IN THE SUPREME COURT OF FLORIDA

BESSMAN OKAFOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-2136

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State relies on the statement of case and facts presented in its Answer Brief of Appellee. The State of Florida files this Supplemental Answer Brief in response to this Court's order of November 2, 2016.

STATEMENT OF CASE AND FACTS

Appellant, Bessman Okafor, was convicted in August 2015 of the first-degree premeditated murder of Alexander Zaldivar in September 2012. (R70, T3469-70). The murder occurred the day before Zaldivar and Brienna Campos and two others were scheduled to testify regarding a May 9, 2012 home invasion robbery in Ocoee for which they were victims. (T2525-9, 2514-5). Okafor and Nolan Bernard were arrested and charged in that robbery. (T2523-4). Okafor bonded out of jail and was placed on home confinement in June 2012. (T2614, 2737). When gunmen entered the home Zaldivar and Campos shared with roommates on September 10, 2012, Zaldivar was shot to death but Brienna and her brother, Remington Campos, survived their gunshot wounds. (T2510-1, 2523-4, 2612-14, 2576).

The jury convicted Okafor of Zaldivar's murder and two counts of Attempted First Degree Murder as well as Armed Burglary of a Dwelling with Explosives or a Dangerous Weapon. (T3469-70). The jury returned an advisory sentence of death by a vote of eleven to one (11-1). (T4186-7). The trial court

subsequently sentenced Okafor to death after finding that the aggravators - which included the prior violent felony conviction, avoid arrest aggravator, and cruel, calculated, and premeditated - outweighed the mitigators. (R1603-46).

In a proposed jury instruction and during the trial's charge conference, Okafor's trial counsel argued that the advisory sentence of the jury must be unanimous under the Fourth and Eighth Amendments to the United States Constitution. (R1358-59, T4061). The trial court gave the standard instruction. (T4061-2). Appellant's trial counsel also filed a motion requesting the trial court "to direct the jury to return findings of fact as to aggravating circumstances in concert with the jury's recommendation as to the appropriate penalty." (R382). The motion was denied. (R541-3).

In January 2016, the United States Supreme Court ruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's death penalty sentencing scheme was a violation of the Sixth Amendment because it required the judge alone to find the existence of an aggravating circumstance. *Id*. at 619.

On October 14, 2016, this Court ruled in *Hurst v. State*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) that the Eighth Amendment requires that a jury recommendation for death must be unanimous. *Id*. at *2. This Court also ruled that the Sixth Amendment right to a trial by jury mandates that the jury find the existence of the aggravating factors proven beyond a reasonable doubt, that the

aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. *Id.* at *10. In addition, this Court ruled that the trial court - instead of the jury - making the necessary findings was not structural error and was subject to harmless error review. *Id.* at *22.

Subsequent to this Court's *Hurst* ruling, Appellant filed a motion to file a supplemental brief, which was granted.

ARGUMENT

ISSUE X

WHETHER THE TRIAL COURT HARMFULLY ERRED BY SENTENCING APPELLANT TO DEATH WITHOUT THE JURY MAKING FACTUAL FINDINGS TO IMPOSE A DEATH SENTENCE OR RECOMMENDING DEATH BY A UNANIMOUS VERDICT IN LIGHT OF *HURST V. STATE* (restated).

In the *Supplemental Brief*, Appellant argues that the trial court harmfully erred by sentencing him to death when the jury did not make the factual findings necessary to impose a sentence of death and that the recommendation was not unanimous. *S.B.* at 4. While maintaining that the non-unanimous jury recommendation and findings of fact to impose the death sentence are structural error, Appellant also argues that the death sentence fails under the harmless error analysis. *S.B.* at 5.

These arguments are without merit. As this Court found in *Hurst*, the lack of unanimity or fact finding by the jury did not amount to structural error. Citing

Neder v. United States, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), this Court noted in *Hurst* that the Supreme Court held that structural error can occur in only a very limited class of cases. *Hurst* at *22. This Court noted that harmless error applied in *Neder* where an element of the offense was erroneously not submitted to the jury and that structural error did not occur in *Washington v. Recuenco*, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), a noncapital case that involved a failure to submit a sentencing factor to the jury in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and the Sixth Amendment. *Id*.

Applying a harmless error analysis to Appellant's case, any error in the penalty phase proceeding was harmless. Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *Hurst* at *23, citing *Zack v. State*, 753 So.2d 9, 20 (Fla.2000). As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances. *Davis v. State*, __ So. 3d __, 2016 WL 6649941, *29 (Fla. Nov. 10, 2016).

Appellant's argument in the *Supplemental Brief* that the jury "made no findings as to any aggravator" (*S.B.* at 5), is refuted by the record. In addition to his conviction for first degree murder, Okafor's jury also found him guilty of the attempted first-degree murders of Brienna and Remington Campos. These contemporaneous felonies served as the basis for the prior violent felony aggravator, along with Okafor's 2005 conviction for aggravated assault with a firearm and 2013 convictions for four counts of robbery and one count of burglary of a dwelling with assault or battery for the prior home invasion robbery for which Alex Zaldivar and Brienna Campos were scheduled to testify as witnesses. (T3564-6, State's exh. 66, State's exh. 67). Thus, there is no doubt that the jury made the necessary fact finding that the prior violent felony conviction aggravator was proven beyond a reasonable doubt.

Furthermore, based on the record before this Court, it is clear beyond a reasonable doubt that a rational jury would have also unanimously found the combined aggravator of avoid arrest and the capital felony being committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Appellant was out of jail on home confinement for the prior home invasion robbery, in which Zaldivar and Brienna were two of the witnesses, when he entered their home a second time the day before his trial. Brienna recalled one of the assailants asking, "is this the house that got robbed." This same

man asked about the whereabouts of two other people that were present at the prior home invasion robbery but not present during the subsequent home burglary during which Zaldivar, Brienna and Remington were shot. (T2534). Brienna testified that after she told the assailants "you're gonna be disappointed like last time, there's nothing here, take the electronics and go," one of the assailants then said, "well, it looks like y'all are gonna get shot tonight." (T2535). Although Okafor and Bernard stole laptops, cell phones, and other electronics during the prior home invasion robbery, expensive electronic equipment was left in the home during the second time Okafor entered the home. (T2517, 2588). In fact, Brienna testified that after she and Remington were released from the hospital, they checked the house and "everything was still there." (T2543, 2576).

On September 9, the day before the murder and two days before Okafor's scheduled trial, the Appellant exchanged text messages with a friend, Antione McLaren, during which Okafor said that he was worried that all of the witnesses would appear in court and "he was worried about going to jail again." (T2710-1, 2713, 2723-4). McLaren testified that Okafor told him, "I can't let them show up." (T2725). Okafor expressed the same concerns about the witnesses testifying against him to friend Nesly Ciceron (T2787-90). The State also provided evidence that the user of Okafor's cellular telephone sent a text message in August 2012 to someone named "Dorey" stating that, "they say all the witnesses gonna

show up." Dorey texted, "damn, who told you?" The user of Okafor's phone texted back, "my lawyer." (T2888-91, State exh. 22). Thus, there was substantial evidence that Okafor was worried about going back to jail, wanted to keep the witnesses from testifying at the home invasion trial and went back to the home the day before he was scheduled to stand trial for the purpose of murdering the witnesses to the prior home invasion robbery. Undoubtedly, the jury would have made the necessary fact finding to determine that there was proof of the combined aggravator avoid arrest/the capital felony being committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Likewise, it is beyond a reasonable doubt that a rational jury would have unanimously found the cruel, calculated and premeditated ("CCP") aggravator where, as here, the evidence leaves no doubt that the heightened premeditation required for CCP was established. Orlando Detective Ed Michael recovered a cell phone from Okafor's home that the detective was able to link to Okafor. Det. Michael testified that on August 24, 2012, a message was sent at 8:14 p.m. from Okafor's phone to Dorey with the text, "did you get that?" The user of Dorey's phone texted back that he was going to be on his way at 8:30. At 8:49, the user of Dorey's phone texted Okafor's phone, "it's here with a full clip." (T2863-9, 2883, 2888, 2890, State exh. 22, R3067). Det. Michael also found history of an internet search on Okafor's phone, which was a smart phone, for "how do you remove gun

residue?" This internet search was performed on September 9, 2012, at 9:11 p.m. (T2878-79). Also on September 9, Okafor and his friend McLaren texted each other several times. (T2713-14, 2716). McLaren testified that Okafor asked McLaren "to get [him] some things" and to come over to his home to discuss his pending case. (T2717, 2721). Okafor asked McLaren to get him "a hoodie and some gloves" because he needed those items that night. (T2721-22). The home break-in, during which Zaldivar was shot twice in the head, occurred about 5 a.m. on September 10. (T2528-9, 3032). There was evidence presented that Okafor had recruited his friend Ciceron to act as a lookout and asked his girlfriend, Sherria Gordon, to listen out for sirens and call him if she heard any. (T2733-5, 2751-2, 2787, 2793). Det. Michael also testified to retrieving an internet search from Okafor's cell phone made on September 10, at 12:23 p.m. regarding a news article referencing victims being shot in an Ocoee home invasion. (T2879-80). Thus, the State presented compelling evidence that Appellant meticulously planned the shooting death of Zaldivar, which subsequently provided proof of the CCP aggravator beyond a reasonable doubt.

No statutory mitigation was presented. The Appellant provided testimony regarding eleven non-statutory mitigating circumstances. While Appellant presented evidence of having a learning disability in early childhood, the evidence presented at trial showed that Okafor was intelligent enough to carefully plan to

murder the witnesses to the home invasion robbery. He arranged for weapons to use and people to act as lookouts for the police. Unlike in *Hurst*, there was no proof of Appellant having a low IQ. Rather, Okafor was savvy enough to use his smart phone to perform internet searches on "how to remove gunshot residue," which indicates that Okafor was looking ahead at what steps he could take to keep from leaving proof of his involvement with the murders he was planning.

The majority of the mitigating factors presented focused on Okafor's childhood. However, Appellant, who was born in November 1984, was 27 years old when he killed Zaldivar. (T3830). While Okafor's brother, Trentton, testified that their mother "would whoop us a lot," he was raised in the same house as Okafor and did not commit any felonies or go to prison. (T3640-1, 3671-2). One of the mitigation witnesses, Okafor's grandfather, had never met Appellant. (T3568, 3571, 3576). Okafor's aunt, Eucharia Okafor Onokala, never met Appellant in person prior to the commencement of the penalty phase. (T3579, 3610, 3624, 3628). Although there was testimony presented that Okafor had lost two children, the testimony did not indicate if Okafor had any relationship with the children or the effect of the loss of the children on Okafor, which the trial judge noted in the sentencing order. (R1603-46).

It is clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed

the mitigating circumstances. Although the jury's recommendation for death was not unanimous, the eleven to one (11-1) recommendation for death was as close to unanimity as possible. The State presented ample evidence of Appellant's prior violent felony convictions, that the murder was committed to avoid arrest /disrupt Okafor's upcoming trial proceedings and that the murder was cruel, calculated, and premeditated. The facts of the case – the killing of a witness to an upcoming criminal trial – go to the basic foundation of the criminal justice system. A rational jury would have taken note of the significance of the murder and the chilling effect the murder would have had on other witnesses to crime. As a result, a rational jury would have unanimously determined that the aggravating factors were sufficient and outweighed the mitigating evidence. Any *Hurst v. Florida* error was harmless. There is no reasonable possibility that the error affected the sentence recommendation.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by the E-Portal to Valarie Linnen, Esquire, vlinnen@live.com, P.O. Box 330339, Atlantic Beach, FL 32233, on November 17, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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