IN THE SUPREME COURT OF FLORIDA

NORMAN GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1071
L.T. NO. 1998-CF-000510
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Norman Grim, was convicted of first-degree murder and sexual battery upon a person 12 years of age or older with use of a deadly weapon in the death of Cynthia Campbell on July 27, 1998. Grim v. State, 841 So. 2d 455 (Fla. 2003).

On July 27, 1998, after being reported missing, Cynthia Campbell's body was found by fishermen off the Pensacola Bay Bridge and was wrapped in a sheet, a shower curtain, and masking tape. Grim, 841 So. 2d at 455. The investigation revealed a surveillance video showing Appellant at a convenience store near the bridge where Campbell's body was found. Id. Multiple witnesses testified to seeing him in the vicinity that day.

A piece of green carpet was found on Campbell's body under the tape during the autopsy. Grim, 841 So. 2d at 457-58. Investigators saw a similar piece of green carpet at Appellant's home. Id. at 458. The autopsy revealed Campbell's face was covered with deep abrasions and contusions, caused by blunt force trauma. Id. The blunt force injuries were consistent with a hammer and she suffered multiple stab wounds to the chest. Id.

A striped pillow case that appeared to have blood on it and matched the pattern of the sheet wrapped around Campbell was found in Appellant's kitchen trash can. Grim, 841 So. 2d at 458. Investigators also seized athletic shoes and a rope which appeared

to be consistent with the rope found on the victim's body and a pair of blood-stained denim shorts. Id. The investigation revealed forensic evidence which included the following:

> The prescription glasses found in the cooler matched Campbell's prescription records, and the roll of masking tape in the cooler was fracture-matched to the tape found on Campbell's body. The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home. Although the examiner was unable to fracture-match these pieces, he determined that they were identical in appearance, construction, and fiber type and could have originated from the same source. Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's, and the bloody fingerprints on the trash bag box were identified as Grim's.
>
> DNA analysis of stains on the cut-off jean shorts Grim was wearing when arrested revealed twelve genetic markers consistent with the DNA of Cynthia Campbell, and the steak knife found in Grim's cooler yielded six genetic markers consistent with the victim. The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the box of trash bags. Likewise, stains on a pair of blue-jean shorts and a pair of shoes found in Grim's living room bore genetic markers consistent with those of the victim.

Id. at 458-59 (internal page numbers omitted). At the penalty phase, after much discussion with the court, Appellant voluntarily and knowingly waived his right to present mitigation. (DAR V 5:812-29). The jury unanimously recommended the death penalty. The trial court followed the jury's recommendation, sentencing Appellant to death for the first-degree murder, followed by 390.5 months of

prison for the sexual battery. The trial court found three aggravating circumstances: 1) the murder was committed by a person under sentence of imprisonment, 2) the defendant had prior convictions for violent felonies, and 3) the murder was committed while the defendant was engaged in the commission of a sexual battery. Id. at 460. The trial court found three statutory mitigating circumstances[1] and seventeen nonstatutory mitigating circumstances. Id.[2]

Appellant's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. Grim, 841 So. 2d 455. Appellant filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on October 6, 2003. Grim v. Florida, 540 U.S. 892 (2003).

Subsequently, Appellant filed numerous proceedings in state and federal courts, all of which were denied. See Grim v. State,

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[1] (1) disruptive home life and child abuse (given significant weight); (2) hard-working employee (given significant weight); and (3) mental health problems that did not reach the level of § 921.141(6)(b), Florida Statutes (1997) (given great weight).

[2] The trial court also considered seventeen nonstatutory mitigators. Because many were subsumed within the statutory mitigation and thus already considered, the trial court considered the following remaining nonstatutory mitigators: (1) lack of long-term psychiatric care (no weight); (2) marital problems and situational stresses (great weight); (3) errors of judgment under stress (no additional weight); (4) model prison inmate (some weight); and (5) entered prison at a young age (given little weight).

971 So. 2d 85 (Fla. 2007); Grim v. Sec'y, Fla. Dept. of Corr., 705 F.3d 1284 (11th Cir. 2013); Grim v. Crews, 134 S.Ct. 67 (2013).

On June 24, 2016, counsel for Appellant filed a successive motion raising claims based on the United States Supreme Court's recent decision in Hurst v. Florida, 136 S.Ct. 616 (2016), in the trial court.[3] On May 8, 2017, the trial court judge entered an order, denying the successive motion without conducting an evidentiary hearing.

OBJECTION TO ORAL ARGUMENT

Appellee objects to Appellant's request for oral argument. In the briefing schedule, this Court ordered the parties to respond to a limited issue that has been decided by this Court in other cases. As such, oral arguments would not serve any purpose other than to delay the proceedings.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Appellant's successive motion for postconviction relief. The record conclusively establishes that any Hurst error was harmless beyond a reasonable doubt as the jury in this case rendered a unanimous

[3] Appellant filed several sub-issues within a single claim alleging that Appellant's death sentence was unconstitutional under Hurst. Appellant argued that Hurst was retroactive and argued that it must be applied to all death row inmates. Appellant also argued that the Hurst error was not harmless and that trial counsel would have conducted himself differently if Hurst had been in place when the case was tried.

recommendation for the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d 142, 175 (Fla. 2016). The lower court was not required to hold an evidentiary hearing in this case because the claims raised below were purely legal and would not have been aided by factual development.

Appellee objects to Appellant's brief on two grounds. First, Appellant's brief exceeds the 25-page limit set by the briefing schedule. Second, Appellant's brief exceeds the scope of the issues to be addressed as ordered by the briefing schedule. The 15-page limit for Appellee's response precludes an in-depth response to the out-of-scope issues raised by Appellant's brief. Should this Court desire additional argument on the surplus issues Appellant raised, the State will file supplemental briefing on these issues.

STANDARD OF REVIEW

The trial court's summary denial of Appellant's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT

ISSUE I

APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER ANY HURST ERROR IS HARMLESS.

In Hurst v. Florida, 136 S. Ct. 616 (2016), the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002).[4] On remand, this Court interpreted this holding as requiring the jury to make numerous factual findings prior to the court imposing a death sentence: the jury

> must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016). However, any Hurst error is subject to harmless error review, and this Court has stated that "the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." Id. at 68.

[4] Appellant's judgment and sentence became final after Ring, and the parties did not dispute below that this Court has applied Hurst retroactively to post-Ring cases. See Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

Appellant argues that the postconviction court should have conducted an evidentiary hearing to determine whether there was harmless error in the unanimous jury verdict. This claim is meritless because a court can properly summarily deny a claim without an evidentiary hearing when the claim is controlled by existing precedent. In cases with unanimous jury death penalty recommendations, this Court has consistently found that Hurst error is harmless and defendants are not entitled to relief.

Appellant argues that the postconviction court improperly denied the successive motion without conducting an evidentiary hearing. This claim is without merit, as a postconviction court may deny the successive motion without an evidentiary hearing when the claims raised are purely legal and do not require any factual development. In Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013), this Court rejected a claim that the trial court was required to conduct an evidentiary hearing regarding a claim raised in a fifth successive postconviction motion that was controlled by existing precedent. This Court explained, that "[b]ecause Mann raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief." Furthermore, a court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. See Franqui v. State, 59 So. 3d 82, 101 (Fla. 2011). As Appellant's claim did not require any factual

development and was a purely legal issue, the postconviction court was proper in summarily denying relief under Hurst.

Appellant justifies the need for an evidentiary hearing based on speculation that a change in the law would have affected his lawyer's decisions at trial. This Court does not grant relief based on speculative claims of harmfulness; as such, holding an evidentiary hearing would not have added merit to his Hurst claim. The harmless error standard focuses on "the effect of the error on the trier-of-fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The key question in evaluating harmless error is whether there is a reasonable possibility that the error affected the verdict. Id. Harmless error is not about speculating whether another person's behavior, in this case, the trial counsel, would have changed absent the change in the law or incorrect instruction, but rather it focuses on what a reasonable jury would do under the circumstances if it had been properly instructed. As such, Appellant's allegation that his trial counsel's behavior would have differed is outside the scope of Hurst harmless error inquiries and does not justify an evidentiary hearing.[5]

Appellant's claim that consideration must be given to the fact that trial counsel would have tried the case differently under

[5] The State observes that it is hardly a new development in Florida capital litigation that a defense attorney prepares to challenge the state's case in aggravation and presents – or prepares to present mitigation during the penalty phase.

Hurst is unavailing. Appellant argues that trial counsel would have challenged the aggravators if he knew that the law was going to change; however, the evidence Appellant claims trial counsel would have presented is nothing more than mitigation. This argument ignores Appellant's waiver of presenting mitigation at the penalty phase. In the direct appeal, this Court stated that because Appellant had waived the presentation of mitigation during the penalty phase, Appellant could not then complain on appeal that the trial court abused its discretion in not calling a witness to present mitigation. Grim, 841 So. 2d at 462. Appellant had the right to present mitigation at the penalty phase, but he knowingly and voluntarily waived that right. There is no indication that he would not have waived mitigation if the law had been different when his penalty phase occurred. Prior to the ruling in Hurst, a court had to give great weight to the recommendation of the jury. Appellant was advised of that information when he waived his right to present mitigation. The change in the law does not change what the jury must consider and what weight the judge must give to the recommendation of sentence. As such, Appellant's claim that this case must be sent back for an evidentiary hearing to determine if the Hurst error was harmless is meritless.

Accordingly, as Appellant's claim did not require any factual development and was a purely legal issue, the postconviction court was proper in summarily denying relief under Hurst.

ISSUE II

THE POSTCONVICTION COURT'S HARMLESS ERROR RULING SHOULD NOT BE VACATED AND APPELLANT'S DEATH SENTENCE SHOULD BE UPHELD.

Appellant argues that the Hurst error is harmful irrespective of the unanimous jury recommendation for the death penalty. This argument is in direct opposition of the case law that has been well established by this Court.

A. ANY HURST ERROR IN APPELLANT'S CASE IS HARMLESS BEYOND A REASONABLE DOUBT.[6]

Despite the fact that Appellant's jury unanimously recommended the death penalty, Appellant nevertheless argues that the postconviction court's harmless error ruling should be vacated. Appellant's argument is without merit.

In Davis v. State, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." The aggravators in this case were either uncontestable [under sentence of imprisonment] established by prior convictions [prior violent felony], or supported by a contemporaneous jury verdict. In the instant case, the jury found Appellant guilty of

[6] Appellant's claims A-C will be addressed together under this section.

sexual battery and first-degree murder. One of the aggravators found by the judge, that the murder was committed while the defendant was engaged in the commission of a sexual battery, was also found by the jury's unanimous verdict during the guilt phase.

Given the verdict at the end of the penalty phase, there is no question that the Hurst error was harmless beyond a reasonable doubt. This Court has consistently followed Davis and found harmless error in cases involving unanimous recommendations. See, e.g., King v. State, 211 So. 3d 866, 889-90 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Knight v. State, ___ So. 3d ___, 2017 WL 411329, *14 (Fla. Jan. 31, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Truehill v. State, 211 So. 3d 930, 956 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Hall v. State, 212 So. 3d 1001, 1034 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Oliver v. State, 214 So. 3d 606, 617 (Fla. 2017)(conducting harmless error analysis on a Hurst error citing Davis); Tundidor v. State, ___ So. 3d ___, 2017 WL 1506854, *13-*14 (Fla. Apr. 27, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Guardado v. Jones, ___ So. 3d ___, 2017 WL 1954984, *2 (Fla. May 11, 2017)(conducting harmless error analysis on a Hurst error citing Davis); Cozzie v. State, ___ So. 3d ___, 2017 WL 1954976 (Fla. May 11, 2017)(conducting harmless error analysis on

a Hurst error citing Davis). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, Appellee urges this Court to affirm the postconviction court's denial of his Hurst claim.

The trial court specifically instructed the jury that their advisory recommendation did not have to be unanimous, but the jury unanimously determined that death was the appropriate sentence. (DAR V 5:906-07). As this Court has noted, it is "inherent" in this recommendation that the jury determined that the aggravating circumstances were sufficient to impose death and that the aggravators outweighed the mitigation. Jones v. State, 212 So. 3d 321, 343 (Fla. 2017).[7] Accordingly, this Court should affirm the postconviction court's ruling denying Appellant any relief based on Hurst.

Likewise, this Court should reject Appellant's argument that the Hurst error cannot be harmless because the jury's role was minimized in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In Hall v. State, 212 So. 3d 1001 (Fla. 2017), this Court

[7] In Jones, 212 So. 3d at fn. 3, this Court stated,

> [t]he fact that Jones declined to present mitigation to the jury during the penalty phase has no bearing here. As previously stated, Jones's waiver of that right was valid, and he "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence."

(Citing Mullens v. State, 197 So. 3d 16, 40 (Fla. 2016), cert. denied, 137 S.Ct. 672 (2017).)

recently affirmed a defendant's death sentence based on a unanimous recommendation and rejected his challenge to Florida's jury instructions based on Caldwell. Id. at 1032-36 (noting that this Court has repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell).

It is well established that the harmless error test applies to constitutional error, and this Court has consistently found that a jury's unanimous death recommendation satisfies the harmless error standard as it establishes, beyond a reasonable doubt, that the jury unanimously made the requisite factual findings. See Jones, 212 So. 3d at 343 (noting that the jury's factual findings in the aggravating circumstances were sufficient to impose death and outweighed the mitigation was inherent in the jury's unanimous recommendation); King, 211 So. 3d at 889-93; Truehill, 211 So. 2d at 955-57.

As such, because there was a unanimous jury recommendation for the death penalty, the Hurst error is harmless and Appellant is not entitled to relief.

B. THIS COURT HAS FOUND THAT HURST ERROR IS NOT STRUCTURAL ERROR.

Appellant appears to argue that harmless error review cannot be applied to Hurst error because the verdicts in such cases are not constitutionally valid. (Initial Brief at 25). Such a claim ignores this Court's well-established precedent and is meritless.

In Hurst v. Florida, 202 So. 3d at 67, this Court found that the error that occurred in Hurst's sentencing phase, "in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review." The United States Supreme Court has stated,

> [s]ince this Court's landmark decision in Chapman v. California, 386 U.S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.

Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

> In Neder v. United States, 527 U.S. 1, 7–8 (1999), the Supreme Court held that structural error can occur in "only a 'very limited class of cases,'" and is error that always makes the trial fundamentally unfair. Where an element of the offense was erroneously not submitted to the jury in *Neder,* the Court found harmless error review applied and that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review."

Hurst, 202 So. 3d at 67 (citing Neder, at 8). In Washington v. Recuenco, 548 U.S. 212, 218-19 (2006), the United States Supreme Court held, in a noncapital case, that "failure to submit a sentencing factor to the jury in violation of Apprendi, Blakely, and the Sixth Amendment was not structural error that would always result in reversal." Hurst, at 67. This Court has stated that a harmless error analysis is appropriate in errors involving jury factfinding. Galindez v. State, 955 So. 2d 517, 522 (Fla. 2007). This Court stated, the test asks whether there is "reasonable doubt

that a rational jury would have found the defendant guilty absent the error." Id. (citing Neder, 527 U.S. at 18). The same harmless error analysis developed in Chapman v. California, 386 U.S. 18 (1967), which "applied in cases concerning the erroneous admission of evidence under the Fifth and Sixth Amendments, also applied to infringement of the jury's factfinding role." Galindez, 955 So. 2d at 522.

As such, pursuant to Davis and other existing precedent, the Hurst error does not require a reversal, and any Hurst error in this case is harmless beyond a reasonable doubt.

CONCLUSION

In conclusion, any Hurst error in Appellant's case is harmless beyond a reasonable doubt, and Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant relief under Hurst.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of August, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Billy Nolas, counsel for Appellant, at billy_nolas@fd.org and Harry Brody at Barbara.sincerelyyours@gmail.com.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
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