 666 So. 2d 71 (Ala. Crim. App. 1994), aff'd, 666 So. 2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S. Ct. 928, 133 L. Ed. 2d 856 (1996) (two deaths); Siebert v. State, 555 So. 2d 772 (Ala. Crim. App.), aff'd, 555 So. 2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3297, 111 L. Ed. 2d 806 (1990) (three deaths); Holladay v. State, 549 So. 2d 122 (Ala. Crim. App. 1988), aff'd, 549 So. 2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S. Ct. 575, 107 L. Ed. 2d 569 (1989) (three deaths); Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988), aff'd, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L. Ed. 2d 300 (1990) (four deaths); Hill v. State, 455 So. 2d 930 (Ala. Crim. App.), aff'd, 455 So. 2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984) (three deaths)."

Stephens, 982 So. 2d at 1147-48, rev'd on other grounds, Ex parte Stephens 982 So. 2d 1148 (Ala. 2006). See also Reynolds

v. State, 114 So. 3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007). Accordingly, Phillips is due no relief on this claim.

XV.

Phillips contends that "evolving standards of decency have rendered unconstitutional Alabama's method of execution under state and federal law." (Phillips's brief, p. 99.) The totality of Phillips's argument on appeal is as follows:

> "Although the Supreme Court in Baze[v. Rees, 553 U.S. 35, 51-53 (2008)], on the record in that case, upheld Kentucky's lethal injection protocol, Alabama's protocol is not 'substantially similar' to Kentucky's. Id. at 61. Instead, Alabama's unreported and undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain and therefore violate evolving standards of decency. See Arthur v. Thomas, 674 F.3d 1257 (11th Cir. 2012). Mr. Phillips's death sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution."

(Phillips's brief, pp. 99-100 (footnote omitted).) This Court recently rejected an identical argument in Shanklin, ___ So. 3d at ___.

In Shanklin, Shanklin argued that,

> "'[a]lthough the Supreme Court upheld Kentucky's lethal injection protocol in Baze[v. Rees, 553 U.S. 35, 51-53 (2008),] based on the record in that case, Alabama's

> protocol is not "substantially similar" to Kentucky's. Id. at 1537. Alabama's undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain and violate evolving standards of decency.'

"(Shanklin's brief, p. 45.) This claim, however, has been decided adversely to Shanklin.

"In Gobble v. State, 104 So. 3d 920 (Ala. Crim. App. 2010), this Court explained:

> "'Alabama's method of performing lethal injection, a three-drug protocol, is substantially similar to the one considered by the United States Supreme Court in Baze v. Rees.
>
> "'The Alabama Supreme Court in Ex parte Belisle, 11 So. 3d 323 (Ala. 2008), held that Alabama's method of performing lethal injection does not constitute cruel and unusual punishment. The Court stated:
>
> > "'"The Eighth Amendment to the United States Constitution provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,--something more than the mere extinguishment of life.' In re Kemmler, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519

(1890). However, as the Supreme Court of the United States recently stated in Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008):

> "'"'Our cases recognize that subjecting individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." Helling v. McKinney, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless

> for purposes of the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).'

"'"553 U.S. at 49-50, 128 S. Ct. at 1530-31.

"'"In Baze, two death-row inmates challenged Kentucky's use of the three-drug protocol, arguing 'that there is a significant risk that the procedures will not be properly followed--in particular, that the sodium thiopental will not be properly administered to achieve its intended effect--resulting in severe pain when the other chemicals are administered.' 553 U.S. at 49, 128 S. Ct. at 1530. Belisle's claim, like the claims made by the inmates in Baze, 'hinges on the improper administration of the first drug, sodium thiopental.' Baze, 553 U.S. at 53, 128 S. Ct. at 1533.

"'"The Supreme Court upheld the constitutionality of Kentucky's method of execution, Baze, 553 U.S. at 62-64, 128 S. Ct. at 1538, and noted that '[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.' Baze, 553 U.S. at 61, 128 S. Ct. at 1537.

Justice Ginsburg and Justice Souter dissented from the main opinion, arguing that 'Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs.' Baze, 553 U.S. at 114, 128 S. Ct. at 1567 (Ginsburg, J., dissenting). The dissenting Justices recognized, however, that Alabama's procedures, along with procedures used in Missouri, California, and Indiana 'provide a degree of assurance--missing from Kentucky's protocol--that the first drug had been properly administered.' Baze, 553 U.S. at 121, 128 S. Ct. at 1571 (Ginsburg, J., dissenting).

"'"The State argues, and we agree, that Belisle, like the inmates in Baze, cannot meet his burden of demonstrating that Alabama's lethal-injection protocol poses a substantial risk of harm by asserting the mere possibility that something may go wrong. 'Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.' Baze, 553 U.S. at 50, 128 S. Ct. at 1531. Thus, we conclude that Alabama's use of lethal injection as a method of execution does not violate the

> Eighth Amendment to the United States Constitution."
>
> "'11 So. 3d at 338-39. Alabama's method of performing lethal injection is not cruel and unusual.'
>
> "104 So. 3d at 977-79."

Shanklin, ___ So. 3d at ___. Thus, Phillips is not entitled to relief on this claim.

Moreover, Phillips's argument on appeal consists of only a bare allegation that "Alabama's unreported and undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain." (Phillips's brief, pp. 99-100.) Thus,

> "[Phillips's] argument fails to take into account the fact that he bears the burden to establish that the State's method of execution constitutes cruel and unusual punishment. See Harris v. Wright, 93 F.3d 581, 583 (9th Cir. 1996) (recognizing that the appellant bears a heavy burden to establish that his sentence is cruel and unusual); cf. United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006) (explaining that the appellant bears the burden to establish that his sentence in disproportionate); Cole v. State, 721 So. 2d 255, 260 (Ala. Crim. App. 1998) (recognizing that the appellant has the burden to establish that a State statute is unconstitutional); Holmes v. Concord Fire Dist., 625 So. 2d 811, 812 (Ala. Civ. App. 1993) ('The party mounting a constitutional challenge to a statute bears the burden of overcoming a presumption of constitutionality.'). Because [Phillips] bears the burden to establish that lethal injection is

> unconstitutional and because he has failed to argue why lethal injection is unconstitutional, his argument is without merit.
>
> "Moreover, this Court, in Saunders v. State, held that 'lethal injection does not constitute per se cruel and unusual punishment. See e.g., McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007), and cases cited therein.' 10 So. 3d 53, 111 (Ala. Crim. App. 2007). Further, both the Supreme Court of the United States and the Alabama Supreme Court have held that lethal injection does not constitute cruel and unusual punishment. Glossip v. Gross, [No. 14-7955, June 29, 2015] ___ U.S. ___, ___ (2015) (holding that lethal injection does not violate the Eighth Amendment); Baze v. Rees, 553 U.S. 35, 54-56, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (holding that lethal injection does not violate the Eighth Amendment); Ex parte Belisle, 11 So. 3d 323, 339 (Ala. 2008) (holding that lethal injection is not unconstitutional). [Phillips] has not offered this Court any basis upon which to hold that lethal injection is unconstitutional."

Carroll v. State, [Ms. CR-12-0599, Aug. 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). Accordingly, Phillips is due no relief on this claim.

Trial Court's Sentencing Order

XVI.

Phillips, in his brief on appeal, contends that the trial court's sentencing order is deficient in several respects. Specifically, Phillips contends that the trial court (1) improperly required a "causal connection between the

mitigating circumstances and the offense" (Phillips's brief, p. 54); (2) "repeatedly made erroneous findings of fact" (Phillips's brief, p. 57); (3) "refus[ed] to find and consider uncontested mitigating circumstances surrounding the offense" (Phillips's brief, p. 58); (4) failed "to make specific findings regarding each statutory aggravating and mitigating circumstance" (Phillips's brief, p. 61); (5) "erroneously based [Phillips's] death sentence on a finding that the mitigating circumstances failed to outweigh the aggravating circumstances" (Phillips's brief, p. 63); and (6) "considered non-statutory aggravation in sentencing [him] to death." (Phillips's brief, p. 67.) Phillips did not first raise these objections in the trial court; thus, we review these claims for plain error only. See Rule 45A, Ala. R. App. P.

After examining the trial court's sentencing order and Phillips's specific allegations on appeal, we are of the opinion that none of the complained-of deficiencies rise to the level of plain error. We do, however, find that the trial court's sentencing order is flawed in one respect.

Specifically, the trial court's sentencing order does not comply with § 13A-5-47(d), Ala. Code 1975, which provides, in relevant part:

> "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52."

(Emphasis added.)

Although Phillips correctly argues that the trial court failed "to make specific findings regarding each statutory aggravating and mitigating circumstance" (Phillips's brief, p. 61), a trial court is not required to do so. See Scott v. State, 937 So. 2d 1065, 1087 (Ala. Crim. App. 2005) ("[T]he trial court need not list and make findings as to each item of alleged nonstatutory mitigation evidence offered by a defendant[.] Reeves v. State, 807 So. 2d 18, 48 (Ala. Crim. App. 2000)."). See also Morrow v. State, 928 So. 2d 315, 326-27 (Ala. Crim. App. 2004). The trial court is required, however, under § 13A-5-47(d), "to 'enter specific written findings concerning the existence or nonexistence of' the

statutory and nonstatutory mitigating circumstances contributing to the trial court's determination of the sentence." Ex parte Mitchell, 84 So. 3d 1013, 1015 (Ala. Crim. App. 2011). When a trial court's sentencing order does not clearly articulate the existence or nonexistence of the aggravating and mitigating circumstances, this Court cannot properly perform its duty under § 13A-5-53(b), Ala. Code 1975.

> "As this Court stated in Roberts v. State, 735 So. 2d 1244 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala. 1999):
>
> > "'In capital cases, it is the duty of this court to independently determine whether the sentence of death is appropriate in a particular case. In order to reach this conclusion, we must reweigh the aggravating circumstances and the mitigating circumstances as found by the trial court.'
>
> "735 So. 2d at 1269 (emphasis added). See also Guthrie v. State, 689 So. 2d 935 (Ala. Crim. App. 1996), aff'd, 689 So. 2d 951 (Ala. 1997)."

Morrow, 928 So. 2d at 326-27. Thus, "in order for this Court to conduct its review of the death sentence, the trial court must specifically identify in its sentencing order those [statutory and] nonstatutory mitigating circumstances that it did find to exist." Id.

Here, the trial court's sentencing order addressed the aggravating and mitigating circumstances as follows:[16]

"Aggravating Factors:

"1. CAPITAL MURDER. Intentionally causing the death of Erica Carmen Phillips by shooting her with a pistol, and did intentionally cause the death of Baby Doe, by shooting Erica Carmen Phillips with a pistol while said Erica Carmen Phillips was pregnant with Baby Doe, in violation of Section 13A-5-40(a)(10) of the Code of Alabama 1975.

"This aggravating factor was proven by overwhelming evidence. The Court found this beyond a reasonable doubt to be proven.

"The Court further finds that the policy of this State has recognized an unborn baby to be a life worthy of respect and protection. The founding fathers of this nation recognize all life as worthy of respect and due process of law.

"Jesse Phillips has been provided by the State of Alabama due process of law by Miranda warnings, criminal procedure, criminal evidence laws, criminal sentencing guidelines and numerous statutes and outstanding legal representation at all critical stages of this trial.

"The only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court at all stages of this case.

"Mitigating Factors:

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[16]Although the indictment in this case identifies Phillips as "Jessie Livell Phillips" (see C. 24 (emphasis added)), the trial court refers to Phillips as "Jesse Phillips" throughout its sentencing order.

"1. Jesse Phillips had no significant criminal history. The State did not put on any evidence before the jury or the Court about this factor. Jesse Phillips did have misdemeanor and traffic cases reported in Officer Colvin's report, but these would not be legally admissible in this case. Ala. Code Section 13A-5-51(1).

"2. Jesse Phillips was laboring with emotional disturbance. The only evidence on this issue came from Jesse Phillips'[s] confession to the Guntersville police that he killed Erica 'because he lost it,' that Erica belittled him and at times called him racial names. This evidence was before the jury and the jury gave it what value it may have held. The Court notes that none of the name calling would prove persuasive as to prove extreme or mental disturbance as required by law. Ala. Code Section 13A-5-51(2).

"3. Jesse Phillips lived his early life in a culture of violence, horrible drug addiction of his mother and as a result was removed from his mother by the Alabama Department of Human Resources (DHR). The jury heard this evidence as gave it what weight they desired. This Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result as a factor from a bad childhood.

"4. Jesse Phillips['s] value as a person. Jesse Phillips helped his drug-addicted mother overcome her drug addiction. This is admirable, but not a mitigating factor that negates the actions he took in this case. There is a possibility he might help other inmates in prison with addiction problems as argued by [his counsel], but that still does not balance out against the crime proven here. That Jesse Phillips also has shown love for his children is a noted factor, but he also murdered their mother

> and unborn sibling while these children were present.
>
> "5. Mercy as a factor. Although not expressly covered by this statute, there is always an issue as to mercy since the beginning of criminal laws as transplanted to the original 13 colonies from the British Isles and Biblical doctrine. The Court and jury were able to recognize the mercy factor, and the Court notes this factor is always an issue as a non-statutory mitigating factor.
>
> "6. There were no other non-statutory mitigating factors offered or presented for the Court's consideration."

(R. 287-89.)

Although the trial court's sentencing order clearly made a specific finding that one aggravating circumstance exists and that one nonstatutory mitigating circumstance does not "negate the actions [Phillips] took in this case"--i.e., that Phillips helped his mother overcome drug addiction--the trial court's order does not clearly articulate whether the other listed mitigating circumstances were found to exist. Instead, the trial court's order indicates that Phillips presented evidence as to certain other mitigating circumstances, and the trial court determined that those circumstances were either "not admissible in this case," that the jury gave the factor whatever "value" it chose, or that the evidence was simply a

"noted factor." Thus, the trial court's order is unclear as to whether the court found the existence or nonexistence of each statutory and nonstatutory mitigating circumstance presented by Phillips. To clarify these ambiguities, we must remand this case to the trial court to enter a new sentencing order that complies with § 13A-5-47(d), Ala. Code 1975. See Stanley, 143 So. 3d at 315.

Because we must remand this case to the trial court, we also address Phillips's other sentencing-order claims in order to provide the trial court with additional guidance on remand.

Phillips first contends that the trial court's order "repeatedly made erroneous findings of fact." (Phillips's brief, p. 57.) Specifically, Phillips contends that there were three factual errors in the trial court's sentencing order: (1) that Phillips "surrendered himself to the Albertville Police Department about two hours after shooting Erica in the head and leaving the scene of the shooting" (C. 287); (2) that Billy "pleaded with [Phillips] to put down the gun" (C. 286); and (3) that, in his second statement to Investigator Turner, Phillips "stated he knew [Erica] was about three months pregnant with their third child." (C. 287.)

The State, in its brief on appeal, concedes that those statements in the sentencing order were erroneous. Specifically, the State explains:

> "The record at trial indicates that Phillips believed his wife to be approximately eight weeks pregnant; the record indicates that [Billy] tried to buy the gun from Phillips when he saw Phillips with it and that Billy was screaming and running towards them just before Phillips shot [Erica]; and, the State agrees that the record does not clearly show how much time elapsed between the shooting and Phillips surrendering to police."

(State's brief, p. 65.)

Although the above-listed findings of fact in the trial court's sentencing order were erroneous, they did not appear to have, in any way, contributed to the trial court's imposition of the death sentence; thus, those erroneous findings do not rise to the level of plain error. See, e.g., Luong v. State, [Ms. CR-08-1219, April 17, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (opinion on remand from the Alabama Supreme Court) ("It is clear after reading this portion of the circuit court's sentencing order that its reference to a nonexistent report was clearly merely a misstatement that in no way contributed to Luong's sentence of death. 'Factual errors in a sentencing order are subject to

harmless error analysis.' Merck v. State, 975 So. 2d 1054, 1066 n. 5 (Fla. 2007). We find no plain error in regard to this claim, and Luong is due no relief on this claim."). Because we must remand this case to the trial court to enter a new sentencing order in compliance with § 13A-5-47(d), however, we also instruct the trial court to correct the above-listed factual errors. See Daniel v. State, 906 So. 2d 991, 1002 (Ala. Crim. App. 2004) (after determining that the trial court's sentencing order was not in compliance with § 13A-5-47(d), this Court also instructed the trial court to correct certain factual errors in its sentencing order).

Phillips also contends that the trial court's finding that "[t]he mitigating factors do not outweigh the aggravating circumstances of killing two or more innocent persons during one course of conduct" (C. 289) was error. (Phillips's brief, p. 63.)

Section 13A-5-47(e), Ala. Code 1975, explains, in part, that, "[i]n deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." (Emphasis added.) Thus, here, the trial court's

finding that the mitigating circumstances do not outweigh the aggravating circumstances is incorrect.

This Court has held, however, that, although such a finding is "defective," it is subject to harmless-error analysis. See Melson v. State, 775 So. 2d 857 (Ala. Crim. App. 1999), aff'd, Ex parte Melson, 775 So. 2d 904 (Ala. 2000). See also Weaver v. State, 678 So. 2d 260, 283 (Ala. Crim. App. 1995), rev'd on other grounds, Ex parte Weaver, 678 So. 2d 284 (Ala. 1996). Because we must remand this case to the trial court to enter a new sentencing order in compliance with § 13A-5-47(d), however, we also instruct the trial court to correct this error and to properly weigh the aggravating circumstances and mitigating circumstances in compliance with § 13A-5-47(e), Ala. Code 1975.

Phillips next contends that the sentencing order is deficient because, he says, the trial court improperly required a "causal connection between the mitigating circumstances and the offense." (Phillips's brief, p. 54.) Specifically, Phillips argues:

> "In this case, however, the trial court rejected the mitigating circumstances of the repeated violence and neglect in Mr. Phillips's childhood, solely because Mr. Phillips had not established a causal

> relationship to the offense. Specifically, the trial court found '[t]his Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result as a factor from a bad childhood.' (C. 288.) Nowhere in the sentencing order did the trial court consider whether this powerful mitigation offered by Mr. Phillips 'might serve as a basis for a sentence less than death,' Tennard [v. Dretke], 542 U.S. [274] at 287 [(2004)]; rather, the court dismissed this evidence outright because the mitigating factors did not 'naturally result' in or cause the offense (C. 285-89)."

(Phillips's brief, p. 55.)

This Court rejected a similar claim in Stanley v. State, 143 So. 3d 230, 331-32 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court). Specifically, in Stanley, we explained:

> "Stanley argues that the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley] committed' (RTR C. 218) conflicts with Tennard v. Dretke, 542 U.S. 274, 287, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004), and Smith v. Texas, 543 U.S. 37, 45, 125 S. Ct. 400, 160 L. Ed. 2d 303 (2004). We disagree.
>
> "In Tennard, the United States Supreme Court addressed a 'threshold "screening test"' applied by the United States Court of Appeals for the Fifth Circuit to a claim alleging that a particular capital-sentencing scheme provided an inadequate vehicle to consider mitigating evidence under Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (a 'Penry claim'). Under the Fifth

Circuit's test, the court initially determined whether the particular evidence was 'constitutionally relevant'; if the evidence was not 'constitutionally relevant,' the court would not review a Penry claim. The United States Supreme Court held that the Fifth Circuit's 'screening test' was unconstitutional.[6]

"In Stanley's case, the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley] committed' is not in conflict with Tennard or Smith. The trial court's amended sentencing order makes clear that it considered all the evidence offered by Stanley, including his family circumstances, his background, and his behavior since being incarcerated. As discussed above, however, the trial court concluded that this evidence, under the particular circumstances, was not mitigating because (1) Stanley's sisters faced the same difficult family background but went on to live successful lives, and (2) as the mitigation specialist testified, many individuals come from bad family backgrounds but do not commit capital murder. (RTR C. 215.) With that context in mind--i.e., having already determined that those facts were not mitigating in Stanley's case--the trial court later noted that Stanley had not offered any 'credible evidence that any of these factors influenced the commission of the crime [Stanley] committed.' Thus, the trial court's statement, even assuming Stanley's reading of Tennard and Smith is correct, does not indicate that the trial court applied a 'relevance' test in conflict with Tennard or Smith.

"_____

"[6]Specifically, the United States Supreme Court stated:

"'Despite paying lipservice to the principles guiding issuance of a

> [certificate of appealability] ..., the Fifth Circuit's analysis proceeded along a distinctly different track. Rather than examining the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on [Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I")]:
>
> > "'"In reviewing a Penry claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury.... To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition.'" [Tennard v. Cockrell, 284 F.3d 591, 595 (5th Cir. 2002)] (quoting Davis v. Scott, 51 F.3d 457, 460-461 (C.A.5 1995)).
> >
> > "'This test for "constitutional relevance," characterized by the State at oral argument as a threshold "screening test," ... appears to be applied uniformly in the Fifth Circuit to Penry claims.... Only after the court finds that certain mitigating evidence is "constitutionally relevant" will it consider whether that evidence was within "'the "effective reach" of the jur[y].'" .... In Tennard v. Cockrell, [284 F.3d

> 591 (5th Cir. 2002),] the Fifth Circuit concluded that Tennard was "precluded from establishing a Penry claim" because his low IQ evidence bore no nexus to the crime, and so did not move on to the "effective reach" question. 284 F.3d at 597.
>
> "'The Fifth Circuit's test has no foundation in the decisions of this Court. Neither Penry I nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment.'

"542 U.S. at 283-84 (citations omitted). In Smith, the United States Supreme Court rejected a similar 'constitutional relevance' test because it 'did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to all of the evidence relevant to the defendant's culpability.' 543 U.S. at 46 (quoting Penry v. Johnson, 532 U.S. 782, 796, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001))."

Stanley, 143 So. 3d at 331-32.

Likewise, here, the trial court's finding that "Capital Murder does not naturally result as a factor from a bad childhood" is not error.

Phillips also contends that the trial court erred because, he says, the trial court "refus[ed] to find and consider uncontested mitigating circumstances surrounding the

offense." (Phillips's brief, p. 58.) This Court has previously rejected this claim.

Specifically, we have held:

> "In Thompson v. State, 153 So. 3d 84, 189 (Ala. Crim. App. 2012), this Court stated:
>
> > "'"'While Lockett [v. Ohio, 438 U.S. 586 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.'" Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996) (quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)). "The weight to be attached to the ... mitigating evidence is strictly within the discretion of the sentencing authority." Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000).
>
> > > "'"'[T]he sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. Murry v. State, 455 So. 2d 53 (Ala. Cr. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984). Therefore, the trial judge is free to consider each case individually and determine

> whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation."'

"'Bush v. State, 695 So. 2d 70, 94 (Ala. Crim. App. 1995) (quoting Clisby v. State, 456 So. 2d 99, 102 (Ala. Crim. App. 1983)). See also Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004) ("We conclude that the trial court did not abuse its discretion in giving little weight to the mitigating facts relating to [the defendant's] abusive childhood."); Hines v. State, 856 N.E.2d 1275, 1282-83 (Ind. App. 2006) ("The trial court is not obliged to weigh or credit mitigating factors the way a defendant suggests.... [or] to afford any weight to [the defendant's] childhood history as a mitigating factor in that [the defendant] never established why his past victimization led to his current behavior.").'

"(Emphasis added.)

"....

"Stanley's argument is that a trial court's failure to find a mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not consider that mitigating evidence. Stanley thus conflates the concept of considering mitigating evidence with finding that a

> mitigating circumstance actually exists in a particular case. This argument has been rejected. See, e.g., Ex parte Hart, 612 So. 2d 536, 542 (Ala. 1992) ('Lockett does not require that all evidence offered as mitigating evidence be found to be mitigating. Lockett provides that a state may not exclude evidence that the defendant claims is mitigating. This does not mean that all evidence offered by the defendant as mitigating must be found to be mitigating and considered as such in the sentencing process.' (emphasis added)); Ex parte Ferguson, 814 So. 2d 970, 976 (Ala. 2001); Ex parte Trawick, 698 So. 2d 162, 177 (Ala. 1997); Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996); Spencer, 58 So. 3d at 257."

Stanley, 143 So. 3d at 330-31. Thus, Phillips's argument that the trial court must both consider mitigating evidence and find that the evidence established a mitigating circumstance is incorrect.

Finally, Phillips contends that the trial court improperly "considered non-statutory aggravation in sentencing [him] to death." (Phillips's brief, p. 67.) Specifically, Phillips contends that,

> "[i]n the 'Aggravating Factors' section of the sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) 'an unborn baby [is] a life worthy of respect and protection' 2) '[t]he founding fathers of this nation recognize[d] all life as worthy of respect and due process of law' and 3) '[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and

> Court,' implying that the death penalty would provide 'due process' to the victims."

(Phillips's brief, p. 69.)

Here, contrary to Phillips's assertion, the trial court did not consider nonstatutory aggravating circumstances when it imposed his sentence. Rather, the trial court recognized that there was only one aggravating circumstance--murder of two or more persons by one act--and, thereafter, weighed that aggravating circumstance by commenting on the "clear legislative intent to protect even nonviable fetuses from homicidal acts," Mack, 79 So. 3d at 610, and the severity of the crime. Such commentary does not amount to the trial court's considering a nonstatutory aggravating factor. See, e.g., Scott v. State, 163 So. 3d 389, 469 (Ala. Crim. App. 2012) ("It is clear that the above comment was a reference to the severity of the murder and was not the improper application of a nonstatutory aggravating circumstance.").

Conclusion

Accordingly, we affirm Phillips's capital-murder conviction. Because, however, "we do not believe the deficiencies in the sentencing order will withstand the rigorous appellate review process," Hagood v. State, 777 So.

2d 221, 222 (Ala. Crim. App. 2000), we remand this case to the trial court for that court to enter a new sentencing order that complies with § 13A-5-47(d), Ala. Code 1975, by making "'specific written findings concerning the existence or nonexistence of' the statutory and nonstatutory mitigating circumstances and the aggravating circumstances contributing to the trial court's determination of the sentence." Ex parte Mitchell, 84 So. 3d at 1014. Additionally, on remand, the trial court should address the other issues in its sentencing order we have identified above--specifically, (1) its findings of fact and (2) the weighing of aggravating and mitigating circumstances. In correcting those deficiencies on remand, no new hearing is required, and the trial court shall take all necessary action to ensure that its new sentencing order be returned to this Court within 42 days from the date of this opinion.

AFFIRMED AS TO CONVICTION; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

Windom, P.J., concurs. Welch and Kellum, JJ., concur in the result. Burke, J., recuses.