

SUPREME COURT OF FLORIDA

Paul Duroousseau v. State of Florida

218 So. 3d 405 (Fla. 2017) · No. SC15-1276 · Decided January 31, 2017

SUMMARY

The Supreme Court of Florida affirmed the denial of Paul Duroousseau’s postconviction claims alleging ineffective assistance of counsel during voir dire. The court held that his death sentence violated the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State*, and that the error was not harmless beyond a reasonable doubt. The court vacated the death sentence and remanded for a new penalty phase.

OPINION

PER CURIAM.

Supreme Court of Florida _____ No. SC15-1276 _____ PAUL DUROUSSEAU, Appellant, vs. STATE OF FLORIDA, Appellee. [January 31, 2017] PER CURIAM. Paul Duroousseau appeals an order of the Fourth Judicial Circuit Court denying his motion to vacate his conviction of first-degree murder and sentence of death, filed pursuant to Florida Rule of Criminal Procedure 3.851.

We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the circuit court’s denial of postconviction relief but vacate Duroousseau’s sentences and remand for resentencing in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted by *Hurst v. State* (Hurst), 202 So. 3d 40 (Fla. 2016). STATEMENT OF FACTS We discussed the facts of this case in our opinion on direct appeal.

See *Duroousseau v. State*, 55 So. 3d 543, 548-50 (Fla. 2010). Paul Duroousseau was sentenced to death for the murder of Tyresa Mack. In 1999, Mack’s sister and stepfather found Mack’s body in her apartment. She was naked from the waist down, and a white cord was wrapped around her neck. Duroousseau’s DNA was found inside Mack’s vagina.

In 2003, Duroousseau was indicted on five counts of first-degree murder for the deaths of five women. The similar methodology of the crimes caused investigators to conclude that Mack was one of Duroousseau’s victims. Duroousseau was arrested for Mack’s murder.

In 2007, Duroousseau was found guilty of the first-degree murder of Mack. After the penalty phase, the jury voted ten to two to impose a death sentence. The trial court found four aggravating factors: (1) Duroousseau was previously convicted of a felony involving the use or threat of violence; (2) the murder was committed while the defendant was engaged in the commission of a

robbery or sexual battery; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel.

The trial court did not find any statutory mitigating circumstances, but it did find sixteen nonstatutory mitigating -2- circumstances.¹ Ultimately, the trial court sentenced Dourousseau to death. Id. at 550. On December 9, 2010, this Court rejected all of Dourousseau's claims² on direct appeal. Id. at 564, cert. denied, 132 S. Ct. 149 (2011). 1.

The trial court found the following sixteen nonstatutory mitigators: (1) Dourousseau was raised in a broken home (little weight); (2) Dourousseau was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age (little weight); (3) Dourousseau grew up in poverty and came from a deprived background (little weight); (4) Dourousseau was raised in a violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis (little weight); (5) Dourousseau personally witnessed his stepfather physically abuse his mother (moderate weight); (6) Dourousseau was beaten as a means of discipline as a child (little weight); (7) Dourousseau worked continuously through his adult life (little to moderate weight); (8) Dourousseau enlisted and served in the United States Army for approximately six years (moderate weight); (9) Dourousseau has supported his two children and is a loving and caring father (little weight); (10) Dourousseau has been a loving, respectful son to his mother and cared for her during several periods of illness and incapacitation (moderate weight); (11) Dourousseau has been a good brother to his siblings and to other family members, helping to care for and watch over his cousins (moderate to significant weight); (12) Dourousseau saved his cousin's life and his brother's life (moderate weight); (13) Dourousseau has the support of family and friends who continue to love him (little weight); (14) Dourousseau has alcohol abuse issues on both the maternal and paternal sides of his family; despite this, Dourousseau has never abused alcohol or illicit drugs (very little weight); (15) society can be protected by a life sentence without parole (very little weight); (16) Dourousseau has exhibited good behavior during the trial of this cause (little weight).

2. Dourousseau raised the following claims on direct appeal: (1) the trial court erred in admitting Williams rule evidence of the two other murders; (2) the trial court erred in denying Dourousseau's motion for judgment of acquittal of felony murder with robbery as the underlying offense and that the evidence is legally insufficient to support the pecuniary gain aggravator; (3) the trial court erred in rejecting an expert's opinion testimony regarding mental mitigation in favor of conflicting lay testimony; (4) the evidence was insufficient to support a first-degree murder conviction; and (5) the trial court erred in denying Dourousseau's motion to declare Florida's capital sentencing scheme -3- On October 1, 2012, Dourousseau filed a motion for postconviction relief in the circuit court.

Dourousseau raised two claims in his postconviction motion: (1) that counsel was ineffective for failing to request additional physical and psychiatric testing; and (2) that counsel was ineffective

for failing to conduct a meaningful voir dire.

However, before the evidentiary hearing, Durosseau abandoned his first claim. On April 9, 2015, the postconviction court began an evidentiary hearing that lasted two days. Ultimately, the postconviction court denied Durosseau's claim that counsel had failed to secure additional physical and mental testing. Durosseau appealed to this Court, arguing that trial counsel was ineffective because she failed to conduct meaningful voir dire.

While his appeal was pending in this Court, the United States Supreme Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), holding that Florida's death penalty sentencing statute violated the Sixth Amendment. In light of *Hurst v. Florida*, Durosseau filed supplemental briefing, arguing that his death sentence should be vacated. ANALYSIS Durosseau alleges that (1) his counsel was ineffective during voir dire, and (2) his death sentence violates *Hurst v. Florida*.

We first reject Durosseau's claim unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). Durosseau, 55 So. 3d at 550. -4- that his trial counsel, Ann Finnell, was ineffective during voir dire.³ We then hold that Durosseau's death sentence is unconstitutional under *Hurst v. Florida*. Ineffective Assistance of Counsel First, Durosseau argues that Finnell was ineffective for asking more collective questions than individual questions.

Second, Durosseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to inquire further of, and move to strike, two specific jurors and one alternate juror. We reject both arguments.

In accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), we review claims of ineffective assistance of counsel as follows: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Long v. State*, 118 So. 3d 798, 805 (Fla. 2013) (quoting *Bolin v. State*, 41 So. 3d 151, 155 (Fla. 2010)). Additionally, 3.

In light of our decision that *Hurst v. Florida* requires us to vacate Durosseau's death sentence, we decline to address Durosseau's argument that Finnell was ineffective because she failed to adequately inquire of the venire members about their attitudes toward aggravating and mitigating factors affecting the imposition of the death penalty and did not sufficiently question the voir dire with the specific aggravators and mitigators that applied to Durosseau. -5- [t]here is a strong presumption that trial counsel's performance was not deficient.

See Strickland, 466 U.S. at 690. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689.

The defendant carries the burden to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). “Judicial scrutiny of counsel’s performance must be highly deferential.” Id. “[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.” Occhicone v. State, 768 So.

2d 1037, 1048 (Fla. 2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992).

In demonstrating prejudice, the defendant must show a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. Long, 118 So. 2d at 805-06 (parallel citations omitted).

Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court’s factual findings that are supported by competent, substantial evidence, but reviewing the circuit court’s legal conclusions de novo. Shellito v. State, 121 So. 3d 445, 451 (Fla. 2013) (citing Mungin v. State, 79 So.

3d 726, 737 (Fla. 2011); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)). With respect to claims that counsel was ineffective during voir dire, the “[e]ffective assistance of trial counsel includes a proficient attempt to empanel a -6- competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members.” Nelson v. State, 73 So.

3d 77, 85 (Fla. 2011). The test for competency and impartiality is whether a juror is capable of placing any bias aside and is willing to render a verdict recommendation based exclusively on the evidence and instruction of law presented at trial. Id. In reviewing an attorney’s performance, we must be highly deferential and make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689.

In light of the challenges in evaluating counsel’s performance, we must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional

assistance.” *Id.* If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong. *Id.* at 691-692.

To establish deficiency, a defendant must first specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms. *Lynch v. State*, 2 So. 3d 47, 56-57 (Fla. 2008). Counsel will not be deemed deficient where her actions constituted a strategy within the bounds of professional norms.

Occhicone, 768 So. 2d at 1048 (concluding it was a reasonable strategy to not present additional evidence at trial to ensure the defendant would have the first and last word during closing argument). “The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.” *Id.* at 1049.

First, Durosseau argues that Finnell was ineffective for asking more collective questions than individual questions that would have led to an informed method of exercising juror challenges. We affirm the postconviction court’s finding that Finnell’s collective questioning did not prejudice Durosseau. Durosseau suggests that he may have been prejudiced by trial counsel’s failure to ask individual questions of the venire members or by counsel’s failure to follow up with additional questions.

Specifically, Durosseau hypothesizes that Finnell lacked a complete understanding of the jury in light of her failure to ask more individual questions. Durosseau likewise hypothesizes that as a consequence, Finnell’s jury strikes were based on incomplete information.

We have previously rejected ineffective assistance claims like these. To show prejudice, [the defendant] argues that [his trial counsel] could possibly have learned more about the jurors’ views and used his peremptory challenges in a different manner to obtain a more defense- friendly jury. Such speculation fails to rise to the level of ineffective assistance under Strickland. -8- *Johnson v. State*, 921 So.

2d 490, 503-04 (Fla. 2005) (footnote omitted). We have likewise rejected “alleg[ations] that if counsel had ‘followed up’ during voir dire with more specific questions, there would have been a basis for a for-cause challenge” as “mere conjecture.” *Reaves v. State*, 826 So. 2d 932, 939 (Fla. 2002); see also *Wade v. State*, 156 So. 3d 1004, 1033 (Fla. 2014) (“Wade’s claim that ‘there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative.’ ” (quoting *Green v. State*, 975 So.

2d 1090, 1105 (Fla. 2008))). Durosseau’s arguments are likewise conjectural and speculative. Durosseau asserts that Finnell’s failure to ask sufficient individual questions precluded her from obtaining the information necessary to make intelligent use of juror challenges. Durosseau does

not identify what information individual questioning would have revealed, nor how that information could have changed his jury make-up or lead to a different result.

Accordingly, we affirm the postconviction court's finding that Duroseau did not suffer any prejudice. Second, Duroseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to exhaust all of her peremptory challenges, failing to request additional challenges, and failing to challenge the jury panel.

We again affirm the postconviction court's findings in denying these claims. -9- The postconviction court found that Duroseau did not identify any prospective juror that would have been better qualified to sit on the jury than the jury eventually seated. Duroseau's argument on appeal contains the same defect.

We have held that this defect is fatal to this type of claim of ineffective assistance of counsel. See, e.g., *Peterson v. State*, 154 So. 3d 275, 282 (Fla. 2014) ("Peterson does not point to any particular venire member [who] would have been better qualified to serve in place of a seated juror.").

Accordingly, we affirm the postconviction court's finding. Duroseau also specifically argues that Finnell should have further inquired into three of the potential jurors: (1) alternate juror Markley, (2) juror Norrie, and (3) juror Cummins.

The postconviction court rejected Duroseau's ineffective assistance of counsel claims regarding Finnell's questioning and challenging of these jurors. We likewise affirm the postconviction court's findings with regard to these three jurors.

As to juror Markley, the postconviction court found that Finnell's actions did not prejudice Duroseau because juror Markley was an alternate juror and never deliberated in Duroseau's trial. We agree. Assuming that further questioning would have revealed information demonstrating, for instance, juror Markley's bias against Duroseau, "prejudice can be shown only where one who was actually biased against the defendant sat as a juror." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) (emphasis added); see also *Dillbeck v. State*, 964 So. 2d 95, 102 (Fla. 2007) (upholding a postconviction court's finding, which stated, "Two of the complained of jurors were alternates only who did not participate in the jury's verdict. Dillbeck cannot show prejudice based on alternate jurors [who] never served.") Because juror Markley served only as an alternate juror, we affirm the postconviction court's finding.

As to jurors Norrie and Cummins—who served on Duroseau's jury and deliberated as to his guilt and punishment—we likewise affirm the postconviction court's findings that Finnell was not deficient for her allegedly insufficient questioning of these two jurors. Duroseau does not identify the particular information that further questioning of these two jurors would have

revealed, and so cannot demonstrate that this undiscovered information would have produced grounds to disqualify either juror.

As we earlier noted, a postconviction movant cannot demonstrate counsel's ineffectiveness with speculative assertions that further questioning of a juror during voir dire could have developed more information that may have disqualified the juror. See *Wade*, 156 So. 3d at 1033; *Green*, 975 So. 2d at 1105; *Johnson*, 921 So. 2d at 503-04; *Reaves*, 826 So. 2d at 939.

Durousseau also argues that Finnell was ineffective for failing to strike alternate juror Markley and jurors Norrie and Cummins from the jury. The - 11 - postconviction court also rejected this claim, and we affirm. A postconviction movant "must demonstrate that [a particular juror] was actually biased, not merely that there was doubt about [the juror's] impartiality." *Owen v. State*, 986 So.

2d 534, 550 (Fla. 2008). Durousseau does not allege that any of the three were actually biased and thus prejudiced Durousseau at trial. Rather, Durousseau merely raises the possibility that alternate juror Markley and jurors Norrie and Cummins might have deserved a for-cause challenge, and counsel was ineffective for failing to strike these potentially problematic jurors.

Accordingly, we affirm the postconviction court's rejection of this claim. *Id.* Durousseau also argues that we should not apply the "actual bias" standard in this case because Finnell's failure to better inquire of jurors is responsible for Durousseau's inability to point to specific information about juror bias.

We reject this contention because it is the postconviction movant's responsibility to demonstrate juror bias, irrespective of the alleged failures of trial counsel. See, e.g., *Boyd v. State*, 200 So. 3d 685, 699 (Fla. 2015). Once the postconviction movant identifies the juror's bias, the movant must identify the manner in which trial counsel was deficient by failing to uncover information during voir dire that would have demonstrated the bias.

See *id.* Accordingly, we reject Durousseau's argument and determine that we appropriately apply the "actual bias" standard in this case. - 12 - Durousseau has failed to demonstrate that his counsel was ineffective during voir dire.

Accordingly, we reject his ineffective assistance of counsel claims. *Hurst v. Florida & Hurst* In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619.

Durousseau's death sentence was imposed under an unconstitutional capital sentencing statute. *Hurst v. Florida* and *Hurst* apply retroactively to Durousseau, whose sentence became final in

2010. See *Mosley v. State*, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016).

The remaining question is whether the Hurst error was harmless beyond a reasonable doubt. A Hurst error is capable of harmless error review. See *Hurst*, 202 So. 3d at 67. Here we determine that the Hurst error during Duroseau's penalty phase proceeding was not harmless beyond a reasonable doubt.

As this Court explained in *Hurst*: The harmless error test, as set forth in *Chapman* [v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. - 13 - *Hurst*, 202 So.

3d at 68 (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated: Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000).

Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," *DiGuilio*, 491 So. 2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error.

Therefore, in the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case.

We reiterate: The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

The focus is on the effect of the error on the trier-of-fact. *DiGuilio*, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.* *Hurst*, 202 So. 3d at 68 (alteration in original). Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances.

See *id.* at 44. - 14 - In the present case, the jury did not make any of the requisite factual findings beyond a reasonable doubt. Rather, the jury only issued a recommendation of death by a vote of ten to two. Further, although the aggravating circumstance of a prior violent felony was found

unanimously by virtue of Duroiseau's previous murder convictions, whether this aggravating circumstance was sufficient to impose death requires a unanimous jury determination.

Hurst, 202 So. 3d at 44. Moreover, there is no way of knowing if the jury found any of the other three aggravating circumstances unanimously or, if any aggravators were unanimously found, whether the jury also unanimously found those aggravators sufficient to qualify for a death sentence. Further, we cannot conclude that the two jurors who voted to recommend life found that the aggravation outweighed the mitigation.

Accordingly, we conclude that the Hurst violation was not harmless, and Duroiseau is entitled to a new penalty phase. As we have done for other capital defendants, we reject Duroiseau's argument that section 775.082(2), Florida Statutes (2015), entitled him to be resentenced to life imprisonment. See Hurst, 202 So. 3d at 44, 63-66. CONCLUSION Because Duroiseau's death sentence was imposed in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for the - 15 - imposition of the death sentence and Florida's independent right to jury trial, and because we conclude that the Hurst error is not harmless beyond a reasonable doubt, we vacate Duroiseau's death sentence and remand for a new penalty phase.

It is so ordered. LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs. PERRY, Senior Justice, concurs in part and dissents in part with an opinion. NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED. CANADY, J., concurring in part and dissenting in part.

I concur with the decision to affirm the denial of relief regarding Duroiseau's conviction. But I dissent from the decision to require a new penalty phase. As I have previously explained, Hurst v. Florida, 136 S. Ct. 616 (2016), should not be given retroactive effect. See Mosley v. State, 41 Fla. L. Weekly S629, 2016 WL 7406506 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs. PERRY, Senior Justice, concurring in part and dissenting in part. I concur with the majority's decision to affirm the postconviction court's denial of relief as it pertains to Duroiseau's convictions and determination that - 16 - the Sixth Amendment requires that we vacate Duroiseau's death sentence.

However, because Florida law requires that Duroiseau be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So. 3d 40, 75-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain

language of section 775.082(2), Florida Statutes.

Because the majority of this Court has determined that Duroousseau's death sentence was unconstitutionally imposed, Duroousseau is entitled to the clear and unambiguous statutory remedy that the Legislature has specified: In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is triggered.

Indeed, the statute repeatedly - 17 - references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. *Hurst v. State*, 202 So.

3d at 40 (Perry, J., concurring in part and dissenting in part). An Appeal from the Circuit Court in and for Duval County, Jack Marvin Schemer, Judge - Case No. 162003CF010182AXXXMA Richard Adam Sichta of The Sichta Firm, LLC, Jacksonville, Florida; and Billy Horatio Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Tallahassee, Florida, for Appellant Pamela Jo Bondi, Attorney General, Carine L. Mitz, Assistant Attorney General, and Robert James Morris, III, Assistant Attorney General, Tallahassee, Florida, for Appellee - 18 -

PER CURIAM.

PER CURIAM. Paul Duroousseau appeals an order of the Fourth Judicial Circuit Court denying his motion to vacate his conviction of first-degree murder and sentence of death, filed pursuant to Florida Rule of Criminal Procedure 3.851.

We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the circuit court's denial of postconviction relief but vacate Duroousseau's sentences and remand for resentencing in light of *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), as interpreted by *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016).

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While his appeal was pending in this Court, the United States Supreme Court decided *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), holding that Florida's death penalty sentencing statute violated the Sixth Amendment.

In light of *Hurst v. Florida*, Duroousseau filed supplemental briefing, arguing that his death sentence should be vacated. ANALYSIS Duroousseau alleges that (1) his counsel was ineffective during voir dire, and (2) his death sentence violates *Hurst v. Florida*.

We first reject Duroousseau's claim that his trial counsel, Ann Finnell, was ineffective during voir dire.³ We then hold that Du-rousseau's death sentence is unconstitutional under *Hurst v. Florida*.

Ineffective Assistance of Counsel First, Dourousseau argues that Finnell was ineffective for asking more collective questions than individual questions.

Second, Dourousseau argues that the postverdict court erred in finding that Finnell was not ineffective for failing to inquire further of, and move to strike, two specific jurors and one alternate juror. We reject both arguments.

In accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we review claims of ineffective assistance of counsel as follows: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Long v. State*, 118 So.3d 798, 805 (Fla. 2013) (quoting *Bolin v. State*, 41 So.3d 151, 155 (Fla. 2010)). Additionally, [t]here is a strong presumption that trial counsel's performance was not deficient.

See *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *O'Chicone v. State*, 768 So.2d 1037, 1048 (Fla.

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Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are

supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *Shellito v. State*, 121 So.3d 445, 451 (Fla. 2013) (citing *Mungin v. State*, 79 So.3d 726, 737 (Fla.

2011); *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004)). With respect to claims that counsel was ineffective during voir dire, the "[e]ffective assistance of trial counsel includes a proficient attempt to empanel a competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members." *Nelson v. State*, 73 So.3d 77, 85 (Fla.

2011). The test for competency and impartiality is whether a juror is capable of placing any bias aside and is willing to render a verdict recommendation based exclusively on the evidence and instruction of law presented at trial. *Id.* In reviewing an attorney's performance, we must be highly deferential and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct.

2052. In light of the challenges in evaluating counsel's performance, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* If the defendant fails to make a showing of one *Strickland* prong, it is not necessary to analyze whether the defendant satisfies the other prong. *Id.* at 691-692, 104 S.Ct.

2052. To establish deficiency, a defendant must first specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms. *Lynch v. State*, 2 So.3d 47, 56-57 (Fla. 2008). Counsel will not be deemed deficient where her actions constituted a strategy within the bounds of professional norms.

Occhicone, 768 So.2d at 1048 (concluding it was a reasonable strategy to not present additional evidence at trial to ensure the defendant would have the first and last word during closing argument). "The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." *Id.* at 1049.

First, *Durousseau* argues that *Finnell* was ineffective for asking more collective questions than individual questions that would have led to an informed method of exercising juror challenges. We affirm the postconviction court's finding that *Finnell*'s collective questioning did not prejudice *Durousseau*. *412. *Durousseau* suggests that he may have been prejudiced by trial counsel's failure to ask individual questions of the venire members or by counsel's failure to follow up with additional questions.

Specifically, Duroseu - hypothesizes that Finnell lacked a complete understanding of the jury, in light of her failure- to ask more individual questions. Duroseu likewise hypothesizes that as a consequence, Finnell's jury strikes were based on incomplete information.

We have previously rejected ineffective assistance claims like these. To show prejudice, [the defendant] argues' that [his trial counsel] could possibly have learned more about the jurors' views and used his peremptory challenges in a different manner to obtain a more defense-friendly jury. Such speculation fails to rise to the level of ineffective assistance under Strickland.

Johnson v. State, 921 So.2d 490, 503-04 (Fla. 2005) (footnote omitted). We have likewise rejected "allegations] that if counsel had 'followed up' during voir dire with more specific questions, there would have- been a basis for a for-cause challenge" as "mere conjecture." Reaves v. State, 826 So.2d 932, 939 (Fla. 2002); see also Wade v. State, 156 So.3d 1004, 1033 (Fla.

2014) ("Wade's claim that 'there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative.' " (quoting Green v. State, 975 So.2d 1090, 1105 (Fla. 2008))). 'Duroseu's arguments are 'likewise conjectural and speculative. Duroseu asserts that Finnell's failure to ask sufficient individual questions precluded her from obtaining the information necessary to make intelligent use of juror challenges.

Duroseu does not identify what information individual questioning would have revealed, nor how that information could have changed his jury make-up or lead to a different result. Accordingly, we affirm the postconviction court's finding that Duroseu did not suffer any prejudice.

Second, Duroseu argues that the postconviction court erred in finding that Finnell was not ineffective for failing to exhaust all of her peremptory challenges, failing to request additional challenges, and failing to challenge the jury panel.

We again affirm the postconviction court's findings in denying these claims. The postconviction court found that Duroseu did not identify any prospective juror that would have been better qualified to sit on the jury than the jury eventually seated. Duroseu's argument on appeal contains the same defect.

We have held that this defect is fatal to this type of claim of ineffective assistance of counsel. See, e.g., Peterson v. State, 154 So.3d 275, 282 (Fla. 2014) ("Peterson does not point to any particular venire member [who] would have been better qualified to serve in place of a seated juror.").

Accordingly, we affirm the postconviction court's finding. Duroseu also specifically argues that Finnell should have further inquired into three of the potential jurors: (1) alternate juror Markley, (2) juror Norrie, and (3) juror Cummins.

The postconviction court rejected Duroseau's ineffective assistance of counsel claims regarding Finnell's questioning and challenging of these jurors. We likewise affirm the postconviction court's findings with regard to these three jurors.

As to juror Markley, the postconviction court found that Finnell's actions did not prejudice Duroseau because juror Markley was an alternate juror and never deliberated in Duroseau's trial. We agree. Assuming that further questioning would have revealed information demonstrating, for instance, juror Markley's bias against Duroseau, "prejudice can be shown only where one who was actually biased against the defendant, sat as a juror." *Carratelli v. State*, 961 So.2d 312, 324 (Fla.

2007) (emphasis added); see also *Dillbeck v. State*, 964 So.2d 95, 102 (Fla. 2007) (upholding a postconviction court's finding, which stated, "Two of the complained of jurors were alternates only who did not participate in the jury's verdict. Dillbeck cannot show prejudice based on alternate jurors [who] never served.") Because juror Markley served only as an alternate juror, we affirm the postconviction court's finding.

As to jurors Norrie and Cummins—who served on Duroseau's jury and deliberated as to his guilt and punishment—we likewise affirm the postconviction court's findings that Finnell was not deficient for her allegedly insufficient questioning of these two jurors. Duroseau does not identify the particular information that further questioning of these two jurors would have revealed, and so cannot demonstrate that this undiscovered information would have produced grounds to disqualify either juror.

As we earlier noted, a postconviction movant cannot demonstrate counsel's ineffectiveness with speculative assertions that further questioning of a juror during voir dire could have developed more information that may have disqualified the juror. See *Wade*, 156 So.3d at 1033; *Green*, 975 So.2d at 1105; *Johnson*, 921 So.2d at 503-04; *Reaves*, 826 So.2d at 939. Duroseau also argues that Finnell was ineffective for failing to strike alternate juror Markley and jurors Norrie and Cummins from the jury.

The postconviction court also rejected this claim, and we affirm. A postconviction movant "must demonstrate that [a particular juror] was actually biased, not merely that there was doubt about [the juror's] impartiality." *Owen v. State*, 986 So.2d 534, 550 (Fla. 2008). Duroseau does not allege that any of the three were actually biased and thus prejudiced Duroseau at trial.

Rather, Duroseau merely raises the possibility that alternate juror Markley and jurors Norrie and Cummins might have deserved a for-cause challenge, and counsel was ineffective for failing to strike these potentially problematic jurors.

Accordingly, we affirm the postconviction court's rejection of this claim. *Id.* Duroseau also argues that we should not apply the "actual bias" standard in this case because Finnell's failure to

better inquire of jurors is responsible for Duroiseau's inability to point to specific information about juror bias.

We reject this contention because it is the postconviction movant's responsibility to demonstrate juror bias, irrespective of the alleged failures of trial counsel. See, e.g., *Boyd v. State*, 200 So.3d 685, 699 (Fla. 2015). Once the postconviction movant identifies the juror's bias, the movant must identify the manner in which trial counsel was deficient by failing to uncover information during voir dire that would have demonstrated the bias.

See *id.* Accordingly, we reject Duroiseau's argument and determine that we appropriately apply the "actual bias" standard in this case. Duroiseau has failed to demonstrate that his counsel was ineffective during voir dire.

Accordingly, we reject his ineffective assistance of counsel claims. *Hurst v. Florida & Hurst* In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619.

Duroiseau's *414death sentence was imposed under an unconstitutional capital sentencing statute. *Hurst v. Florida* and *Hurst* apply retroactively to Duroiseau, whose sentence became final in 2010. See *Mosley v. State*, 41 Fla. L. Weekly S629, 209 So.3d 1248, 2016 WL 7406506 (Fla. Dec. 22, 2016).

The remaining question is whether the *Hurst* error was harmless beyond a reasonable doubt. A *Hurst* error is capable of harmless error review. See *Hurst*, 202 So.3d at 67. Here we determine that the *Hurst* error during Duroiseau's penalty phase proceeding was not harmless beyond a reasonable doubt.

As this Court explained in *Hurst*: The harmless error test, as set forth in *Chapman* [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So.3d at 68 (quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated: Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., *Zack v. State*, 753 So.2d 9, 20 (Fla.

2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," *DiGuilio*, 491

So.2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error.

Therefore, in the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case.

We reiterate: The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

The focus is on the effect of the error on the trier-of-fact. DiGuilio, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.* Hurst, 202 So.3d at 68 (alteration in original). Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances.

See *id.* at 44. In the present case, the jury did not make any of the requisite factual findings beyond a reasonable doubt. Rather, the jury only issued a recommendation of death by a vote of ten to two. Further, although the aggravating circumstance of a prior violent felony was found unanimously by virtue of Duroseau's previous murder convictions, whether this aggravating circumstance was sufficient to impose death requires a unanimous jury determination.

Hurst, 202 So.3d at 44. Moreover, there is no way of knowing if the jury found any of the other three aggravating circumstances unanimously or, if any aggravators were unanimously found, whether the jury also unanimously found those aggravators sufficient to qualify for a death sentence. Further, we cannot conclude that the two jurors who voted to recommend life found that the aggravation outweighed the mitigation.

Accordingly, we conclude that the Hurst violation was not harmless, and Duroseau is entitled to a new penalty phase. As we have done for other capital defendants, we reject Duroseau's argument that section 775.082(2), Florida Statutes (2015), entitled him to be resentenced to life imprisonment. See Hurst, 202 So.3d at 44, 63-66. **CONCLUSION** Because Duroseau's death sentence was imposed in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for the imposition of the death sentence and Florida's independent right to jury trial, and because we conclude that the Hurst error is not harmless beyond a reasonable doubt, we vacate Duroseau's death sentence and remand for a new penalty phase.

It is so ordered. LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs. PERRY, Senior Justice, concurs in part and dissents in part with an opinion..

The trial court found the following sixteen nonstatutory mitigators: (1) Duroousseau was raised in a broken home (little weight); (2) Duroousseau was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age (little weight); (3) Duroousseau grew up in poverty and came from a deprived background (little weight); (4) Duroousseau was raised in a violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis (little weight); (5) Duroousseau personally witnessed his stepfather physically abuse his mother (moderate weight); (6) Duroousseau was beaten as a means of discipline as a child (little weight); (7) Duroousseau worked continuously through his adult life (little to moderate weight); (8) Duroousseau enlisted and served in the United States Army for approximately six years (moderate weight); (9) Duroousseau has supported his two children and is a loving and caring father (little weight); (10) Duroousseau has been a loving, respectful son to his mother and cared for her during several periods of illness and incapacitation (moderate weight); (11) Duroousseau has been a good brother to his siblings and to other family members, helping to care for and watch over his cousins (moderate to significant weight); (12) Duroousseau saved his cousin's life and his brother's life (moderate weight); (13) Duroousseau has the support of family and friends who continue to love him (little weight);- (14) Duroousseau has alcohol abuse issues on both the maternal and paternal sides of his family; despite this, Duroousseau has never abused alcohol or illicit drugs (very little weight); (15) society can be protected by a life sentence without parole (very little weight); (16) Duroousseau has exhibited good behavior during the trial of this cause (little weight). '■'!

1. Duroousseau raised the following claims on direct appeal: (1) the trial-court erred.- in admitting Williams rule evidence of the two other murders; (2) the trial court erred in denying Duroousseau's motion for judgment of acquittal of felony murder' with robbery as the underlying offense- and that the evidence is legally insufficient, to support the pecuniary gain aggravator; (3) the trial court erred in rejecting an ' expert's opinion testimony regarding mental mitigation in favor of "conflicting lay testimony; (4) the evidence- was insufficient to support a first-degree murder conviction; and (5) the trial court erred in denying Duroousseau's motion to declare Florida's capital sentencing scheme unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct.

2428, 153 L.Ed.2d 556 (2002). Duroousseau, 55 So.3d at 550.. In light of our decision that *Hurst v. Florida* requires us to vacate Duroousseau's death sentence, we decline to address Duroousseau's argument that Finnell was ineffective because she failed to adequately inquire of the venire members about their attitudes toward aggravating and mitigating factors affecting the imposition

of the death penalty and did not sufficiently question the voir dire with the specific aggravators and mitigators that applied to Duroiseau.

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