In The Supreme Court of Florida

MARK JAMES ASAY,

Appellee

v. CASE NO. SC16-223

STATE OF FLORIDA,

Appellant.

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to the rule of appellate procedure governing notice of supplemental authority, Rule 9.225, the State provides the following supplemental authority on the Hurst issue:

Ex parte Jerry Bohannon, Case No. 1150640 (Ala. Sept 30, 2016)(rejecting a claim that Hurst requires that the jury not only determine the aggravating circumstances but also determine that the aggravating circumstance outweighs the mitigating circumstances because "Ring and Hurst requires only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty - the plain language in those cases requires nothing more and nothing less" and observing that Hurst was "an application, not an expansion, of Apprendi and Ring")

State v. Belton, 2016 WL 1592786, *8-*10 (Ohio April 20, 2016)(rejecting a claim that the defendant had a Sixth Amendment right to a jury trial under Hurst to determination of mitigating factors and weighing and affirming a death sentence imposed by a three judge panel).

Respectfully submitted,

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/s/ Charmaine Millsaps
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY has been furnished via the e-portal to Martin J. McClain, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334 this 6th day of October, 2016.

/s/ Charmaine Millsaps
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REL: 09/30/2016

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2016

1150640

Ex parte Jerry Bohannon

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Jerry Bohannon

v.

State of Alabama)

(Mobile Circuit Court, CC-11-2989 and CC-11-2990;
Court of Criminal Appeals, CR-13-0498)

STUART, Justice.

This Court granted certiorari review of the judgment of the Court of Criminal Appeals affirming Jerry Bohannon's conviction for capital murder and his sentence of death. We affirm.

Facts and Procedural History

The evidence presented at trial established the following. Around 7:30 a.m. on December 11, 2010, Jerry Bohannon, Anthony Harvey, and Jerry DuBoise were in the parking lot of the Paradise Lounge, a nightclub in Mobile. The security cameras in the parking lot recorded DuBoise and Harvey talking with Bohannon. After DuBoise and Harvey had turned and walked several feet away from him, Bohannon reached for a pistol. Apparently, when they heard Bohannon cock the hammer of the pistol, DuBoise and Harvey turned to look at Bohannon. DuBoise and Harvey then ran; Bohannon pursued them, shooting several times. DuBoise and Harvey ran around the corner of the building and when the reappeared they had guns. A gunfight ensued. Harvey was shot in the upper left chest; DuBoise was shot three times in the abdomen. The testimony indicated that, in addition to shooting DuBoise and Harvey,

Bohannon pistol-whipped them. Both DuBoise and Harvey died of injuries inflicted by Bohannon.

In June 2011, Bohannon was charged with two counts of capital murder in connection with the deaths. The murders were made capital because two or more persons were killed "by one act or pursuant to one scheme or course of conduct." § 13A-5-40(a)(1), Ala. Code 1975. Following a jury trial, Bohannon was convicted of two counts of capital murder. During the penalty phase, the jury recommended by a vote of 11-1 that Bohannon be sentenced to death; the circuit court sentenced Bohannon to death for each capital-murder conviction. Bohannon appealed. The Court of Criminal Appeals affirmed one of Bohannon's capital-murder convictions but remanded the case, in light of a double-jeopardy violation, for the circuit court to set aside one of Bohannon's capital-murder convictions and its sentence. Bohannon v. State, [CR-13-0498, October 23, 2015] ___ So. 3d ___ (Ala. 2015). The circuit court vacated one conviction and sentence, and, on return to remand, the Court of Criminal Appeals affirmed Bohannon's death sentence. Bohannon v. State, [CR-13-0498, December 18, 2015] ___ So. 3d ___ (Ala. 2015). Bohannon

petitioned this Court for certiorari review of the judgment of the Court of Criminal Appeals. This Court granted Bohannon's petition to consider four grounds:

> -- Whether Bohannon's death sentence must be vacated in light of Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016);
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> -- Whether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with Hurst;
>
> -- Whether the circuit court committed plain error by allowing the State to question defense character witnesses about Bohannon's alleged acts on the night of the shooting; and
>
> -- Whether the circuit court committed plain error by failing to sua sponte instruct the jury on the victims' intoxication?

Standard of Review

Bohannon's case involves only issues of law and the application of the law to the undisputed facts; therefore, our review is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)("This Court reviews pure questions of law in criminal cases de novo."), and State v. Hill, 690 So. 2d 1201, 1203-04 (Ala. 1996).

Discussion

First, Bohannon contends that his death sentence must be vacated in light of the United States Supreme Court's decision in Hurst.

In 2000, in Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence.

In Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), this Court considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring, stating:

> "Waldrop argues that under Alabama law a defendant cannot be sentenced to death unless, after an initial finding that the defendant is guilty of a capital offense, there is a second finding: (1) that at least one statutory aggravating circumstance exists, see Ala. Code 1975, § 13A-5-45(f), and (2) that the aggravating circumstances outweigh the mitigating circumstances, see Ala. Code 1975, § 13A-5-46(e)(3). Those determinations, Waldrop argues, are factual findings that under Ring must be made by the jury and not the trial court. Because, Waldrop argues, the trial judge in his case, and not the jury, found that two aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances, Waldrop claims that his Sixth Amendment right to a jury trial was violated. We disagree.
>
> "It is true that under Alabama law at least one statutory aggravating circumstance under Ala. Code 1975, § 13A-4-49, must exist in order for a defendant convicted of a capital offense to be sentenced to death. See Ala. Code 1975, § 13A-5-45(f)('Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.'); Johnson v. State, 823 So. 2d 1, 52 (Ala. Crim. App. 2001)(holding that in order to sentence a capital defendant to death, the sentencer '"must determine the existence of at least one of the aggravating circumstances listed in [Ala. Code 1975,] § 13A-5-49"' (quoting Ex parte Woodard, 631 So. 2d 1065, 1070 (Ala. Crim. App. 1993))). Many capital offenses listed in Ala. Code 1975, § 13A-5-40, include conduct that clearly corresponds

to certain aggravating circumstances found in § 13A-5-49:

> "'For example, the capital offenses of intentional murder during a rape, § 13A-5-40(a)(3), intentional murder during a robbery, § 13A-5-40(a)(2), intentional murder during a burglary, § 13A-5-40(a)(4), and intentional murder during a kidnapping, § 13A-5-40(a)(1), parallel the aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged ... [in a] rape, robbery, burglary or kidnapping," § 13A-5-49(4).'

"Ex parte Woodard, 631 So. 2d at 1070-71 (alterations and omission in original).

"Furthermore, when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala. Code 1975, § 13A-5-45(e); see also Ala. Code 1975, § 13A-5-50 ('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.'). This is known as 'double-counting' or 'overlap,' and Alabama courts 'have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense.' Ex parte Trawick, 698 So. 2d 162, 178 (Ala. 1997); see also Coral v. State, 628 So. 2d 954, 965 (Ala. Crim. App. 1992).

"Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.' Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.

"....

"Waldrop also claims that Ring and Apprendi require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. See Ala. Code 1975, §§ 13A-5-46(e), 13A-5-47(e), and 13A-5-48. Specifically, Waldrop claims that the weighing process is a 'finding of fact' that raises the authorized maximum punishment to the death penalty. Waldrop and several of the amici curiae claim that, after Ring, this determination must be found by the jury to exist beyond a reasonable doubt. Because in the instant case the trial judge, and not the jury, made this determination, Waldrop claims his Sixth Amendment rights were violated.

"Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of

Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)(rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"' (quoting Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').

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

(1983)(Rehnquist, J., concurring in the judgment)('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In Ford v. Strickland, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' Ford, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument

> "'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'

> "696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990) ('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also Melson v. State, 775 So. 2d 857, 900-901 (Ala. Crim. App. 1999); Morrison v. State, 500 So. 2d 36, 45 (Ala. Crim. App. 1985).
>
> "Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."

Ex parte Waldrop, 859 So. 2d at 1187-90 (footnotes omitted). This Court concluded that "all [that] Ring and Apprendi require" is that "the jury ... determine[] the existence of the 'aggravating circumstance necessary for imposition of the death penalty.'" 859 So. 2d at 1188 (quoting Ring, 536 U.S. at 609), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.

In Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a

jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment.

The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the "findings necessary to impose the death penalty." ___ U.S. at ___, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury, stating:

> "Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.' ... The State contends

> that this finding qualified Hurst for the death penalty under Florida law, thus satisfying Ring. '[T]he additional requirement that a judge also find an aggravator,' Florida concludes, 'only provides the defendant additional protection.' ...
>
> "The State fails to appreciate the central and singular role the judge plays under Florida law. ... [T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.' Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' § 921.141(3) .... '[T]he jury's function under the Florida death penalty statute is advisory only.' Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.
>
> "....
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> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Hurst, ___ U.S. at ___, 136 S.Ct. at 622-24 (final emphasis added).

Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make "the

critical findings necessary to impose the death penalty." ___ U.S. at ___, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury

"find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or

legal judgment that takes into account a theoretically limitless set of facts." 859 So. 2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of a aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may "exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute." 530 U.S. at 481. Hurst does not disturb this holding.

Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), which

upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, ___ U.S. at ____, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A-5-49(9), Ala. Code 1975, that "[t]he defendant

intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct," which made Bohannon eligible for a sentence of death. See also § 13A-5-45(e), Ala. Code 1975 ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."). Because the jury, not the judge, unanimously found the existence of an aggravating factor -- the intentional causing of the death of two or more persons by one act or pursuant to one scheme of course of conduct -- making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated.

Bohannon's argument that the jury's finding of the existence of the aggravating circumstance during the guilt phase of his trial was not an "appropriate finding" for use during the penalty phase is not persuasive. Bohannon reasons that because, he says, the jury was not informed during the guilt phase that a finding of the existence of the aggravating circumstance during the guilt phase would make him eligible

for the death penalty, the jury did not know the consequences of its decision and appreciate its seriousness and gravity.

A review of the record establishes that the members of the venire were "death-qualified" during voir dire. Specifically, the trial court instructed:

> "THE COURT: The defendant was indicted by the Grand Jury of Mobile County during its term in June of 2011. ...
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> "....
>
> "THE COURT: The case -- and by that I mean the Grand Jury indictment -- is indicted for what is known as capital murder.
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> "Capital murder is an offense which, if the defendant is convicted, is punishable either by death or by life imprisonment without the possibility of parole.
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> "The first part of this case that will be presented to the jury is what is known as the guilt phase. The jury will be called upon to determine whether the State has proved that the defendant is guilty beyond a reasonable doubt of the offense, or whether the State has proved the guilt of the defendant beyond a reasonable doubt of anything at all.
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> "If the jury finds the defendant not guilty, that, of course, ends the matter.
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> "If the jury finds the defendant guilty of some offense less than capital murder, then it will be incumbent upon the Court -- or me -- to impose the appropriate punishment.

> "If, however, the jury finds the defendant guilty of the offense of capital murder, the jury would be brought back for a second phase, or what we know as the penalty phase of this case. And, at that time, the jury may hear more evidence, will hear legal instructions and argument of counsel. The jury would then make a recommendation as to whether the appropriate punishment is death or life imprisonment without the possibility of parole."

Bohannon's jury was informed during voir dire that, if it returned a verdict of guilty of capital murder, Bohannon was eligible for a sentence of death. Therefore, Bohannon's argument that his jury was not impressed with the seriousness and gravity of its finding of the aggravating circumstance during the guilt phase of his trial is not supported by the record.

Next, Bohannon contends that an instruction to the jury that its sentence is merely advisory conflicts with Hurst because, he says, Hurst establishes that an "advisory recommendation" by the jury is insufficient as the "necessary factual finding that Ring requires." Hurst, ___ U.S. at ___, 136 S.Ct. at 622 (holding that the "advisory" recommendation by the jury in Florida's capital-sentencing scheme was inadequate as the "necessary factual finding that Ring requires"). Bohannon ignores the fact that the finding

required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama. Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst.

Bohannon further contends that the circuit court erred when it failed to limit the State's questioning of defense character witnesses about his alleged acts on the night of the shooting. Because Bohannon made no objection on this basis at trial, we review the issue for plain error.

> "Plain error is
>
> "'error that is so obvious that the failure to notice it would seriously affect the

> fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So. 2d 73 (Ala. 1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor.'
>
> "Ex parte Trawick, 698 So. 2d [162,] 167 [(Ala. 1997)].

Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007). See also Ex parte Womack, 435 So. 2d 766, 769 (Ala. 1983).

According to Bohannon, the State's questioning was highly prejudicial in light of the facts that his state of mind was a central issue for the jury's determination and that his defense depended on persuading the jury that it should view the surveillance tape and other evidence through the lens of his law-abiding character. He further argues that the prejudice was compounded by the State's argument that each of his character witnesses admitted that a person who beats and shoots somebody is not a law-abiding, peaceful person. Accordingly, he maintains that his conviction should be reversed as a result of the circuit court's failure to limit the State's cross-examination of his character witnesses.

Our review of the record establishes that the State's questioning of Bohannon's character witnesses about his

conduct immediately before and during the offense as reflected in the surveillance tape "'did not seriously affect the fairness or integrity of the judicial proceedings.'" Ex parte Walker, 972 So. 2d at 742 (quoting Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997)). The record establishes that the State asked three of Bohannon's witnesses whether the content of the tape was consistent with Bohannon's reputation for good behavior. For example, the State asked a witness: "[Y]ou saw what happened out there at the Paradise Lounge ... [T]hat's not consistent with having a good reputation." The State's questions were about a surveillance tape that had already been admitted into evidence and had been viewed by the jury. Because the jury was free to draw its own conclusions about Bohannon's state of mind from its viewing of the tape, no probability exists that the alleged improper questioning substantially prejudiced Bohannon or affected the integrity of his trial. Plain error does not exist in this regard.

Lastly, Bohannon contends that the circuit court also committed plain error by failing sua sponte to instruct the jury on the victims' intoxication. Specifically, he argues that because the evidence supported a reasonable inference of

self-defense, the circuit court should have instructed the jury that the victims' intoxication at the time of the offense may have made them aggressive. See Stevenson v. State, 794 So. 2d 453, 455 (Ala. Crim. App. 2001)(recognizing that "'[a] defendant is permitted to demonstrate, under a theory of self-defense, that the victim was under the influence of alcohol at the time of the fatal altercation'" and that "a defendant should be allowed a jury instruction [when requested] regarding the intoxication of the deceased, to show tendencies towards aggression, when the evidence would support a reasonable inference of self-defense"(quoting Quinlivan v. State, 555 So. 2d 802, 805 (Ala. Crim. App. 1989))).

In Ex parte Martin, 931 So. 2d 759 (Ala. 2004), this Court, when addressing whether the trial court's failure to give, sua sponte, instructions to the jury explaining the scope of the victim's statements constituted plain error, recognized:

> "'"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))."

931 So. 2d at 767-68.

This Court has required a trial court to instruct the jury sua sponte "only [in] those instances where evidence of prior convictions [were] offered for impeachment purposes." Johnson v. State, 120 So. 3d 1119, 1128 (Ala. 2006) (citing Ex parte Martin, 931 So. 2d at 769). In such cases, the trial court has been required to issue a sua sponte instruction because, in light of the facts in those particular cases, an

instruction was considered necessary to protect the defendant from the misuse of "presumptively prejudicial" information that could be considered by the jury for a limited purpose. Ex parte Minor, 780 So. 2d 796, 804 (Ala. 2000).

The record in this case simply does not support a conclusion that the circuit court's failure to issue a sua sponte instruction on the victims' intoxication constituted plain error. The evidence at issue is not "presumptively prejudicial" to Bohannon, and, because the jury was instructed to consider all the evidence, Bohannon was not substantially prejudiced by the circuit court's failure to issue such an instruction. The record establishes that Bohannon's counsel argued in his opening statement that one of the victims pushed Bohannon a couple of times during the altercation and that the victims were high on methamphetamine and that that drug makes individuals aggressive. The record also establishes that evidence was admitted indicating that the victims were intoxicated and that the jury, when it viewed the surveillance tape, was able to observe the confrontation between Bohannon and the victims. Therefore, the jury was free to consider all the evidence Bohannon presented, which included evidence of

the victims' intoxication and Bohannon's argument that the victims' intoxication made them act aggressively. Because the jury was instructed to consider all the evidence, the failure to sua sponte give an instruction on the victims' intoxication did not seriously affect the fairness or integrity of Bohannon's trial or substantially prejudice Bohannon. Ex parte Martin, supra; and Ex parte Henderson, 583 So. 2d 305, 306 (Ala. 1991). After considering the evidence and the totality of the circuit court's jury instruction, we conclude that the circuit court's failure to give sua sponte an instruction about the proper use of the victims' intoxication did not constitute plain error.

Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs in the result.

2016 WL 1592786
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
BELTON, Appellant.

No. 2012–0902.
|
Submitted Jan. 26, 2016.
|
Decided April 20, 2016.

Synopsis
Background: Defendant was convicted on no-contest plea following hearing in the Court of Common Pleas, Lucas County, No. CR200802934, of capital murder and aggravated robbery and was sentenced to death. Defendant appealed as of right.

Holdings: The Supreme Court, Kennedy, J., held that:

[1] amended sentencing statute requiring that trial court impose punishment using minimum sanctions that it determined accomplished goals of sentencing did not implicitly repeal death penalty statutes;

[2] statutory scheme governing hearing before three-judge panel on plea of no contest to capital offense did not implicate defendant's right to jury trial under *Apprendi* and *Ring*;

[3] defendant's Eighth Amendment challenges to lethal injection protocol were not appropriate matters for consideration on direct appeal;

[4] defendant did not lack state court remedies to challenge constitutionality, under Eighth Amendment, of Ohio's lethal injection protocol;

[5] prospective juror's stated opposition to death penalty was appropriate ground for challenge for cause;

[6] defendant bore burden to prove existence of any mitigating factors by preponderance of evidence;

[7] trial court was under no obligation to review prosecutor's complete file on case in order to determine whether State complied with its *Brady* obligations;

[8] defendant's confession was knowing, voluntary, and intelligent;

[9] defendant was not entitled to relief based on claims of ineffective assistance of counsel;

[10] evidence supported finding of aggravating circumstance;

[11] aggravating factor outweighed mitigating factors; and

[12] death sentence was proportionate to death sentences approved in similar cases involving murder committed during course of robbery.

Affirmed.

O'Neill, J., concurred in part and dissented in part.

West Headnotes (70)

[1] **Sentencing and Punishment**
The Death Penalty

Amended sentencing statute requiring that trial court impose punishment using minimum sanctions that it determined accomplished goals of sentencing, namely, to protect public from future crime and to punish offender, without imposing unnecessary burden on State or local government resources, did not implicitly repeal statutes authorizing imposition of death penalty, based on defendant's claim that life without possibility of parole would achieve same goals as death sentence at fraction of cost; costs of execution versus lifetime incarceration was only one factor for trial court to consider, defendant acknowledged ongoing debate over whether death sentences had more of deterrent effect on homicides than long-term prison sentences did, and therefore, sentencing court could determine that death penalty was minimum sanction in certain case, legislature's failure to expressly repeal death penalty indicated belief that death might be appropriate penalty in some cases, and while rehabilitation was factor for trial court to consider, it was not dispositive. R.C. §§

2929.03, 2929.04, 2929.11(A).

Cases that cite this headnote

[2] **Statutes**
⇐By Inconsistent or Repugnant Statute

If two affirmative statutes exist, one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation.

Cases that cite this headnote

[3] **Criminal Law**
⇐Right to Plead Guilty; Mental Competence

A criminal defendant does not have a constitutional right to enter a guilty plea or to have it accepted by the court.

Cases that cite this headnote

[4] **Criminal Law**
⇐Plea of No Contest or Nolo Contendere

There is no absolute right to enter a no contest plea.

Cases that cite this headnote

[5] **Criminal Law**
⇐Plea of Guilty
Criminal Law
⇐Requisites and Proceedings for Entry

State law governs the exercise of the ability to plead guilty, and a defendant may plead no contest only with the consent of the court.

Cases that cite this headnote

[6] **Criminal Law**
⇐Waiver of Rights, Defenses, and Objections
Criminal Law
⇐Nature and Effect of Plea

In most cases, a defendant's plea of no contest or guilty to a felony amounts to a waiver of trial, meaning that the State need not present evidence of guilt.

Cases that cite this headnote

[7] **Criminal Law**
⇐Statutory Provisions
Criminal Law
⇐Requisites and Proceedings for Entry
Criminal Law
⇐Requisites and Proceedings for Entry

In a capital case, before a defendant's plea of guilty or no contest to a capital offense may be accepted, a three-judge panel must examine witnesses, hear any other evidence properly presented by the prosecution, and unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3) .

Cases that cite this headnote

[8] **Jury**
⇐On Demurrer or Plea of Guilty
Sentencing and Punishment
⇐Matters Related to Jury

When a capital defendant waives a jury and enters a no-contest plea, a three-judge panel determines both guilt and the appropriate sentence; the statutory scheme governing such a plea contains no provisions permitting an accused charged with a capital offense to waive

a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[9] **Jury**
On Demurrer or Plea of Guilty
Sentencing and Punishment
Matters Related to Jury

When a capital defendant has waived his right to jury trial and entered a no contest plea to the capital offense, trial courts are not at liberty to create a nonstatutory procedure to convene a jury for sentencing purposes. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[10] **Jury**
Statutory Provisions

Statutory scheme requiring three-judge panel to make determination of guilt and appropriate sentence upon defendant's entry of guilty or no contest plea to capital murder, which required panel to first make findings during guilt phase as to existence of aggravating factor, and then weigh aggravating and mitigating factors during penalty phase, did not implicate defendant's right to jury trial under *Apprendi* and *Ring*; case did not proceed to sentencing until after panel found defendant guilty of one or more aggravating circumstances, and therefore, it was not possible to make factual finding during penalty phase that exposed defendant to greater punishment. U.S.C.A. Const.Amend. 6; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[11] **Jury**
Sentencing Matters

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[12] **Jury**
Death Penalty

Once an aggravating factor has been found during the guilt phase of a hearing before a three-judge panel following the defendant's entry of a plea of guilty or no contest to a capital offense, the weighing of the aggravating factors against the mitigating factors is not a fact-finding process subject to the Sixth Amendment right to jury trial, because these determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination; instead, the weighing process amounts to a complex moral judgment about what penalty to impose upon a defendant who is already death-penalty eligible. U.S.C.A. Const.Amend. 6; R.C. § 2929.03(D).

Cases that cite this headnote

[13] **Jury**
Statutory Provisions

Statutory scheme governing sentencing for capital murder upon entry of guilty or no contest plea to offense, which required three-judge panel to make findings as to existence of any aggravating factors during guilt phase and then balance aggravating and mitigating factors during penalty phase, was consistent with United States Supreme Court's holding in *Lockett v. Ohio* that States could not preclude "sentencer" in capital case from considering "as a mitigating factor, any aspect of a defendant's

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"; nothing in *Lockett* required that defendant who waived right to jury trial by entering plea of guilty or no contest be granted right to jury trial on issue of mitigation and weighing of aggravating and mitigating factors at sentencing. U.S.C.A. Const.Amend. 6; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[14] **Sentencing and Punishment**
Remorse, Acceptance of Responsibility, and Cooperation

Evidence that a capital defendant accepted responsibility by entering a guilty plea is a relevant mitigating factor at sentencing. R.C. § 2929.04(B)(7).

Cases that cite this headnote

[15] **Criminal Law**
Requisites and Proceedings for Entry
Criminal Law
Requisites and Proceedings for Entry

Statutory scheme governing entry of guilty or no contest plea to capital murder, which required three-judge panel to determine existence of any factors in aggravation during guilt phase, and then weigh aggravating and mitigating factors during penalty phase, did not violate defendant's constitutional right to present defense, simply because he would present his case in mitigation to panel instead of jury. U.S.C.A. Const.Amend. 14; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[16] **Criminal Law**
Necessity and Scope of Proof

The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, meaning that they have a right to present relevant testimony and other evidence. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[17] **Criminal Law**
Sentence or Judgment

Defendant's Eighth Amendment challenges to lethal injection protocol, specifically, training of technicians performing procedure, reliability of any back up procedures in event of any difficulty, and efficacy of single drug protocol, were not appropriate matters for consideration on direct appeal from no contest plea to capital murder, where claims required consideration of evidence outside record. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[18] **Criminal Law**
Sentence and Punishment

Capital defendant did not lack state court remedies to challenge constitutionality, under Eighth Amendment, of Ohio's lethal injection protocol; postconviction remedies were available. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[19] **Sentencing and Punishment**
Procedure

Even assuming lack of available remedy in state court to challenge constitutionality of Ohio's lethal injection protocol, under Eighth

Amendment, absence of state court remedies did not, in and of itself, prove that lethal injection protocol amounted to cruel and unusual punishment; lack of state court remedies implicated due process concerns, not substantive Eighth Amendment rights. U.S.C.A. Const.Amends. 8, 14.

Cases that cite this headnote

[20] **Sentencing and Punishment**
Proportionality
Sentencing and Punishment
Torture

The Eighth Amendment addresses two aspects of a criminal sentence: (1) it prohibits specific torturous methods of execution, and (2) it requires proportionality between the crime and the punishment. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[21] **Criminal Law**
Issues Considered

Capital defendants who waive their right to a jury and enter a guilty plea cannot challenge pretrial rulings on appeal; instead, they are limited to attacking the validity of the plea itself.

Cases that cite this headnote

[22] **Criminal Law**
Issues Considered

Capital defendants who waive their right to a jury and enter a no-contest plea may challenge pretrial rulings. Rules Crim.Proc., Rule 12(I).

Cases that cite this headnote

[23] **Jury**
Punishment Prescribed for Offense

In prosecution for capital murder, prospective juror's stated opposition to death penalty was appropriate ground for challenge for cause.

Cases that cite this headnote

[24] **Jury**
Punishment Prescribed for Offense

A prospective juror may be excused for cause in a capital murder case if the juror's views on the death penalty would prevent or substantially impair the performance of his duties.

Cases that cite this headnote

[25] **Jury**
Punishment Prescribed for Offense

Even when a for-cause challenge against a prospective juror is not warranted in a capital murder case, the prosecutor may use peremptories to eliminate jurors based on opposition to the death penalty.

Cases that cite this headnote

[26] **Sentencing and Punishment**
Other Matters Related to Offender

Conditions of confinement in maximum security prison did not constitute factor in mitigation for jury to consider in sentencing for capital murder.

Cases that cite this headnote

[27] **Sentencing and Punishment**
Mitigating Circumstances in General

"Mitigating factors" relevant to sentencing for capital murder are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death, but for Eighth Amendment purposes, this definition of "mitigating factors" does not include evidence of potential prison sentences, as alternative to death, or evidence about future conditions of confinement. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[28] **Sentencing and Punishment**
Degree of Proof

In sentencing for capital murder, the prosecutor bears the burden to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors; however, the defendant bears the burden to prove the existence of any mitigating factors by a preponderance of the evidence.

Cases that cite this headnote

[29] **Sentencing and Punishment**
Sympathy and Mercy

Request for mercy was not mitigating factor, for purposes of sentencing for capital murder.

Cases that cite this headnote

[30] **Sentencing and Punishment**
Arguments and Conduct of Counsel

State, not defendant, had right to present final closing arguments to jury in sentencing phase of capital murder.

Cases that cite this headnote

[31] **Sentencing and Punishment**
Arguments and Conduct of Counsel

During the sentencing phase of a capital trial the State, having the burden of proving that aggravating circumstances outweigh the mitigating factors, has the right to open and close arguments to the jury.

Cases that cite this headnote

[32] **Criminal Law**
Burden of Showing Error
Criminal Law
Presumption as to Effect of Error; Burden

Any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order.

Cases that cite this headnote

[33] **Sentencing and Punishment**
Admissibility

During penalty phase of capital murder proceeding, after defendant entered no contest plea to offense, State was not limited to evidence of aggravating factors found during guilt phase of proceeding before three-judge panel; rather, State was permitted to rely on evidence relevant to nature and circumstances of those aggravating factors for which he was found guilty, and evidence rebutting mitigation evidence put forth by defendant.

Cases that cite this headnote

[34] **Sentencing and Punishment**
Arguments and Conduct of Counsel

During penalty phase of capital murder proceeding before three-judge panel, following entry of no-contest plea to offense, prosecutor was not permitted to refer to nature and circumstances of killing unless and until defendant utilized nature and circumstances of offense as mitigating factor. R.C. § 2929.04(B, C).

Cases that cite this headnote

[35] **Criminal Law**
Sanctions for Failure to Disclose

Trial court was under no obligation to review prosecutor's complete file on case in order to determine whether State complied with its *Brady* obligations, in prosecution for capital murder, absent any allegation of *Brady* violation.

Cases that cite this headnote

[36] **Criminal Law**
Promises as to Sentence
Criminal Law
Threats; Fear of Injury

Defendant's confession to murder of convenience store clerk was knowing, voluntary, and intelligent, despite defendant's claim that confession was coerced by detectives' promises of leniency and threats of death penalty; defendant was 22 years old and had eleventh grade education, he was offered beverages before and during interviews and was permitted to smoke, he slept in period between arrest and first interview, he did not have trouble communicating and answered questions appropriately, detectives's suggestion that confession might be defendant's "saving grace" and that court might show mercy was not promise of leniency nor promise of death sentence if he did not cooperate, and they did not claim to have any authority to decide how defendant would be charged. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[37] **Criminal Law**
Review De Novo
Criminal Law
Evidence Wrongfully Obtained

Review of a trial court's ruling on a motion to suppress is a mixed question of law and fact: the appellate court accepts the trial court's factual findings as long as they are supported by competent, credible evidence, but it reviews de novo the application of the law to these facts.

2 Cases that cite this headnote

[38] **Criminal Law**
Form and Sufficiency
Criminal Law
Form and Sufficiency in General

Before police officers may question a suspect in a custodial setting, the Fifth Amendment requires them to warn the suspect that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires; the suspect may then knowingly and intelligently waive these rights and agree to answer questions or make a statement. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[39] **Criminal Law**
Form and Sufficiency in General

An express written or oral statement of waiver of the right to remain silent or of the Fifth Amendment right to counsel is usually strong proof of the validity of that waiver. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[40] **Criminal Law**
Waiver of Rights

If a defendant challenges a confession following the waiver of *Miranda* rights as involuntary, the State must prove a knowing, intelligent, and voluntary waiver by a preponderance of evidence. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[41] **Criminal Law**
What Constitutes Voluntary Statement, Admission, or Confession

To determine whether a confession was involuntary, the court considers the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement; however, the court will not conclude that a *Miranda* waiver was involuntary unless there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[42] **Criminal Law**
Coercion

Criminal Law
Promises; Hope of Benefit

A court may find coercion when law-enforcement officers persuade or deceive the accused, with false promises or information, into relinquishing his *Miranda* rights and responding to questions; however, the presence of promises does not as a matter of law, render a confession involuntary. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[43] **Criminal Law**
Admonition to Tell the Truth in General
Criminal Law
Coercion

Police officers may discuss the advantages of telling the truth, advise suspects that cooperation will be considered, or even suggest that a court may be lenient with a truthful defendant, without raising concerns that a confession is coerced. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[44] **Criminal Law**
Admonition to Tell the Truth in General

Admonitions by law enforcement for a suspect to tell the truth are considered to be neither threats nor promises that would render a confession involuntary. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[45] **Criminal Law**
Coercion

It is not unduly coercive for a law enforcement officer to mention potential punishments during

an interview with a suspect. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[46] **Criminal Law**
Knowledge, Experience, and Skill

Detective was qualified to testify as fingerprint expert, in guilt phase of hearing on no-contest plea to capital murder; he had testified more than 20 times as fingerprint expert, he had collected fingerprints "hundreds of times" and made thousands of comparisons over period of 16 years, he completed 40-hour FBI course on fingerprinting, he studied fingerprint analysis as part of 80-hour crime scene course, he was member of Ohio Identification Officers for many years and regularly attended that organization's annual training updates, and although he had not attended any fingerprint training for three years and indicated that he was not aware of type of standards for collection and comparison of prints, these limitations went to weight and credibility of detective's testimony, not admissibility. Rules of Evid., Rule 702.

Cases that cite this headnote

[47] **Criminal Law**
Reception and Admissibility of Evidence
Criminal Law
Admissibility
Criminal Law
Rulings as to Evidence in General
Criminal Law
Opinion Evidence

A trial court's ruling on evidentiary issues, including the admissibility of expert opinions, will not be reversed on appeal absent an abuse of discretion and proof of material prejudice.

2 Cases that cite this headnote

[48] **Criminal Law**
Subjects of Expert Testimony
Criminal Law
Basis of Opinion

The trial judge has a special obligation to ensure that scientific testimony is not only relevant but reliable. Rules of Evid., Rule 702.

Cases that cite this headnote

[49] **Criminal Law**
Knowledge, Experience, and Skill

A witness need not have complete knowledge of the field in question to qualify as an expert; it is sufficient that the knowledge the expert possessed about scientific evidence at issue would aid the trier of fact in performing its fact-finding function. Rules of Evid., Rule 702.

Cases that cite this headnote

[50] **Criminal Law**
Knowledge, Experience, and Skill

A witness can have expert status without having completed special education or receiving a certification. Rules of Evid., Rule 702.

Cases that cite this headnote

[51] **Criminal Law**
Fingerprints

Detective's testimony as expert on science of fingerprint analysis was reliable, as prerequisite to admission, in guilt phase of no-contest plea to capital murder. Rules of Evid., Rule 702(C).

Cases that cite this headnote

[52] **Criminal Law**
Cause and Effect
Criminal Law
Ballistics and Weapons

Coroner's testimony about distance from which victim was shot in back of head, victim's injuries, length of time it took for victim to die after being shot, and what he must have experienced during that time, was relevant to establish facts and circumstances of murder, as required for three-judge panel to make determination of guilt following defendant's entry of no-contest plea to aggravated murder, and State was not limited to presenting evidence necessary to establish factual basis of plea. R.C. § 2945.06.

Cases that cite this headnote

[53] **Constitutional Law**
Prosecutor
Criminal Law
Duties and Obligations of Prosecuting Attorneys

When evaluating a prosecutorial-misconduct claim, the relevant question is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process, and to answer that question, court considers two factors: (1) whether the conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[54] **Criminal Law**
Requisites and Proceedings for Entry
Criminal Law
Requisites and Proceedings for Entry

When a defendant enters a plea of guilty or no contest to a capital offense, the prosecutor is required to present sufficient evidence at the plea hearing to prove both aggravated murder and the capital specifications. R.C. § 2945.06.

Cases that cite this headnote

[55] **Criminal Law**
Requisites and Proceedings for Entry
Criminal Law
Requisites and Proceedings for Entry

When the defendant has entered a plea of guilty or no contest to a capital offense, the prosecutor is not limited to offering only that quantum of evidence necessary to establish a factual basis for the plea, so as to allow the three-judge panel to make a determination of guilt during the plea hearing; instead, the prosecutor may offer any evidence that is relevant to an element of the charged offense and is otherwise admissible. R.C. § 2945.06.

Cases that cite this headnote

[56] **Criminal Law**
Deficient Representation and Prejudice in General

To establish ineffective assistance of counsel, the defendant must (1) show that counsel's performance fell below an objective standard of reasonableness, as determined by prevailing professional norms, and (2) demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[57] **Criminal Law**
Presumptions and Burden of Proof in General

When performing a *Strickland* analysis of a claim of ineffective assistance of counsel, the court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[58] **Criminal Law**
Jury Selection and Composition

Defense counsel's advice for defendant to waive right to jury trial on charges for capital murder and aggravated robbery was not objectively unreasonable, as required to support claim of ineffective assistance of counsel; State's evidence included video recordings of defendant's confession and shooting itself, latter recording depicted victim's cooperation with robbery and defendant's proximity to victim when he shot victim in back of head, and counsel may have reasonably concluded that three-judge panel would be less likely to be emotionally swayed by evidence than jury. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[59] **Criminal Law**
Preservation of Error for Appeal

Defendant was not entitled to relief from convictions and sentences for capital murder and aggravated robbery based on claim that counsel was ineffective for failure to object during hearing before three-judge panel, following entry of no contest plea, and therefore, failure to preserve any objections for appellate review, absent citation in record or identification of any example of issue that counsel failed to preserve. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[60] **Criminal Law**
Argument and Comments

Defense counsel's decision to waive opening statement during mitigation phase of capital murder trial before three-judge panel, after prosecutor waived opening statement, was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[61] **Criminal Law**
Adequacy of Investigation of Mitigating Circumstances

Defense counsel's decision not to hire neuropsychologist to perform neuroimaging and/or neuropsychological examination of defendant to determine whether defendant had suffered from brain impairment was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel, during mitigation phase of trial before three-judge panel after defendant entered no-contest plea to aggravated murder and aggravated robbery, even though counsel secured funding for neuroimage of defendant's brain; counsel consulted with neuropsychologist before deciding not to pursue evaluation, counsel may have been concerned that evaluation would yield negative results, which would damage defendant's mitigation case, and defendant's psychologist who recommended evaluation did not believe that indicators of potential brain impairment were strong enough to insist on evaluation. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[62] **Criminal Law**
Adequacy of Investigation of Mitigating Circumstances

Defendant was not prejudiced by counsel's failure to secure substance abuse expert to testify as to effects of drugs and alcohol on defendant's life, as required to support claim of ineffective assistance of counsel during mitigation phase of trial before three-judge panel after defendant entered no-contest plea to capital murder and aggravated robbery, where such evidence was introduced through testimony of defendant's psychologist, and defendant provided no indication as to how psychologist's testimony on subject was inadequate nor proffered any evidence as to what substance-abuse expert would have provided. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[63] **Criminal Law**
Experts; Opinion Testimony

A defendant cannot establish ineffective assistance of counsel based on counsel's failure to secure an expert if counsel used alternative devices to fulfill the same functions as the expert assistance sought.

Cases that cite this headnote

[64] **Criminal Law**
Presentation of Evidence in Sentencing Phase

Defense counsel's decision to call forensic counselor on maximum security floor of prison where defendant was confined for three years prior to trial, who testified that defendant was polite and followed rules, was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel, during mitigation phase of hearing before three-judge panel following defendant's entry of no contest plea to capital murder and aggravated robbery, despite defendant's claim that counselor was impeached on cross-examination with evidence that defendant had been in fights and record indicating that defendant had been "hard placement," where counselor's testified that, to best of his knowledge, fights occurred soon after his arrest, testimony was consistent with defense mitigation argument that his behavior in prison improved over time as he adapted to environment, and State could have introduced same evidence regardless of whether counsel opened door to it by calling counselor to testify. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[65] **Criminal Law**
Presentation of Witnesses

Generally, trial counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court when considering a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[66] **Criminal Law**
Grounds in General

The "cumulative error" doctrine provides that a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal.

Cases that cite this headnote

[67] **Sentencing and Punishment**
Scope of Review
Sentencing and Punishment
Proportionality

In conducting independent review of a death sentence, the Supreme Court must determine whether the evidence supports the finding of aggravating circumstances, whether the

aggravating circumstances outweigh the mitigating factors, and whether the defendant's death sentence is proportionate to those affirmed in similar cases. R.C. § 2929.05(A).

Cases that cite this headnote

[68] **Sentencing and Punishment**
Sufficiency

Evidence was sufficient to support finding of aggravating factor that defendant, as principal offender, killed victim during course of aggravated robbery, for purposes of sentencing for capital murder; victim was working as convenience store clerk when defendant entered store, store's security camera videos showed single armed suspect approach victim at counter, confront victim with gun, take money and other items, and then shoot victim at close range in back of head, and defendant confessed to crimes during video recorded interviews with detectives. R.C. § 2929.04(A)(7).

Cases that cite this headnote

[69] **Sentencing and Punishment**
Comparison with Dispositions in Other Cases

In penalty phase of hearing before three-judge panel after defendant entered no contest plea to capital murder and aggravated robbery, aggravating factors that defendant, as principal offender, killed victim, a convenience store clerk, during course of aggravated robbery in which that he shot victim in back of head after victim had fully cooperated with robbery, and then went shopping for shoes after murder, outweighed mitigating factors including defendant's difficult childhood, physical abuse by father, defendant's, relative lack of significant criminal history, diagnoses of mental health disorders, and progressively good behavior in prison, as required to support imposition of death sentence as appropriate punishment. R.C. § 2929.04(B).

Cases that cite this headnote

[70] **Sentencing and Punishment**
Killing While Committing Other Offense or in Course of Criminal Conduct
Sentencing and Punishment
Vileness, Heinousness, or Atrocity

Death sentence for capital murder upon defendant's entry of no-contest plea, based on findings that defendant had entered convenience store where victim was working, confronted victim with gun, then shot victim in back of head after victim fully cooperated, was proportionate to death sentences approved in similar cases involving murders of victims during course of robbery. R.C. § 2929.05(A).

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

KENNEDY, J.

***1 KENNEDY, J.**

{ ¶ 1} In 2008, defendant-appellant, Anthony Belton, robbed a gas-station convenience store and murdered Matthew Dugan, the attendant working in the store. Belton entered a no-contest plea to charges of aggravated robbery and aggravated murder with capital specifications, and a three-judge panel sentenced him to death.

{ ¶ 2} Belton's appeal of right is now before us. For the reasons explained below, we reject each of Belton's

propositions of law and affirm his convictions and death sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Background

{ ¶ 3} In August 2008, the state charged Belton with one count of aggravated murder, R.C. 2903.01(B) and (F), and two counts of aggravated robbery, R.C. 2911.01(A). The aggravated-murder charge carried two death specifications, R.C. 2929.04(A)(3) (murder to escape detection) and 2929.04(A)(7) (felony murder). In addition, all three counts carried a firearm specification, R.C. 2941.145.

{ ¶ 4} The trial was originally scheduled for March 2, 2009. However, the trial court granted several continuances so that the parties would have sufficient time to investigate, complete discovery, and consult experts.

{ ¶ 5} The trial was also delayed because the trial court devoted significant attention to three constitutional arguments raised by the defense. First, Belton's counsel filed a motion to suppress the statements Belton made to police on August 14, 2008. Second, Belton argued that R.C. 2929.03 and Crim.R. 11(C)(3) are unconstitutional because they do not allow a capital defendant to have a jury determine his or her sentence if the defendant enters a plea of guilty or no contest.[1] Finally, trial counsel sought discovery on a selective-prosecution claim. After briefing and oral argument, the trial court rejected Belton's claims and his discovery request.

{ ¶ 6} In April 2012, Belton waived his right to a jury and entered a plea of no contest to all charges. The trial court convened a three-judge panel to conduct a plea hearing on April 2, 2012.

B. Evidence Presented at the Plea Hearing

1. The State's Evidence

a. The robbery and murder

{ ¶ 7} On August 13, 2008, 34–year–old Matthew Dugan was working the night shift at a BP carryout and service station located at the intersection of Secor and Dorr Streets in Toledo. Four store security cameras were operational during Dugan's shift.

{ ¶ 8} Security recordings show a man entering the carryout at 6:53 a.m.[2] The man, who was wearing a dark hooded jacket and appeared to be African–American, left the store when another customer entered. At 6:55 a.m., the man reentered the store, selected two bottled drinks from the cooler, and brought them to the checkout counter. At that point, another customer entered the store, and the man left again. Dugan helped the other customer, then returned the bottled drinks to the cooler.

{ ¶ 9} At 7:00 a.m., the man entered the store a third time. He again selected two drinks and walked to the counter. Dugan began to ring up the sale, then turned around to get something from the wall behind the counter. When Dugan turned back around, the man was pointing a handgun at him.

*2 { ¶ 10} The recording shows Dugan leap back, raising his hands. Dugan opened the register, removed bills from the drawer, and gave them to the man. Then Dugan retrieved some items from the wall behind the counter for the man. The man gestured toward something else behind Dugan, and Dugan turned around. The man then leaned forward, raised the gun, and fired at the back of Dugan's head. Dugan fell to the floor, and the shooter left the store.

{ ¶ 11} Recordings indicate that several customers entered and left the carryout after Dugan was shot, apparently without noticing his body behind the counter. Customer Tiffany Greenlee testified that she intended to purchase coffee and a muffin from the carryout that morning, but she could not find an employee to ring up her sale. Greenlee set her items on the counter and left. On her way out, Greenlee looked into the store window and saw a man on the floor behind the counter, lying in a pool of blood. Greenlee called 9–1–1 at 7:40 a.m.

b. Investigation

{ ¶ 12} Police quickly responded and secured the scene. Police identified the victim as Dugan. The owner of the carryout, Samuel Baiz, informed police that $600 and several prepaid phone cards were missing from the store.

{ ¶ 13} Detective William Goetz recovered a spent 9 mm shell casing near the cash register and a spent projectile two to three feet from Dugan's body. Police also photographed and collected paper money and coins that were lying on the checkout counter, along with two perspiring drink bottles, a muffin, and a bottled cappuccino. A printout from the cash register showed that the last transaction that morning was at 7:00 a.m.

{ ¶ 14} Detective Goetz reviewed the store's security recordings, and Detective Jeffrey Clark coordinated a canvass of the area. Clark testified that during the canvass, an employee at a nearby business gave him the name "Anthony Beltran" as a possible suspect.

{ ¶ 15} Clark returned to police headquarters, where he ran the name "Anthony Beltran" through a database. According to Clark, his search generated 11 names, including two African–American males. One of the two was Anthony Belton, whose last known address was 934 Cuthbert.

{ ¶ 16} Clark mentioned Belton's name to Detective Jason Lenhardt. Lenhardt told Clark that he knew Belton and had last seen him around 9:00 p.m. on August 12, 2008. He also informed Clark that Belton had recently moved to 1018 Ranch, which was located one-half mile from the BP. At the plea hearing, Lenhardt testified that on August 12, Belton had a Mohawk and was wearing a black hooded sweatshirt, gray cargo pants, and black sneakers (which matched the clothing worn by the perpetrator in the surveillance video).

{ ¶ 17} Clark obtained a search warrant for 1018 Ranch and executed the search with Lenhardt, Goetz, and other officers on the evening of August 13. Police found three men at the location: Belton, Dymon Bolton, and Christopher Wilson. Belton and Bolton were inside a 1997 Buick that was parked in front of the house. Lenhardt noted that Belton was still wearing gray cargo pants and black sneakers, but he was wearing a black t-shirt instead of the sweatshirt and his Mohawk had been shaved.

*3 { ¶ 18} Detective Schriefer collected fingerprints from the Buick, and at Belton's request, Detective Lenhardt retrieved two pairs of new sneakers (and corresponding receipts) from the car. Lenhardt also seized two black hooded sweatshirts that were on top of a car parked in the driveway of 1018 Ranch.

{ ¶ 19} Officers took Belton, Bolton, and Wilson into custody and took them to headquarters.

c. Belton's interrogation and arrest

{ ¶ 20} Detectives Clark and Kermit Quinn interviewed Belton twice on August 14; the first interview began at 12:50 a.m. After executing a written waiver of his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Belton provided several conflicting accounts of the events of August 13. The state introduced video recordings of Belton's interviews at the plea hearing.

{ ¶ 21} In response to police questioning, Belton initially denied involvement in the robbery or murder. He told detectives that he had shaved his Mohawk the night before because he lost a bet. Belton said that he had spent the night at his brothers' apartment. Around 9:30 a.m., he went to his own neighborhood to try to sell some drugs because he needed money. Belton noticed that there were a lot of police around, so he stopped by his mother's house, and she told him about the murder. Later, Belton went to Burger King and then the mall, where he bought sneakers.

{ ¶ 22} After further questioning, Belton admitted some involvement in the robbery. According to Belton, he was driving around with a man named "D," who suggested that Belton rob someone. D gave Belton a gun to use and Belton entered the BP twice. Each time, he picked up two sodas, but then left the store because customers came in and Belton was concerned that he might get caught. But Belton denied entering the store a third time. Instead, he said that D had entered the store, wearing a black hoodie, while Belton and Bolton waited in the car. After Belton heard a pop, he drove down the street to pick up D. D reported that he had shot the clerk in the back. The men went to Belton's brothers' apartment, where they counted and divided the money. Belton's share was $170.

{ ¶ 23} Finally, Belton admitted that he had shot the clerk. Belton said that he did not mean to kill Dugan, but "the gun went off" when he "went to put the safety on." At this point in the interview, Belton agreed to help Detectives Clark and Quinn find the firearm.

{ ¶ 24} Officers Lenhardt and Ruben Jurva transported Belton to 1018 Ranch around 3:00 or 4:00 a.m. Officer Jurva located a Hi–Point 9 mm handgun under a log in the yard. The firearm had three live cartridges in the magazine and one in the chamber. The grip on the gun was broken, and police were unable to locate the missing pieces.

{ ¶ 25} After returning to the station, Detectives Quinn and Clark interviewed Belton a second time, beginning at 5:34 a.m. Before questioning began, Clark reminded Belton of his *Miranda* rights.

*4 { ¶ 26} During this interview, Belton admitted that he had owned the gun for about a month but claimed that he did not know it was loaded. With respect to the shooting, Belton insisted that he had only clicked the safety button on the weapon, but he had not pulled the trigger. He said that he regretted everything and that he was sorry he had killed Dugan. Belton also clarified that Wilson was not involved in the robbery. According to Belton, his cousin "TT"—later identified as Tony Bivens—drove him and Bolton to and from the BP. TT also drove Belton and Bolton to the mall later to buy shoes.

{ ¶ 27} At this point, detectives arrested Belton and searched him. Clark recovered $147 cash and ten Page Plus prepaid phone cards, with a total value of $130. (During the interviews, Belton had admitted to owning a prepaid Page Plus cell phone.) Police also seized Belton's clothing: a black t-shirt, gray pants, and black and gray Adidas tennis shoes.

d. Additional inculpatory statements

{ ¶ 28} Sergeant Corey Russell testified that Belton made additional inculpatory statements while he was in a holding cell at police headquarters on August 14, 2008. Russell was working at a desk near the cells where Belton, Bolton, and Wilson were being detained. According to Russell, he could easily overhear conversations between the men, who were in separate cells.

{ ¶ 29} Russell testified that while Bolton was being interviewed elsewhere, Belton made numerous statements to Wilson. According to Russell, Belton told Wilson that Bolton had "given him up." Belton then asserted that Bolton had told the officers "everything said in the car * * * word for word"; he asked Wilson to let everyone know that Bolton "couldn't keep his mouth shut." Ultimately, Russell said, Belton indicated that *he* was responsible and that he did not understand why officers were still holding Wilson.

e. Forensic evidence

{ ¶ 30} Dr. Diane Scala–Barnett, a Lucas County deputy coroner, performed an autopsy on Dugan's body. Scala–Barnett testified that Dugan died of a single gunshot wound to the back of the head and classified the death as a homicide. Based on stippling around the entrance wound, she opined that the gun had been fired 12 to 24 inches from Dugan's head. Moreover, after being shown the video of the shooting, Scala–Barnett was asked how the shooter had gotten so close to Dugan considering the size of the counter, and she said that the shooter had leaned forward across the counter to fire at close range. Finally, Scala–Barnett noted that the gunshot did not instantly kill Dugan.

{ ¶ 31} The state introduced evidence showing that the fingerprints lifted from the driver's-side rear door of the Buick were Belton's, but DNA evidence was inconclusive. Finally, the state introduced evidence about the operability of the Hi–Point 9 mm handgun recovered at 1018 Ranch. The president of Hi–Point Firearms, Thomas Deeb, determined that the gun was functional and performed acceptably. The state also submitted ballistics reports from BCI analyst Todd Wharton, who concluded that the recovered Hi–Point 9 mm handgun fired the cartridge found at the crime scene. In one report, Wharton noted that the firearm's "safety lever can easily become disengaged by routine handling" because it was missing part of the right grip plate, hold-open spring, and magazine catch cover/button. Even so, Wharton opined that the gun's trigger could not be pulled while the safety was engaged. Wharton stated that someone would have to exert 5.25 pounds of pressure on the trigger to fire the weapon.

2. Belton's Evidence

*5 { ¶ 32} Belton submitted two exhibits in his defense: a curriculum vitae for John Nixon, a firearms expert with Athena Research and Consulting, L.L.C., and Nixon's report.

{ ¶ 33} Nixon's report described his analysis of the Hi–Point 9 mm handgun and opined that it was in average condition. He noted that "[t]he safety lever was unusually easy to operate," but nevertheless concluded that the pistol would not fire if the safety was on. Nixon's report also states that the weapon did not fire when he tapped it on his lab bench in a variety of positions, though he noted that "more violent testing may well have resulted in accidental discharge."

{ ¶ 34} Nixon test-fired the gun 28 times and concluded

that it required 3.384 to 5.733 pounds of force to pull the trigger. He did note that on the tenth test, the peak force and distance the trigger moved were significantly less than normal for the pistol. According to Nixon, the "practical effect" of this aberration would be "to surprise the shooter, and possibly result in an unintentional discharge of the pistol."

C. Verdict and Sentencing

{ ¶ 35} The three-judge panel found Belton guilty of the charged offenses.

{ ¶ 36} Before sentencing, the trial court merged the two capital specifications, the two aggravated-robbery counts, and the three firearm specifications. The state elected to proceed on the felony-murder specification, R.C. 2929.04(A)(7). After a mitigation hearing, the panel sentenced Belton to death for the aggravated murder, ten years for the aggravated robbery, and three years for the firearm specification, to be served consecutively.

{ ¶ 37} Belton now appeals, raising 20 propositions of law. We will address Belton's propositions out of order for ease of analysis.

II. ANALYSIS

A. Constitutional Challenges to Ohio's Death–Penalty Laws

1. Repeal of the Death Penalty

[1] { ¶ 38} In proposition of law No. 2, Belton contends that his death sentence is unconstitutional because the 2011 amendment to R.C. 2929.11 "effectively repealed Ohio's death penalty."[3]

{ ¶ 39} R.C. Chapter 2929 addresses penalties and sentencing for criminal offenses. *See State v. Ford,* 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 18. The specific provision at issue here is R.C. 2929.11(A), which articulates the overriding purposes of felony sentencing.

{ ¶ 40} From the time of its 1996 enactment until September 30, 2011, R.C. 2929.11(A) stated:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

*6 Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7457–7458.

{ ¶ 41} In 2011, the General Assembly enacted Am.Sub.H.B. 86, which modified the second purpose in R.C. 2929.11(A) as follows:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.* To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(Emphasis added.)

{ ¶ 42} According to Belton, R.C. 2929.11, as amended, irreconcilably conflicts with R.C. 2929.03 and 2929.04. R.C. 2929.03 and 2929.04 expressly provide for the death penalty, but Belton says that a death sentence will never satisfy R.C. 2929.11(A)'s requirement that it be the minimum sanction necessary to protect the public and punish an offender *without* imposing additional burdens on government resources. According to Belton, a sentence of life without parole achieves the same goals as a death sentence at a fraction of the cost.

{ ¶ 43} Belton then urges the court to resolve this

conflict in favor of amended R.C. 2929.11 because (1) it was enacted later and (2) it reflects the General Assembly's "manifest intent" to repeal the death penalty. *See* R.C. 1.51 (reconciling conflicts between general and specific statutory provisions) and 1.52 (harmonizing irreconcilable statutes).

[2] { ¶ 44} "[W]e have said many times [that] repeals by implication are not favored * * *." *Lucas Cty. Bd. of Commrs. v. Toledo,* 28 Ohio St.2d 214, 217, 277 N.E.2d 193 (1971). This "is understandable * * * since it may properly be assumed that the General Assembly had knowledge of the prior legislation when the subsequent legislation was enacted, and had the General Assembly intended to nullify such prior legislation it would have done so, by means of an express repeal thereof." *Cincinnati v. Thomas Soft Ice Cream, Inc.,* 52 Ohio St.2d 76, 79, 369 N.E.2d 778 (1977). Accordingly, if "two affirmative statutes exist one is not to be construed to repeal the other by implication unless they can be reconciled by *no* mode of interpretation." (Emphasis added.) *In re Hesse,* 93 Ohio St. 230, 234, 112 N.E. 511 (1915); *see also Henrich v. Hoffman,* 148 Ohio St. 23, 26, 72 N.E.2d 458 (1947) (if "two statutes are susceptible to a reasonable construction so that neither will be nullified, it is the duty of the court to so interpret them").

{ ¶ 45} Here, Belton cannot establish an irreconcilable conflict between R.C. 2929.11 and the statutory provisions governing the death penalty. Belton cites studies documenting the expenses associated with the death penalty and asserts that capital cases are "astronomically more expensive" than comparable noncapital cases. But, as R.C. 2929.11 states, cost is not the only relevant factor in determining a sentence. A court must also consider the minimum penalty necessary to sufficiently punish an offender. And Belton's assertion that the death penalty serves *no* penological function not otherwise served by a sentence of life without parole is, at best, questionable. Indeed, Belton's own brief acknowledges that there is ongoing debate over whether death sentences have more of a deterrent effect on homicides than long-term prison sentences do.

*7 { ¶ 46} In some cases then, a sentencing court may determine that the death penalty *is,* in fact, "the minimum sanction[ ]" that will accomplish its purpose of "punish[ing] the offender." R.C. 2929.11(A). And the fact that the General Assembly has not expressly repealed R.C. 2929.03 and 2929.04 indicates its judgment that the death penalty may be appropriate in at least some aggravated-murder cases.

{ ¶ 47} Belton also asserts that the death penalty violates R.C. 2929.11(A) because "[d]eath does not rehabilitate" and under R.C. 2929.11(A), courts must consider rehabilitation when arriving at a sentence.[4] But R.C. 2929.11(A) states that a sentencing court should consider *four* factors: the need to incapacitate an offender, deterrence, rehabilitation, and restitution. Rehabilitation is only one of these considerations, and it is not dispositive of a court's sentencing determination.

{ ¶ 48} For these reasons, Belton has not met the heavy burden required to establish that the General Assembly implicitly repealed the death penalty in 2011. And because each of the constitutional and international-law challenges asserted in Belton's second proposition of law is premised on Ohio's repeal of the death penalty, we reject proposition of law No. 2.

2. Pleas and Capital Sentencing

{ ¶ 49} Under Ohio law, a capital defendant who enters a plea of guilty or no contest waives his right to have a jury determine both his guilt and his sentence. *See* R.C. 2945.06; Crim.R. 11(C)(3). In proposition of law No. 3, Belton asserts several constitutional challenges to this statutory scheme.

a. Pleading guilty or no contest to capital charges

[3] [4] [5] { ¶ 50} "A criminal defendant does not have a constitutional right to enter a guilty plea or to have it accepted by the court." *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 27, citing *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *North Carolina v. Alford,* 400 U.S. 25, 38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), fn. 11. Likewise, "there is no absolute right to enter a no contest plea." *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, fn. 2. "Instead, state law governs the exercise of the ability to plead guilty," *Bates* at ¶ 28, and a defendant may plead no contest only with the consent of the court, *Jones* at fn. 2.

[6] [7] { ¶ 51} The process for entering a plea of guilty or no contest to charges of aggravated murder and related capital specifications is set forth in R.C. 2945.06 and Crim.R. 11(C)(3). In most cases, a defendant's plea of no contest or guilty to a felony amounts to a waiver of trial, meaning that the state need not present evidence of guilt.

State v. Post, 32 Ohio St.3d 380, 392, 513 N.E.2d 754 (1987). However, "more stringent procedures" apply when a trial court accepts a plea to capital charges. *State v. Green,* 81 Ohio St.3d 100, 103, 689 N.E.2d 556 (1998). In a capital case, a three-judge panel must examine witnesses, "hear any other evidence properly presented by the prosecution," and "unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense." *Id.* at 104–105, 689 N.E.2d 556. If the three-judge panel determines that the defendant committed aggravated murder and one or more aggravating circumstances, then the panel must proceed to sentencing. *See* Crim.R. 11(C)(3).

*8 { ¶ 52} As in all capital cases, the sentencing process is governed by R.C. 2929.03 and 2929.04. The three-judge panel must hear the mitigating evidence presented by the defense and identify any factors that militate against a sentence of death. Then the panel must determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. R.C. 2929.03(D)(1). After the panel arrives at a sentencing determination, it must issue a written opinion describing both its weighing process and its sentence. R.C. 2929.03(F).

[8] [9] { ¶ 53} Under this statutory scheme, then, when a capital defendant waives a jury and enters a no-contest plea, a three-judge panel determines both guilt and the appropriate sentence. "R.C. 2945.06 and Crim.R. 11(C)(3) contain no provisions permitting an accused charged with a capital offense to waive a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty." *Bates,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, at ¶ 29, citing *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 122–125. And trial courts are not at liberty to create a nonstatutory procedure to convene a jury for sentencing purposes. *See State ex rel. Mason v. Griffin,* 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644, ¶ 17 (granting a writ to prohibit a trial judge from creating a hybrid, nonstatutory procedure).

{ ¶ 54} In short, Ohio law does not permit a jury to sentence a capital defendant if the defendant has elected to enter a plea of guilty or no contest to capital charges.

b. *Apprendi* and its progeny

[10] { ¶ 55} Belton argues that the above statutory scheme violates the Sixth Amendment to the United States Constitution. According to Belton, "even if a capital defendant enters a guilty plea to Aggravated Murder and the accompanying death specifications, he has a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt."

[11] { ¶ 56} In support of his constitutional claim, Belton cites two United States Supreme Court decisions: *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Apprendi,* the Supreme Court held that "the Sixth Amendment does not permit a defendant to be 'expose[d] * * * to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' " (Emphasis and brackets sic.) *State v. Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 189, quoting *Apprendi* at 483, 120 S.Ct. 2348. Thus, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490, 120 S.Ct. 2348.

*9 { ¶ 57} Two years later, in *Ring,* the Supreme Court applied the *Apprendi* rule to invalidate Arizona's capital-sentencing scheme. Under Arizona's former scheme, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." (Brackets sic.) *Ring* at 588, 122 S.Ct. 2428. *Ring* declared this system unconstitutional, because the aggravating factors operated as " 'the functional equivalent of an element of a greater offense.' " *Id.* at 609, 122 S.Ct. 2428, quoting *Apprendi* at 494, fn. 19, 120 S.Ct. 2348. The Supreme Court explained that because the finding of an aggravating circumstance made a defendant eligible to receive the death penalty, the jury must also determine whether the state met its burden of proof as to that element. *Id., overruling Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

{ ¶ 58} More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida,* 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the

jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until the *judge* found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring,* violated the Sixth Amendment. *Id.*

{ ¶ 59} Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

[12] { ¶ 60} Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring.* Weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales,* 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *see, e.g., State v. Fry,* 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State,* 869 A.2d 285, 303–305 (Del.2005); *Ritchie v. State,* 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon,* 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

***10** { ¶ 61} For these reasons, we hold that when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.

c. Additional challenges

{ ¶ 62} Belton's third proposition of law raises several additional constitutional challenges to Ohio's procedures for sentencing a capital defendant who enters a plea of guilty or no contest.

{ ¶ 63} First, he claims in his brief that Crim.R. 11(C)(3) is unconstitutional because it " 'needlessly penalizes the assertion of a constitutional right,' " quoting *United States v. Jackson,* 390 U.S. 570, 583, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Under Crim.R. 11(C)(3), if a defendant waives a jury trial and enters a guilty plea, a trial court may dismiss capital specifications "in the interests of justice." But there is no analogous rule governing cases that proceed to a jury trial. Belton claims that this different treatment impermissibly burdens capital defendants' exercise of their right to a trial by jury.

{ ¶ 64} We have previously considered and "rejected similar attacks on Crim.R. 11(C)(3)." *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 51, citing *State v. Dickerson,* 45 Ohio St.3d 206, 214, 543 N.E.2d 1250 (1989), and *State v. Buell,* 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986). And Belton offers no explanation why the court should now reconsider those holdings.

[13] { ¶ 65} Second, Belton argues that Ohio's sentencing procedures for capital defendants who plead guilty violate *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), because they do not permit *a jury* to consider "substantial mitigating evidence, namely acceptance of responsibility through a plea of guilty."

{ ¶ 66} In *Lockett,* the United States Supreme Court invalidated Ohio's former death-penalty statute because it did "not permit the type of individualized consideration of mitigating factors * * * required by the Eighth and Fourteenth Amendment in capital cases." *Id.* at 606, 98 S.Ct. 2954. But the Supreme Court did not hold, as Belton suggests, that states must permit a jury to consider any possible mitigating evidence at sentencing. Instead, the court indicated that states could not preclude "the sentencer" in a capital case from considering "*as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis sic.) *Id.* at 604, 98 S.Ct. 2954.

[14] { ¶ 67} Ohio's present sentencing law is consistent with *Lockett.* Evidence that a capital defendant accepted

responsibility by entering a guilty plea is a relevant mitigating factor at sentencing. *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 86. *See* R.C. 2929.04(B)(7). Belton is correct that a defendant who pleads guilty will never have an opportunity to present this type of mitigating evidence to a jury. However, the defendant can present that evidence to a three-judge panel. That panel will hear the defendant's mitigating evidence, weigh that evidence against the aggravating circumstances, and make an individualized sentencing determination, as required by R.C. 2929.03.

*11 [15] [16] { ¶ 68} Finally, Belton argues that "the denial of a right to jury sentencing after a plea of guilty violates a capitally charged defendant's rights to present a defense." The U.S. Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense," *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), meaning that they have a right to present relevant testimony and other evidence. *See State v. Swann,* 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 12–13. But a defendant is not deprived of his right to present a defense simply because he does not present his evidence to a jury. *See, e.g., State v. Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 55–62 (rejecting a defendant's argument that a three-judge panel violated his right to present a complete defense). And Belton does not claim that he was prevented from presenting a full mitigation defense to the three-judge panel.

{ ¶ 69} For these reasons, proposition of law No. 3 fails.

3. Lethal–Injection Protocol

{ ¶ 70} In proposition of law No. 4, Belton argues that Ohio's lethal-injection protocol violates the Eighth Amendment's guarantee against cruel and unusual punishment.

[17] { ¶ 71} First, Belton questions "the training of the technicians performing the lethal injection procedure, the reliability of any back up procedures in the event of any difficulty, such as an inability to locate a suitable vein for injection, and the efficacy of the single drug protocol." But to support these claims, Belton would have to rely on proof outside the record. Consequently, Belton's arguments are "not appropriately considered on a direct appeal." *State v. Madrigal,* 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000) (because proof outside the record was needed to establish ineffective assistance of counsel, the claim was not appropriate on direct appeal).

[18] { ¶ 72} Second, Belton claims that Ohio law does not afford any state-court remedy for a protocol challenge, and he says that this alone *proves* that Ohio's lethal-injection protocol—and any other method of execution the state might use—violates multiple constitutional provisions. This argument turns entirely on Belton's reading of this court's decision in *Scott v. Houk,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835.

{ ¶ 73} *Scott* presented us with a certified question of law from a federal district court: "Is there a post-conviction or other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), or under Ohio law?" *Scott* at ¶ 1. In response, we answered: "There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under *Baze* * * *, or under Ohio law." *Id.* at ¶ 4.

*12 { ¶ 74} In doing so, however, we noted that "review [is] available on this issue through Section 1983, Title 42, U.S.Code, for injunctive relief against appropriate officers or [through] federal habeas corpus petitions." *Id. Scott* also catalogued the established methods by which "an Ohio death-penalty defendant [can] receive state review of his or her case," *id.* at ¶ 2, and affirmed this court's prior holding that "these opportunities for review more than satisfy defendants' 'constitutional rights to due process and fair trials' while also protecting Ohio's 'inherent power to impose finality on its judgments,' " *id.* at ¶ 3, quoting *State v. Steffen,* 70 Ohio St.3d 399, 407, 412, 639 N.E.2d 67 (1994).

{ ¶ 75} In the wake of *Scott,* federal courts have struggled to define its holding. In Scott's own federal habeas proceedings, the United States Court of Appeals for the Sixth Circuit interpreted this court's decision in *Scott* as an "admission that Scott could not pursue [his lethal-injection] claim in any state forum." *Scott v. Houk,* 760 F.3d 497, 511 (6th Cir.2014), fn. 2. But in other decisions, the United States District Court for the Southern District of Ohio has concluded that *Scott* does not foreclose every possible avenue for raising a protocol challenge in Ohio courts. *See Gapen v. Bobby,* S.D.Ohio No. 3:08–cv–280, 2012 WL 3686303, *4 (Aug. 27, 2012) (report and recommendation by U.S. magistrate) ("*Scott* should not be read as narrowing the scope of any pre-existing Ohio procedures for raising a claim that all lethal injection executions are unconstitutional"), adopted in S.D.Ohio No. 3:08–cv–280, 2012 WL 4057406 (2012);

see also Hill v. Mitchell, S.D.Ohio No. 1:98–cv–452, 2013 WL 1345831, *117–120 (Mar. 29, 2013), quoting *Scott,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, ¶ 4 (" 'The Ohio General Assembly has not yet provided an *Ohio-law* cause of action for Ohio courts to process challenges to a lethal-injection protocol * * * ' " [emphasis added]).

{ ¶ 76} We endorse the latter interpretation of *Scott.* In fact, in 2015, we accepted discretionary jurisdiction over a postconviction matter that squarely presents challenges to Ohio's lethal-injection protocol. *See State v. Broom,* —— Ohio St.3d ——, 2016-Ohio-1028, —— N.E.3d ——. Thus, we reject Belton's contention that prisoners have no avenue by which to pursue execution-protocol challenges in any state forum, which is the premise underlying his constitutional argument about *Scott.*

[19] [20] { ¶ 77} Moreover, even if state-court review for a particular type of Eighth Amendment challenge were unavailable in Ohio, that would not, in itself, prove an Eighth Amendment violation. The Eighth Amendment addresses two aspects of a criminal sentence: (1) it prohibits specific torturous methods of execution, *Gregg v. Georgia,* 428 U.S. 153, 169–170, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and (2) it requires proportionality between the crime and the punishment, *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012). A challenge to the adequacy of state-court judicial remedies implicates notions of due process, not the substantive protections of the Eighth Amendment. *See Scott,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, at ¶ 3.

*13 { ¶ 78} We reject proposition of law No. 4.

4. Settled Issues

{ ¶ 79} Proposition of law Nos. 7, 8, and 13 present three constitutional claims that this court has squarely rejected.

{ ¶ 80} Belton asserts facial and as-applied constitutional challenges to Ohio's capital-punishment scheme and argues that the death-penalty statutes violate international law and treaties. And he urges the court to reconsider its holdings that (1) Ohio's definition of reasonable doubt is constitutional and (2) residual doubt is not a relevant factor at the mitigation phase. *See State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 173, 192. In his brief, Belton explains that he is making "a good faith effort to argue for a change in the law" and also seeking to preserve these issues for federal habeas review.

{ ¶ 81} We have rejected each of these claims in our prior decisions, and we now summarily reject these propositions of law. *See Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 279–280.

B. Pretrial Issues

1. Pretrial Motions

{ ¶ 82} In proposition of law No. 5, Belton claims that the trial court undermined his right to a jury trial by denying pretrial motions that sought to protect that right. According to Belton, the denial of seven motions left him with no choice other than to waive a jury and instead proceed before a three-judge panel.

[21] [22] { ¶ 83} Capital defendants who waive their right to a jury and enter a guilty plea cannot challenge pretrial rulings on appeal; instead, they are limited to attacking the validity of the plea itself. *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (explaining that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process"). However, Ohio permits capital defendants who waive their right to a jury and enter a no-contest plea to challenge pretrial rulings. *See* Crim.R. 12(I) ("The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence").

[23] [24] [25] { ¶ 84} First, Belton challenges the trial court's denial of his motion to prohibit the prosecutor from using peremptory challenges to exclude potential jurors who expressed reservations about the death penalty. A prospective juror may be excused for cause if the juror's views on the death penalty "would prevent or substantially impair the performance of his duties." *State v. Rogers,* 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), paragraph three of the syllabus; *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). However, even when a for-cause challenge is not warranted, the prosecutor may "use peremptories to eliminate jurors based on opposition to the death penalty." *State v. Murphy,* 91 Ohio St.3d 516, 529–530, 747 N.E.2d 765 (2001), citing *State v. Esparza,* 39 Ohio St.3d 8, 13–14, 529 N.E.2d 192 (1988). Accordingly, the trial

court did not err by denying Belton's motion.

*14 [26] { ¶ 85} Second, Belton asked the court to order a jury view of a maximum-security prison or, alternatively, to let him introduce a video showing conditions at such a facility. Belton contends that "a fact finder should be aware of the consequences and conditions associated with life incarceration" when he or she decides whether to impose the death penalty. Belton says the trial court's denial of his motion eliminated "another potentially effective mitigating factor" that might have persuaded one or more jurors to impose a life sentence.

[27] { ¶ 86} Belton's argument fails because this is not admissible mitigation evidence. "[M]itigating factors are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death." *State v. White,* 85 Ohio St.3d 433, 448, 709 N.E.2d 140 (1999); *see also Lockett,* 438 U.S. at 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (sentencer in a capital case cannot constitutionally be "precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record or any of the circumstances of the offense" [emphasis sic]). But for Eighth Amendment purposes, this definition does not include evidence of potential prison sentences (as an alternative to death), *White* at 448, 709 N.E.2d 140, or evidence about future conditions of confinement. *See State v. Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 130 (explaining that such evidence is not mitigating, because it does "not relate to appellant, his background or the nature and circumstances of the crime"). Therefore, the evidence Belton wished to present was not relevant to the sentencing evaluation, and the trial court properly denied his motion.

[28] { ¶ 87} Next, Belton requested a jury instruction that the defense bears no burden at the mitigation phase. It is true that the prosecutor bears the burden to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. *State v. Stumpf,* 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987). However, the defendant bears the burden to prove the existence of any mitigating factors by a preponderance of the evidence. *Id.* Accordingly, the trial court did not err by denying Belton's motion for a jury instruction that he bore *no* burden at the mitigation phase.

[29] { ¶ 88} Belton also requested a jury instruction about mercy as a mitigation factor. According to Belton, the trial court "removed one of the few potentially effective mitigating factors" available to him by denying this motion. But we have long held that mercy is not a mitigating factor. *See State v. O'Neal,* 87 Ohio St.3d 402, 416, 721 N.E.2d 73 (2000); *State v. Lorraine,* 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993) ("Mercy * * * is irrelevant to the duty of the jurors"). The trial court did not err by denying this motion.

[30] [31] [32] { ¶ 89} Next, Belton moved for leave to present the final argument at the mitigation phase. "During the sentencing phase of a capital trial the state, having the burden of proving that aggravating circumstances outweigh the mitigating factors, has the right to open and close arguments to the jury." *Rogers,* 17 Ohio St.3d 174, 478 N.E.2d 984, at paragraph six of the syllabus. "[A]ny claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." *State v. Bayless,* 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph three of the syllabus. Belton has not attempted to meet that burden here, nor can he. Accordingly, the trial court did not err by denying Belton's motion.

*15 [33] { ¶ 90} Belton filed a motion in limine to limit the state's mitigation-phase argument to aggravating circumstances already proved during the guilt phase. Belton is correct that the prosecutor may not rely on aggravating circumstances during the mitigation phase that were not already proved during the first phase of a trial. However, the prosecution's mitigation-phase case is not strictly limited to evidence of those aggravating circumstances. For example, a prosecutor may also rely on evidence "relevant to the nature and circumstances of the aggravating circumstances * * * of which the defendant was found guilty" and "evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant." *State v. Gumm,* 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), syllabus. Accordingly, the trial court properly denied Belton's motion.

[34] { ¶ 91} Finally, Belton filed a motion in limine to prohibit the prosecutor from referring to the nature and circumstances of the offense as a factor to consider in the mitigation phase unless and until Belton offered it. According to Belton, "Unless and until Defendant utilizes the nature and circumstances of the offense as a mitigating factor, the State may not make reference to them nor may this Court instruct the jurors that the nature and circumstances of the offense may be mitigating factors."

{ ¶ 92} The trial court denied Belton's motion, noting that there are many ways to permissibly introduce nature-and-circumstances evidence and citing the state's representation that it had no intention to argue that the

nature and circumstances of the crime were an aggravating factor. However, the trial court did not analyze whether a prosecutor may state that nature and circumstances are a factor to consider in the mitigation phase if the defense has not offered them as mitigating evidence.[5] As we explained in *State v. DePew,* 38 Ohio St.3d 275, 289, 528 N.E.2d 542 (1988):

> R.C. 2929.04(B) and (C) deal with mitigation and were designed to enable *the defendant* to raise issues in mitigation and to facilitate his presentation thereof. If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution. When the *purpose* of these sections is understood, it is clear that such comment is appropriate only with regard to those factors actually offered in mitigation by the defendant.

(Emphasis sic.) In light of this body of law, the trial court should have granted Belton's motion in limine to prohibit references to "the nature and circumstances of the offense *as a factor to be considered in mitigation* unless and until offered by defendant." (Emphasis added.)

{ ¶ 93} In sum, the trial court erred by denying one of the seven pretrial motions Belton cites in support of his claim that the trial court undermined his right to a jury trial. Ultimately, Belton is suggesting that this pretrial ruling rendered his jury waiver involuntary. But Belton executed a written waiver of his right to trial by jury, and such waivers are presumptively knowing, intelligent, and voluntary. *See State v. Bays,* 87 Ohio St.3d 15, 19, 716 N.E.2d 1126 (1999). In this case, we are not persuaded that the trial court's ruling on this single motion in limine is sufficient to overcome that presumption of voluntariness.

***16** { ¶ 94} For these reasons, we reject proposition of law No. 5.

2. Prosecutor's File

[35] { ¶ 95} In proposition of law No. 6, Belton contends that the trial court erred by denying his motion to have a copy of the prosecutor's complete file turned over to the court for review to determine whether it contained undisclosed exculpatory or impeachment evidence.

{ ¶ 96} Belton filed a pretrial motion seeking "an order directing that a complete copy of the prosecutor's file be made and turned over to the court for review and to be sealed for appellate review, if necessary." He argued that turning the file over to the court was a "necessary corollary to" the prosecution's disclosure obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The trial court denied the motion, explaining that it was not necessary for the court to review the file absent an allegation of noncompliance with discovery under Crim.R. 16.

{ ¶ 97} The trial court's analysis was correct. "We have consistently rejected the argument that a trial court must 'examine the prosecutor's file to determine the prosecutor's truthfulness or seal the prosecutor's file for purposes of appellate review' on the basis of speculation that the prosecutor *may* have withheld exculpatory evidence." (Emphasis sic.) *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 64, quoting *Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶ 60.

{ ¶ 98} Belton's sixth proposition of law fails.

C. Plea–Hearing Issues

1. Belton's Confessions

[36] { ¶ 99} In proposition of law No. 9, Belton argues that the trial court should have granted his motions to suppress his confession because it was a product of "coercive police misconduct designed to overcome his free will."

[37] { ¶ 100} Review of a trial court's ruling on a motion to suppress is "a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. We accept the trial court's factual findings as long as they are supported by competent, credible evidence. *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. However, we review de novo the application of the law to these facts. *Burnside* at ¶ 8.

a. Factual background

{ ¶ 101} Police arrested Belton around 7:30 or 8:00 p.m. on August 13, 2008, and transported him to police headquarters, where he was placed in a holding cell. Detectives Clark and Quinn first interviewed Belton from 12:50 to 3:02 a.m. on August 14. Clark read Belton the *Miranda* warnings and gave him a written copy of his rights. Belton executed a written *Miranda* waiver, which was witnessed by Clark and Quinn.

{ ¶ 102} Belton's second interview began around 5:35 a.m. and lasted approximately 30 minutes. Belton was not Mirandized again. However, before the interview began, Clark reminded Belton that the same rights still applied. Belton indicated that he understood.

*17 { ¶ 103} Before trial, Belton moved to suppress his confessions. After briefing and a suppression hearing,[6] the trial court denied the motion. The trial court found that (1) under "the totality of the circumstances," Belton was properly Mirandized and knowingly, intelligently, and voluntarily waived his rights as to both interviews, (2) no evidence indicated that Belton was "under the influence of any medications, narcotics or alcohol or illicit drugs" at the time of his statements, and (3) the interrogations and the detectives' statements "were not such to overbear the defendant's will to resist and bring about the confessions."

{ ¶ 104} At the plea hearing, the state introduced Belton's statements over his continuing objection.

b. Analysis

{ ¶ 105} Belton now argues that the trial court erred by admitting these statements for a single reason: they were coerced by police. According to Belton, the detectives "essentially promise[d] leniency" and implied that "confessing or not confessing would literally make the difference between life and death."

[38] [39] { ¶ 106} Before police officers may question a suspect in a custodial setting, the Fifth Amendment requires them to warn the suspect that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda,* 384 U.S. at 479, 86 S.Ct. 1602, 16 L.Ed.2d 694. The suspect may then "knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver * * *." *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

[40] [41] { ¶ 107} If a defendant later challenges a confession as involuntary, the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of evidence. *See Miranda* at 475, 86 S.Ct. 1602; *Colorado v. Connelly,* 479 U.S. 157, 168–169, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). To determine whether a confession was involuntary, we "consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards,* 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *death penalty vacated on other grounds,* 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). However, we will not conclude that a waiver was involuntary "*unless* there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep." (Emphasis sic.) *Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, at ¶ 35; *see State v. Treesh,* 90 Ohio St.3d 460, 472, 739 N.E.2d 749 (2001) ("we need not assess the totality of the circumstances unless we find that the tactics used by the detectives were coercive").

*18 { ¶ 108} As an initial matter, other than the fact that Belton was in police custody, nothing about the circumstances of his interrogation was inherently coercive. Belton was 22 years old, had an 11th-grade education, and had prior experience with the criminal-justice system. *See State v. Smith,* 61 Ohio St.3d 284, 288, 574 N.E.2d 510 (1991) (similar facts supported a finding of voluntariness). He was offered beverages before and during his interviews and was permitted to smoke and to use the bathroom. Belton was able to get some sleep in a holding cell during the hours between his arrest and his first interrogation.

{ ¶ 109} According to Detective Clark, Belton "seemed fully alert," did not have trouble communicating, and responded appropriately to questions. And the interviews themselves were not unduly onerous. The first interview lasted approximately two hours and ten minutes. Then, after a break of two and a half hours, during which Belton accompanied officers to recover the murder weapon, detectives questioned Belton a second time for about 30 minutes. The total time that elapsed between the beginning of the first interview and the conclusion of the

second was less than six hours.

{ ¶ 110} Belton next contends that, in spite of his valid waiver, he was coerced to confess as a result of statements that Detectives Clark and Quinn made during the interviews. Throughout the questioning, the detectives pressed Belton about the veracity of his accounts. At times, they said that perhaps Belton was not a bad person and Dugan's death was an accident. Clark warned Belton that the penalty for aggravated murder is death or life imprisonment and expressed concern about what Belton's grandmother might hear on the news. The detectives also suggested that if Belton confessed, it might be his "saving grace" and that if he cooperated, they would have something to take to the prosecutor and the court might have mercy. In essence, Belton says the officers threatened him with a death sentence and implied that only a confession would save him.

[42] [43] [44] [45] { ¶ 111} This court may find coercion when law-enforcement officers "persuad[e] or deceiv[e] the accused, with false promises or information, into relinquishing his rights and responding to questions." *Edwards,* 49 Ohio St.2d at 39, 358 N.E.2d 1051. However, "the presence of promises does not as a matter of law, render a confession involuntary." *Id.* at 41, 358 N.E.2d 1051. Officers may discuss the advantages of telling the truth, advise suspects that cooperation will be considered, or even suggest that a court may be lenient with a truthful defendant. *Id.* And "[a]dmonitions to tell the truth are considered to be neither threats nor promises." *State v. Loza,* 71 Ohio St.3d 61, 67, 641 N.E.2d 1082 (1994); *see also State v. Dixon,* 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 29. Finally, it is not unduly coercive for a law-enforcement officer to mention potential punishments. *See State v. Western,* 2d Dist., 2015-Ohio-627, 29 N.E.3d 245, ¶ 38; *compare State v. Robinson,* 9th Dist. Summit No. 16766, 1995 WL 9424, *4 ("While a correct statement of the law may not render a confession involuntary, a misstatement of the law may cause such a confession to be involuntary").

***19** { ¶ 112} Here, contrary to Belton's claims, the detectives did not promise leniency if he confessed or threaten death if he did not. Nor did they claim to have authority to decide how Belton would be charged. Instead, Detective Quinn clearly told Belton, "I ain't making you no promises." He indicated that the prosecutor would decide the appropriate charge, and the judge would decide the sentence.

{ ¶ 113} Under the circumstances, we hold that the trial court properly denied Belton's motion to suppress, and we reject proposition of law No. 9.

2. Fingerprint Evidence

[46] { ¶ 114} In proposition of law No. 10, Belton claims that the trial court erred by admitting the fingerprint evidence collected from the Buick "by an incompetent witness" and admitted during the testimony of an incompetent expert witness. While we are hard pressed to see how this evidence prejudices Belton because the police found him in the Buick, we nevertheless address his proposition of law.

{ ¶ 115} Over defense objection, Detective Goetz testified as a fingerprint expert at the plea hearing. According to Goetz, Detective Schriefer collected a fingerprint from the driver's side rear door of the Buick while they were executing a search warrant. Goetz and Schriefer later compared the print to Belton's fingerprints and each independently concluded that they were a match. Then, together, they mapped ten points of similarity between the prints. Goetz opined, to a reasonable degree of scientific certainty, that the print on the car was Belton's.

[47] { ¶ 116} A trial court's ruling on evidentiary issues, including the admissibility of expert opinions, will not be reversed on appeal absent an abuse of discretion and proof of material prejudice. *See State v. Johnson,* 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 53; *Terry v. Caputo,* 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 16 ("Trial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion").

[48] { ¶ 117} To be admissible, expert testimony must satisfy all of the following criteria:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

Evid.R. 702. "[T]he trial judge has a special obligation to ensure that scientific testimony is not only relevant but reliable." *Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 139, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

{ ¶ 118} Belton does not dispute that Goetz's testimony satisfies the first requirement. The collection of fingerprints and the comparison of those prints with known samples is a matter beyond the knowledge or experience possessed by a lay person. *See State v. Hartman,* 93 Ohio St.3d 274, 284, 754 N.E.2d 1150 (2001) ("expert testimony was necessary to make fingerprint comparisons").

***20** { ¶ 119} As to the second requirement, Belton claims that Goetz was not qualified as an expert. But Goetz has testified as a fingerprint expert more than 20 times in Lucas County. Moreover, Goetz testified that he has collected fingerprints "hundreds of times" and made thousands of fingerprint comparisons over the last 16 years. Goetz completed a 40–hour Federal Bureau of Investigation course on developing latent fingerprints and also studied fingerprint analysis as part of an 80–hour crime-scene course at BCI. Finally, Goetz testified that he has been a member of Ohio Identification Officers since 1996, and he has regularly attended that organization's annual training updates.

{ ¶ 120} In response to defense questioning, Goetz admitted that he probably had not attended any fingerprint training for three years. He also conceded that only one of his trainings involved either a written or a peer evaluation—the BCI crime-scene training, which he completed in 1996. Goetz indicated that he was not aware of any type of standards for the collection and comparison of fingerprints.

[49] [50] { ¶ 121} These statements indicate some possible limitations on the breadth of Goetz's expertise, and are relevant in determining the weight and credibility of his testimony. However, the trial court did not abuse its discretion by concluding that Goetz had met Evid.R. 702(B)'s requirement of "specialized knowledge, skill, experience, training, or education" regarding fingerprint evidence. A witness "need not have complete knowledge of the field in question" to qualify as an expert; it is sufficient that the knowledge Goetz possessed about fingerprint analysis would "aid the trier of fact in performing its fact-finding function." *Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 148. Indeed, a witness can have expert status without having completed special education or receiving a certification. *Id.* Here, Goetz testified that he had received relevant training in fingerprint analysis and testified to his vast experience with both collecting and analyzing fingerprints and with testifying as a fingerprint expert. Under the circumstances, the trial court reasonably determined that the second prong of Evid.R. 702 was satisfied.

[51] { ¶ 122} Finally, to be admissible, Goetz's testimony had to be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C). In the past, this court has observed that "the reliability of fingerprint evidence is well established." *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 93; *see also Davis* at ¶ 140. And numerous federal and state courts have reached the same conclusion, even in the face of recent efforts by defendants to "mount[ ] a frontal assault on the use of fingerprint evidence in litigation." *United States v. Herrera,* 704 F.3d 480, 484 (7th Cir.2013); *see also United States v. John,* 597 F.3d 263, 274 (5th Cir.2010); *People v. Rivas,* 238 Cal.App.4th 967, 975–976, 190 Cal.Rptr.3d 43 (3d Dist.2015). Belton offers no reason why we should now categorically reject fingerprint evidence as a permissible subject of expert testimony.

***21** { ¶ 123} For these reasons, the trial court did not err by permitting Goetz to testify as a fingerprint expert, and we reject proposition of law No. 10.

3. Prosecutorial Misconduct

[52] { ¶ 124} In proposition of law No. 11, Belton contends that the prosecutor committed misconduct by introducing evidence about the nature and circumstances of the crime that was not necessary to establish guilt at his plea hearing. Because Belton did not raise this objection before the trial court, we review this claim for plain error. *State v. Lang,* 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 154.

[53] { ¶ 125} When evaluating a prosecutorial-misconduct claim, the relevant question is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). To answer that question, we consider two factors: (1) whether the conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. *State v. Maxwell,* 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 243.

{ ¶ 126} Belton alleges that the prosecutor acted improperly by introducing Dugan's autopsy report and parts of the coroner's testimony. Specifically, Belton objects to Dr. Scala–Barnett's "graphic testimony * * * about the distance of the gun from the victim, the injuries sustained by the victim, the length of time it took for him to expire and what he must have experienced during that time." He reasons that this evidence was both "overkill" and "unnecessary" given that he had entered a no-contest plea. *See* Crim.R. 11(B)(2) (a no-contest plea "is an admission of the truth of the facts alleged in the indictment"). He further claims that this was an improper attempt by the prosecutor to argue that the nature and circumstances of the crime were aggravating circumstances. *See State v. Kirkland,* 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 94 ("the state may not tell the decisionmaker that the nature and circumstances of the murder itself are the aggravating circumstances").

[54] { ¶ 127} As explained above, when a capital defendant enters a plea of guilty or no contest, a panel of three judges must "hear evidence" and "decid [e] whether the accused is *guilty* of aggravated murder beyond a reasonable doubt" before it can proceed to sentencing. (Emphasis sic.) *Post,* 32 Ohio St.3d at 393, 513 N.E.2d 754. A prosecutor is therefore required to present sufficient evidence at a plea hearing to prove both aggravated murder and the capital specifications. *See Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 93 (sufficiency challenges are permitted even when a capital defendant pleads guilty).

[55] { ¶ 128} Belton suggests that a prosecutor's ability to introduce evidence during a plea hearing is more restricted than it is during the guilt phase of other capital trials. But we apply the same evidentiary rules in both contexts. *See, e.g., id.* at ¶ 127–128. And the prosecutor is not, as Belton implies, limited to offering only "that quantum of evidence necessary to establish a factual basis for the plea so as to allow the fact-finder to make a determination of guilt." Instead, the prosecutor may offer any evidence that is relevant to an element of the charged offense and otherwise admissible. As always, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage,* 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus.

***22** { ¶ 129} Here, it was not error, let alone plain error, for the prosecutor to introduce or the trial court to admit the evidence Belton identifies. Scala–Barnett's testimony that the fatal gunshot was fired at close range and about the location of the shooter was relevant to establishing Belton's intent to kill. *See Ketterer* at ¶ 128. Her testimony about Dugan's injuries was relevant to proving the facts and circumstances of the offense. *See id.* Finally, contrary to Belton's claims, Scala–Barnett did not speculate about Dugan's mental state in the moments preceding his death. *Cf. State v. Combs,* 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991) (describing comments about murder victims' thoughts as "gross speculation").

{ ¶ 130} For these reasons, because the prosecutor's conduct was not improper, we reject proposition of law No. 11.

D. Ineffective Assistance of Counsel

{ ¶ 131} In proposition of law Nos. 1, 12, 16, 17, and 18, Belton argues that trial counsel provided constitutionally ineffective assistance.[7] *See* Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article 1, Section 10. For ease of analysis, we address Belton's claims out of order.

[56] [57] { ¶ 132} To establish ineffective assistance of counsel, Belton must (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms," *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052. When performing a *Strickland* analysis, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052.

1. Failing to Argue Entitlement to Sentence Other than Death

{ ¶ 133} Belton contends that trial counsel were ineffective because they did not argue that he was entitled to a sentence other than death under Ohio law. Belton claims that the General Assembly "effectively repealed Ohio's death penalty" when it amended R.C. 2929.11(A) in 2011. But as explained above, Ohio has not repealed the death penalty. Therefore, we cannot conclude that Belton's trial counsel were ineffective for failing to make this argument.

2. Jury Waiver

[58] { ¶ 134} Belton also argues that counsel were ineffective because they advised him to waive a jury trial. The fact that Belton "voluntarily waived his right to a jury does not establish ineffective assistance of counsel." *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 55. The state's evidence included video recordings of Belton's confession and the shooting itself. The latter depicts Dugan's cooperation during the robbery and Belton's proximity to Dugan when he shot him in the back of the head. Counsel may have reasonably concluded that a three-judge panel was less likely than a jury to be emotionally swayed by this evidence. Hence, it was not objectively unreasonable for counsel to advise Belton to waive a jury trial.

3. Objections During Plea Hearing

***23** [59] { ¶ 135} Belton raises two ineffective-assistance claims about trial counsel's failure to raise objections during the plea hearing.

{ ¶ 136} First, he argues generally that trial counsel unjustifiably failed to raise objections and thus failed to preserve issues for appellate review. But Belton does not provide a single citation or identify any example of an issue that counsel failed to preserve. Because he failed to cite any example, Belton cannot satisfy either prong of *Strickland. See State v. Bey,* 85 Ohio St.3d 487, 504, 709 N.E.2d 484 (1999).

{ ¶ 137} Second, Belton specifically contends that trial counsel should have objected to the coroner's testimony about the nature and circumstances of the crime and Dugan's death. But as we explained above, the coroner's testimony was proper. Accordingly, counsel's performance was not ineffective in this regard.

4. Mitigation Preparation and Presentation

{ ¶ 138} The remainder of Belton's ineffective-assistance claims pertain to trial counsel's mitigation-phase preparation and performance.

[60] { ¶ 139} First, Belton argues that trial counsel abandoned their duty to actively and zealously advocate on his behalf when they waived a mitigation-phase opening statement. *See Evitts v. Lucey,* 469 U.S. 387, 394, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (counsel "must play the role of an active advocate"). But counsel's decision to waive opening or closing statements is generally viewed as a tactical one, even in a capital case. *See State v. Bradley,* 42 Ohio St.3d 136, 144, 538 N.E.2d 373 (1989). Here, the prosecutor had already waived his own opening statement and Belton's counsel decided to follow suit, jumping straight into a presentation of mitigating evidence. Belton cannot overcome the strong presumption that this was a reasonable strategic decision.

[61] { ¶ 140} Second, Belton argues that counsel should have had him evaluated by a neuropsychologist because Belton exhibited signs of antisocial-personality disorder. According to Belton, violent offenders who exhibit signs of antisocial-personality disorder "more often than not also exhibit signs of abnormal brain development," a mitigating factor.

{ ¶ 141} During the mitigation hearing, Dr. Bob Stinson, the defense psychologist, testified that he initially recommended neuroimaging and/or a neuropsychological examination for Belton. Stinson had identified "a number of risk factors and a number of behavioral indicators that [Belton] is experiencing neurological or neuropsychological impairment," including in utero exposure to drugs and possibly infection, a complicated birth, reported head injuries and migraines, drug use, and impulsivity. In light of these indicators, Stinson opined that a neuropsychological evaluation "very well may have shown that there's brain impairment and it may have helped to explain how [Belton] got to his lot in life."

{ ¶ 142} Trial counsel secured funding for a neuropsychologist to determine whether it was necessary to image Belton's brain. But they did not hire the expert. Accordingly, for the purpose of his evaluation, Stinson "assumed" that Belton did not have a brain impairment. According to Stinson, he would have more strongly urged a neuropsychological evaluation if it had been obvious to him that [Belton] suffered from brain injury.

***24** { ¶ 143} Stinson's testimony indicates that a neuropsychological evaluation might have yielded useful mitigation evidence. But even so, Belton cannot establish that trial counsel were deficient for failing to pursue that course. The record indicates that counsel consulted with a neuropsychologist and ultimately decided not to pursue an evaluation. Counsel may have been concerned that the evaluation would yield negative results, thereby damaging Belton's case. Notably, even Stinson did not believe the indicators of potential brain impairment in Belton were

sufficiently strong for him to insist on the evaluation.

{ ¶ 144} Under the circumstances, we presume that counsel's decision was strategic. And in any event, the record does not indicate what results a neuropsychological evaluation or brain scan would have yielded, so Belton cannot establish prejudice under *Strickland.*[8]

[62] [63] { ¶ 145} Third, Belton argues that trial counsel should have secured a substance-abuse expert to testify about how drugs and alcohol affected his life. A defendant cannot establish ineffective assistance based on counsel's failure to secure an expert if counsel used "alternative devices" to "fulfill the same functions as the expert assistance sought." *State v. Jenkins,* 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), paragraph four of the syllabus; *see also Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶ 103. Here, trial counsel introduced significant evidence of Belton's history of drug and alcohol abuse—and how it may have affected him—through the testimony of Stinson, the defense psychologist. Belton offers no indication of how Stinson's testimony on the subject was inadequate. Because the record contains "no evidence * * * as to what a substance-abuse expert would have said in the penalty phase," Belton cannot "demonstrate[ ] prejudice from missing such testimony." *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 111.

[64] { ¶ 146} Last, Belton contends that counsel should not have called Matthew Martin, a forensic counselor, as a witness during the mitigation phase. Belton argues that Martin's testimony was a "disaster" because he did not really know Belton, he was unprepared, and his testimony opened the door for the prosecutor to introduce evidence of Belton's altercations in jail.

{ ¶ 147} Martin testified that he is a forensic counselor on the maximum-security floor of the Lucas County Corrections Center, where Belton had been incarcerated for the last three years. Martin said that Belton was polite and followed the rules. For a time, Belton even held a special position, trustee, for which he was selected due to good behavior.

{ ¶ 148} Initially, Martin testified that Belton had been in only one physical altercation while on Martin's floor (when another inmate attacked him). However, on cross-examination, the prosecutor inquired about specific fights that occurred between 2008 and 2011. The prosecutor also presented Martin with a jail record from July 23, 2009, which described Belton as "a hard placement [because he] has had issues in each module on the fifth floor." Ultimately, Martin stated that to the best of his knowledge, Belton's fights had occurred soon after his arrest; Martin did not recall Belton's initiating any fights in the last three years.

*25 [65] { ¶ 149} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Treesh,* 90 Ohio St.3d at 490, 739 N.E.2d 749. Here, Martin's testimony was consistent with the defense's mitigation argument that Belton's behavior in jail improved over time, as he adapted to the environment. And Belton's concern that Martin's testimony opened the door to questions about his jailhouse altercations does not make this strategy objectively unreasonable. *See State v. Nix,* 1st Dist. Hamilton No. C–030696, 2004-Ohio-5502, ¶ 60 ("it clearly cannot be said that defense counsel is constitutionally ineffective whenever he or she inadvertently opens the door to otherwise inadmissible testimony"). In fact, the state would have been able to introduce the same evidence in any event; the defense psychologist had testified about his review of Belton's jail records and even described some of his disciplinary charges. Counsel's performance was not deficient in this regard.

{ ¶ 150} For all these reasons, Belton's ineffective-assistance claims fail. We reject proposition of law Nos. 1, 12, 16, 17, and 18.

E. Cumulative Error

{ ¶ 151} In proposition of law No. 20, Belton urges the court to reverse his conviction or, alternatively his sentence, on grounds of cumulative error.

[66] { ¶ 152} The cumulative-error doctrine provides that "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 223, citing *State v. DeMarco,* 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{ ¶ 153} Here, Belton cannot point to "multiple instances of harmless error." *State v. Garner,* 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Nor does he explain how the alleged errors collectively deprived him of a fair trial. Accordingly, proposition of law No. 20 fails.

F. Independent Sentence Evaluation

{ ¶ 154} In proposition of law No. 19, Belton argues that his death sentence was inappropriate in light of the mitigating evidence presented. This claim dovetails with our obligation to independently review Belton's death sentence for appropriateness and proportionality. R.C. 2929.05(A).

[67] { ¶ 155} In conducting this review, we must determine whether the evidence supports the three-judge panel's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether Belton's death sentence is proportionate to those affirmed in similar cases. *Id.*

1. Aggravating Circumstance

[68] { ¶ 156} The three-judge panel found Belton guilty of two aggravating circumstances: committing murder to escape detection, R.C. 2929.04(A)(3), and, as the principal offender, committing murder in the course of an aggravated robbery, R.C. 2929.04(A)(7). The specifications were merged before sentencing, and the prosecutor elected to proceed with the (A)(7) specification.

**26 { ¶ 157} The evidence adduced at the plea hearing supports the panel's finding that Belton murdered Dugan in the course of an aggravated robbery and that Belton was the principal offender. Security-camera video from the BP carryout, recorded on the morning of August 13, 2008, shows a single armed individual confront Dugan with a gun, take money and other items, then shoot Dugan at close range. In addition, video recordings show Belton confessing both crimes to police on August 14, 2008. This evidence, coupled with other evidence adduced at the no-contest-plea hearing, indicates that Belton knowingly killed Dugan while committing aggravated robbery and that Belton was the principal offender in the crimes.

2. Mitigating Factors

{ ¶ 158} We must weigh the above aggravating circumstance against any mitigating evidence about "the nature and circumstances of the offense" and Belton's "history, character, and background." R.C. 29259.04(B). In addition, we must consider the statutory mitigating factors under R.C. 2929.04: (B)(1) (victim inducement), (B)(2) (duress, coercion, or strong provocation), (B)(3) (mental disease or defect), (B)(4) (youth), (B)(5) (lack of significant criminal history), (B)(6) (accomplice only), and (B)(7) (any other relevant factors).

a. Belton's mitigation hearing

{ ¶ 159} The defense presented testimony from five witnesses at the mitigation phase: Belton's mother, Kim Harold; Belton's great-aunt, Linda Berry; a mitigation specialist, Mark Rooks; a psychologist, Dr. Bob Stinson; and a forensic counselor at the Lucas County Corrections Center, Matthew Martin. Belton also introduced 22 exhibits, including reports of Rooks's interviews with Belton's family members and Belton's educational, medical-history, and employment records. Belton did not testify or present an unsworn statement.

{ ¶ 160} On rebuttal, the state presented the testimony of Dr. David Connell, a clinical psychologist, and introduced records from the Lucas County Corrections Center.

i. Background and family history

{ ¶ 161} Belton's mother, Kim Harold, was born to a teenage mother, Sheila Googins, in 1965. As a child, Kim moved frequently, living at times with her mother, her grandmother, and foster parents. When she was five or six, Kim moved in with her mother and stepfather, George Harold, who adopted her. George molested Kim for years, and at some point when Kim was a teenager, she told Sheila that George had molested her. Sheila told Kim she did not believe her, but then Sheila became depressed over the allegation and attempted suicide. Kim moved in with her grandmother after Sheila's suicide attempt. Kim became depressed and began to use marijuana and crack, but she did complete high school and then attended a semester of a nursing program at the University of Toledo.

{ ¶ 162} At a young age, Kim entered an 11–year relationship with Anthony Belton Sr. They had two sons together when Kim was in her early twenties. Belton was born on November 23, 1985, and Aaron followed on January 5, 1987. Kim used drugs during both pregnancies—marijuana during the first and cocaine during the second. She was also hospitalized for an abdominal contusion during her pregnancy with Belton. Even so, records and family members indicate that

Belton's birth was normal and that he was a full-term baby.

*27 { ¶ 163} As a young child, Belton saw his father infrequently. The family lived in Toledo, but Belton Sr. was stationed in Japan for four or five years as a member of the United States Marine Corps. When Belton was about four years old, Belton Sr. became frustrated with Kim's continued drug use, and he moved to California. Kim attempted suicide. But soon she began dating Belton Sr.'s nephew, Christopher Belton, and they had a son together. Christopher became like a surrogate father to Belton.

{ ¶ 164} Kim and her sons moved frequently, living in eight or nine homes while Belton was growing up. Belton attended school regularly, but he began to get into trouble at an early age. According to Belton's great-aunt, Belton knew the difference between right and wrong, but had a tendency not to listen. Kim disciplined him by spanking him or hitting him with a belt.

{ ¶ 165} Belton witnessed both domestic abuse and drug use in the home. On one occasion, police came to investigate a domestic-violence incident and Belton was maced by the police. Another time, Kim went to the hospital, where she reported that Christopher had assaulted and raped her. Kim smoked marijuana in front of her sons, at times used $100 worth of cocaine in a single day, and left home for days-long crack binges. Yet she rejected offers from Belton Sr. and her mother to take the boys.

{ ¶ 166} When Belton was around 11 years old, Kim was incarcerated for forgery and petty theft. Kim sent Belton and Aaron to live with Belton Sr. in California. Initially, Belton attended school and earned good grades. He got along well with his father's girlfriend, LaTisha. But after about a year, Belton Sr. and LaTisha broke up, and the family moved.

{ ¶ 167} When Belton was 13 or 14 years old, Belton Sr. began dating a woman named Michelle. Michelle and her three daughters moved into the house, and she expected Belton to help with the kids. She also tried to act as a surrogate mother to Belton, which he resented. According to Dr. Stinson, "By this time, [Belton] was an angry child who very much resented the abandonments that he had suffered up to this point in life."

{ ¶ 168} Belton Sr. employed military-style discipline with the boys and frequently grounded Belton or took away privileges. He ordered Belton to do physical exercises such as push-ups as punishment. Belton Sr. also sometimes ordered Belton to box with him so that Belton Sr. could show him that he was stronger and was in charge. At times, he made Belton sit in a hot car all day while he worked.

{ ¶ 169} Belton attended Gompers High School in San Diego, California, a school that Stinson testified was known for its "crime ridden, gang infested environment." Riots broke out at Gompers several times a year, and when fights broke out, teachers would contain the fighting by closing gates inside the school until a swat team arrived. Belton's attendance at school was spotty. He got into fights, was beaten up a few times, and ultimately joined a gang. Belton began using alcohol and marijuana, but he did not try cocaine or crack, because he had seen what those drugs did to his family members.

*28 { ¶ 170} When Belton was 17 or 18 years old, he assaulted a female classmate, and her family threatened charges. Belton Sr. decided to send his sons back to Toledo on a bus.

{ ¶ 171} Although Belton was glad to return to Toledo, he did not adjust well to the move; his great-aunt testified that he seemed depressed and angry. Initially, Belton enrolled in high school and got a job. But his school attendance was poor, and he was soon kicked out for fighting. Belton began pursuing a GED, but stopped attending classes. And he was fired from his job because he did not want to follow rules. Around this time, Belton began hanging out with his cousins, who used and dealt drugs.

{ ¶ 172} Belton lived with his mother and his Great–Aunt Sherry, but he left after he got into some disagreements with his great-aunt. Finally, Belton moved into the home of his maternal great-grandmother, Marianne Dodson. Dodson ran a "flop house" for anyone who needed a place to stay. Dodson's guests tended to spend their days smoking marijuana, instead of working or attending school.

{ ¶ 173} Belton's mother described him as intelligent, fun-loving, and not a bad person. She said that Belton loves to help people. And Belton's great-aunt stated that she has never seen Belton get violent.

ii. Belton's mental health

{ ¶ 174} Belton's great-aunt, Linda Berry, is a psychiatric nurse. She saw Belton frequently as a child and remembers him as being quiet. At family events, he

sat alone rather than playing with other children.

{ ¶ 175} According to Berry, Belton became severely depressed in 2003 when his uncle, George Harold, died in a motorcycle accident. George had been a father figure and a stabilizing force to Belton. After George's death, Berry said, Belton "wouldn't talk to anybody" and "isolated himself." Berry thinks Belton may have experienced hallucinations and shown other signs of psychosis at the time.

{ ¶ 176} Berry set up an appointment for Belton to be evaluated at Connecting Point in November 2005. He was diagnosed with dysthymic disorder, which is chronic, low-grade depression.[9] His file was closed in March 2006.

{ ¶ 177} Dr. Bob Stinson, a forensic psychologist, testified that he had met with Belton, administered the Woodcock–Johnson III achievement test, and interviewed Belton's mother, brother, cousin, and great-aunt. Stinson also reviewed discovery materials, the mitigation specialist's interview notes, and records collected by the mitigation specialist.

{ ¶ 178} Stinson analyzed Belton's life through the lens of a United States Department of Justice ("DOJ") model that identifies various risk factors that make a person more likely to engage in criminal behavior, as well as various protective factors that reduce the risk of such behavior. According to Stinson, virtually every risk factor identified by the DOJ model applies to Belton, meaning that he was "at high risk for developing a psychological disorder or drug dependence and criminal activity." Stinson testified that these risk factors provide "a context in which to understand how [Belton] developed morally, how he developed in terms of values and what influence[d] his choices that he ultimately made."

*29 { ¶ 179} Stinson conceded that Belton made a choice when he committed the crimes. However, he opined that Belton's background may reduce his moral culpability for his crimes. And Stinson testified that Belton has expressed sincere remorse for his actions.

{ ¶ 180} Stinson diagnosed Belton with an untreated bipolar disorder. In support, he cited Belton's reports of feeling alternately sad, energized, irritable, and suspicious of others. He also noted Belton's personal and family history of depression, his difficulty sleeping, and his report of hearing voices. The state's psychologist, Dr. Connell, disagreed with Stinson's diagnosis. Based on his review of the records, Connell opined that the better diagnosis is antisocial-personality disorder.

{ ¶ 181} Stinson also diagnosed Belton with drug and alcohol dependence. Belton began using alcohol and marijuana at age 15. Belton told Stinson that by the time he was 17, he was a "minialcoholic." He told Stinson that he drank pints of liquor at a time and sometimes blacked out. At the time of his arrest, Belton was using at least one ounce of marijuana a day. At other times, he used as much as one and a half ounces daily. Stinson explained that individuals with untreated mental illness "oftentimes turn to drugs and alcohol" in an effort to self-medicate.

{ ¶ 182} Belton's full-scale IQ is 89. However, Stinson noted indications of possible brain damage, such as perinatal risk factors, reported head injuries, reported migraines, and other behavioral indicators. Stinson recommended, but did not insist, that defense counsel secure a neuropsychological or neurological evaluation of Belton. Because this evaluation did not occur, Stinson's conclusions are based on the assumption that Belton does not have brain damage.

iii. Jailhouse behavior

{ ¶ 183} Matthew Martin, a forensic counselor on the maximum-security floor of the Lucas County Correctional Facility, testified about Belton's behavior in jail since his arrest. Belton had been on Martin's floor for three years, after initial placements on suicide watch and then another floor. According to Martin, Belton is polite and can exercise self-control.

{ ¶ 184} Martin testified that Belton hardly ever had discipline problems while on his floor. According to Martin, Belton had been selected as a trustee, a privilege reserved for well-behaved inmates. Martin explained that Belton was removed from that position only because a jail captain thought his case was too high profile.

{ ¶ 185} On rebuttal, the state introduced reports from the jail's disciplinary board dated from 2008 to 2011. The reports document Belton's attack on a special-needs inmate, physical altercations with other inmates, disregard of instructions, and possession of contraband. In July 2009, Belton challenged a shift commander to a fight, stating, "I'm facing the death penalty. I ain't got nothing to lose." Personnel suspected Belton was trying to manipulate his placements in the jail, and one report indicated that Belton may be "a hard placement." Belton also made repeated requests for painkillers, which Dr. Connell described as suspicious, drug-seeking behavior.

*30 { ¶ 186} Dr. Stinson testified that Belton's prison

record shows his potential to adjust to confinement. He explained that although Belton's record is imperfect, it shows improvement over time. Belton was cited in six disciplinary actions in 2009, three in 2010, and three in 2011. According to Stinson, prison is probably the most stable environment Belton has ever been in and he has responded well to the structure.

b. Weight of mitigating factors

{ ¶ 187} Based on the above evidence, Belton asked the trial court to assign weight to the following mitigating factors: (1) his history and background, R.C. 2929.04(B), (2) his youth, R.C. 2929.04(B)(4), (3) his lack of significant criminal history, R.C. 2929.04(B)(5), and (4) other factors such as mental-health problems, remorse, acceptance of responsibility, and adaptability to a prison setting, R.C. 2929.04(B)(7). He concedes that there is nothing in the nature and circumstances of the offense that is mitigating.

{ ¶ 188} Upon our review of the record, we assign weight to the following mitigating factors. First, Belton presented significant evidence of his difficult childhood and upbringing. As a child, Belton moved frequently and had an unstable home life. His family had a history of depression, domestic violence, physical abuse, and drug and alcohol abuse. Belton's mother smoked marijuana in front of him and left home for days at a time to go on crack binges. When she was incarcerated, Belton went to live with his father in California, even though they had not seen each other for years. Belton's father physically abused him. Belton attended a violent, crime-ridden high school, where gangs and riots were common. He eventually joined a gang himself and began using drugs. He did not finish high school, had trouble holding a job, and had difficulty following rules. We assign significant weight to Belton's family history and background.

{ ¶ 189} Second, Belton was 22 years old when he robbed the BP carryout and murdered Dugan. In the past, we have accorded some weight to the defendant's youth when considering defendants of a similar age. *See, e.g., Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 307 (23–year–old defendant); *State v. Goodwin,* 84 Ohio St.3d 331, 350, 703 N.E.2d 1251 (1999) (according "nominal weight" to defendant's age of 19). *Compare State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 262 (defendant's age of 25 "entitled to little, if any, weight"). Accordingly, we assign Belton's age some weight in mitigation.

{ ¶ 190} Third, the record does not indicate that Belton has a significant history of serious criminal convictions or delinquency adjudications. Belton's criminal record includes offenses such as loitering, disorderly conduct, giving false information to a police officer, failing to register a dog, and driving without a licensed driver while holding a temporary permit. We afford this factor some weight. *See State v. Neyland,* 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 301.

***31** { ¶ 191} Fourth, the defense presented evidence that Belton suffered from mental-health problems. R.C. 2929.04(B)(7). Belton was diagnosed with dysthymia in 2005, and he may have been depressed for much longer. In addition, Dr. Stinson diagnosed Belton with bipolar disorder, as well as drug and alcohol dependence. And although the state's expert psychiatrist disagreed with Stinson's diagnosis of bipolar disorder, he opined that Belton suffers from antisocial-personality disorder. This evidence of mental-health problems is entitled to some weight.

{ ¶ 192} Belton also argues that the record establishes his remorse for the crimes and his acceptance of responsibility. These claims are undermined by Belton's actions in the immediate aftermath of the murder (buying shoes and going to Burger King), his initial lies to police, and his statements to Christopher Wilson while they were in holding cells regarding Bolton's having told the police everything. However, Dr. Stinson and Belton's great-aunt both testified that Belton has repeatedly expressed remorse to them. And although Belton did not immediately accept responsibility for the crimes, he did help police locate the murder weapon, confess, and (much later) enter a plea of no contest to the charges against him. This factor is entitled to some weight.

{ ¶ 193} Finally, Belton asserts that he has established his adaptability to prison life. Although Belton was clearly not a model prisoner, there is some evidence that he began to cause fewer disciplinary problems as he spent more time in prison. Dr. Stinson explained that prison is probably the most stable environment Belton has ever lived in and opined that his behavior would only continue to improve. We assign minimal weight to this factor.

{ ¶ 194} At oral argument, Belton also asked us to consider one additional factor in our reweighing of his sentence: He asserts that the costs associated with a death sentence exceed the costs associated with a sentence of life imprisonment without parole. This "is not a legitimate mitigating factor." *State v. Davis,* 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 114 (explaining that such costs are not relevant mitigating evidence because

they are not evidence about the defendant's character or record or about the circumstances of the offense).

3. Weighing

[69] { ¶ 195} As detailed above, Belton has presented significant mitigating evidence that has substantial weight. That said, Belton shot Dugan at close range, in the back of the head, even though Dugan had cooperated with Belton's demands for money and phone cards. Belton then left Dugan to die and went shoe shopping. Under the circumstances, we conclude that the aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt. *See State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 167 (compared with the serious aggravating circumstances of committing murder during the course of an aggravated robbery and aggravated burglary, Elmore's mitigating evidence had little significance).

4. Proportionality

*32 [70] { ¶ 196} The death penalty is appropriate and proportionate in this case, when compared to death sentences approved in similar cases. *See, e.g., Murphy,* 91 Ohio St.3d 516, 747 N.E.2d 765 (shooting a robbery victim outside a bar); *Bey,* 85 Ohio St.3d 487, 709 N.E.2d 484 (stabbing a retail employee during a robbery); *State v. Eley,* 77 Ohio St.3d 174, 672 N.E.2d 640 (1996) (shooting a store clerk while robbing a market).

III. CONCLUSION

{ ¶ 197} We reject each of Belton's propositions and affirm his convictions and sentence of death.

Judgment affirmed.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, and FRENCH, JJ., concur.

O'NEILL, J., concurs in part and dissents in part for the reasons set forth in his dissenting opinion in *State v. Wogenstahl,* 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900.

All Citations

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Footnotes

1 The trial court held five hearings on this issue, and the parties filed multiple briefs arguing their positions. Later, the court postponed trial to await an appellate court's ruling on the same issue in a different case. Belton also unsuccessfully attempted to file an interlocutory appeal of the trial court's ruling. *See State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162.

2 Detective Jeffrey Clark testified that the time stamp on the recording was approximately 50 minutes behind the actual time. This opinion refers to the actual time of events, not the incorrect times indicated by the time stamp.

3 Belton does not—nor could he—make a case that the General Assembly *expressly* repealed the death penalty. The specific statutory provisions governing the death penalty, R.C. 2929.03 and 2929.04, were first enacted in 1972. And although these statutes have been amended multiple times, they have not been repealed.

4 Belton offers this argument as support for his claim that the General Assembly repealed the death penalty when it amended R.C. 2929.11(A) in 2011. But rehabilitation was not added as part of the 2011 amendment. Rehabilitation (and the other three factors mentioned) have all been included in R.C. 2929.11(A) since its initial enactment.

5 However, the trial court did quote a passage from *DePew,* and it granted the defendant's motion to "prohibit the prosecutor from arguing and the court from giving instructions regarding statutory mitigating factors not raised by the defendant."

6 At the hearing, the state introduced complete video recordings of both interviews and presented testimony from Detective Lenhardt, Sergeant Russell, and Detective Clark. Belton's attorney's argued, in part, that Belton had been

under the influence when he waived his rights, so much of the suppression-hearing testimony focused on whether Belton was under the influence of drugs or alcohol during questioning, but Belton does not press that claim on appeal.

7 Proposition of law No. 18, part (e), repeats the claims raised in proposition of law Nos. 1, 12, and 16.

8 Because Belton would need evidence outside the record to establish his claims that a neuropsychologist and a substance-abuse expert should have been called to testify, they are not appropriately raised on direct appeal. *See Madrigal,* 87 Ohio St.3d at 390–391, 721 N.E.2d 52 (it is not permissible to rely on evidence outside the record in a direct appeal). Belton could raise them on postconviction review.

9 On rebuttal, the state's psychologist, Dr. Connell, noted that it was inappropriate for Connecting Point to attempt to diagnose Belton at the time, in light of his daily drug use.

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