

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NICOLAS DOMINIQUE,

Respondent.

Case No. SC15-1613

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	17
ARGUMENT	18
ISSUE I: WHETHER THE FOURTH DISTRICT MISINTERPRETED, AND THUS WRONGLY APPLIED, HAYGOOD TO THE FACTS OF THIS CASE?	18
A. PRESERVATION.	18
B. THE STANDARD OF REVIEW PERTAINING TO FUNDAMENTAL ERROR.	20
C. THE MERITS.	22
CONCLUSION	36
CERTIFICATE OF SERVICE	36
CERTIFICATE OF COMPLIANCE	37

TABLE OF CITATIONS

AUTHORITIES CITED	PAGE#
Cases	
<u>Anderson v. State</u> , 639 So. 2d 609 (Fla. 1994).....	21
<u>Berube v. State</u> , 149 So. 3d 1165 (Fla. 2d DCA 2014).....	39
<u>Brown v. State</u> , 124 So. 2d 481, 484 (Fla. 1960).....	23
<u>Carpenter v. State</u> , 785 So. 2d 1182, 1199-1200 (Fla. 2001)....	22
<u>Castor v. State</u> , 365 So. 2d 701, 703 (Fla. 1978).....	22
<u>Craig v. State</u> , 510 So. 2d 857 (Fla. 1987), <u>cert. denied</u> , 484 U.S. 1020 (1988)	21
<u>Daniels v. State</u> , 121 So. 3d 409, 419 (Fla. 2013).....	29
<u>Dawkins v. State</u> , 170 So. 3d 81 (Fla. 3d DCA), <u>rev. pending</u> , SC15-1322 (Fla. September 2, 2015)	17, 39
<u>Dominique v. State</u> , 160 So. 2d 894 (Fla. 2014).....	16, 36
<u>Dominique v. State</u> , 171 So. 3d 204 (Fla. 4 th DCA 2015)	passim
<u>Dominique v. State</u> , 40 So. 3d 33 (Fla. 4 th DCA 2010)	14, 26
<u>Floyd v. State</u> , 850 So. 2d 383, 403 (Fla. 2002).....	23
<u>Garzon v. State</u> , 939 So. 2d 278 (Fla. 4 th DCA 2006), <u>approved</u> , 980 So. 2d 1038 (Fla. 2008)	20, 24
<u>Griffin v. State</u> , 160 So. 3d 63, 69 (Fla. 2015).....	36
<u>Haygood v. State</u> , 109 So. 3d 735 (Fla. 2013).....	passim
<u>Hill v. State</u> , 124 So. 3d 296, 301 (Fla. 2d DCA 2013).....	28
<u>Many v. State</u> , 756 So. 2d 169 (Fla. 4 th DCA 2000)	21

Rayner v. State, 286 So. 2d 604 (Fla. 2d DCA 1973)..... 21

Reed v. State, 837 So. 2d 366 (Fla. 2002)..... 23, 24

State v. Delva, 575 So. 2d 643 (Fla. 1991)..... 20, 22, 23, 25

State v. Montgomery, 39 So. 3d 252 (Fla. 2010)..... 15, 18, 25

Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)..... 23

Sutton v. State, 718 So. 2d 215, 216 n.1 (Fla. 1st DCA 1998) .. 24

Wilson v. State, 786 So. 2d 632, 633 (Fla. 4th DCA 2001) 20

Statutes

Section 924.051(3), Florida Statutes..... 20

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Nicolas Dominique, the appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name. The record consists of volumes one through three, and the trial transcript consists of volumes one through eight which are separately numbered. Reference to the record on appeal will be by the symbol "R" and reference to the transcripts will by the symbol "T," both followed by the appropriate volume and page numbers, For example, page 3 of volume 2 of the record will be cited as follows: (R2 3).

STATEMENT OF THE CASE AND FACTS

Some of the pertinent history and facts are set out in the decision of the lower tribunal, the decision of which Petitioner, the State of Florida, seeks review: Dominique v. State, 171 So. 3d 204 (Fla. 4th DCA 2015) (Dominique III) . However, Petitioner provides a more complete synopsis of pertinent facts for the convenience of this Court.

In this case, Respondent, Nicolas Dominique, was charged with the first degree murder of Dwayne Clementson on October 15, 2005

(R1 3-4), and convicted by a jury of murder in the second degree with a firearm (R2 356). He was sentenced to a mandatory minimum sentence of forty years in prison. (R2 373-379)

During the trial, in opening argument, the defense conceded that Respondent shot Dwayne Clementson. (R2 124) As the Fourth District noted in the opinion below:

The state argued that the defendant's actions constituted first-degree murder. The defendant argued that his actions in chasing the new boyfriend down the street while firing his gun was, at worst, manslaughter by culpable negligence.

Dominique III, 171 So. 3d at 204.

The testimony established that Respondent had dated Vonshell Lindsay for about a year. (T3 280, 353-54) Vonshell had also dated the victim, Dwayne Clementson, prior to and after dating Respondent. (T3 280, 353, 359) Vonshell had been living with her parents but three days before the shooting, had moved in with Clementson. (T3 352)

Vonshell broke off the relationship with Respondent about three months before October 15, 2005. (T3 354) However, Respondent often called Vonshell through Vonshell's sister Chantel Jackson. (T3 282-83, 356) He often suggested getting back together and would sometimes get mad when she said that they could not get back together. (T3 356)

On October 15, 2005, Vonshell was at her parents' house when Respondent called Vonshell on her sister's cell phone. (T3 369)

Respondent asked Vonshell about getting back together again. (T3 370) Later that evening, Respondent called for Vonshell again on Chantel's phone and Chantel gave Vonshell the phone. (T3 284, 372) During the second phone call, Vonshell told Respondent, for the first time, that she was trying to rekindle a relationship with Clementson and, at that precise moment, Respondent said he saw Clementson pulling up to the house. (T3 371-72, 386-88) The connection abruptly ended after Respondent said, "there he goes right now." (T3 388)

Vonshell was scared and surprised; she dropped the phone and ran to the front door and out the door, yelling Clementson's name. (T3 285, 372) By the time Vonshell opened the door, Clementson was turning around, running down the street with Respondent running behind him while shooting multiple shots with his arm extended. (T3 373-376) Respondent was running as he was shooting. (T3 394) She did not see him stop and aim the gun with two hands and fire. (T3 394) The shooting did not start until after the victim took off running. (T3 400)

Chantel looked out the window and also saw Respondent running down the street after Clementson while shooting. (T 286) Chantel heard four or five continuous and quick shots. (T3 287, 299-300) Chantel called 911. (T3 287-88)

Ingrid Bazelais was on the phone with Clementson that night when she heard him say "fuck, oh shit," and the call suddenly

ended. (T3 270, 275) Bazelais happened to be at a house on the next street from Vonshell Lindsay's parents' home and, within a very short time after the call "dropped," she heard six shots with several pauses in between, shots coming from the direction of Vonshell Lindsay's parents' house; (T3 271-72, 275-76) The sound of the shots appeared to be travelling closer to her. (T3 272) All five shots were fired within two to four seconds. (T3 276) She went to the corner of the street and peeked around and saw someone lying on the ground. (T3 273)

Margarita Lopez testified she was driving with her family when she saw two black males chasing each other down the street. (T3 324-25) She heard five shots with a pause in between. (T3 325-27, 341) She heard shots, and then saw one man drop to the ground. (T3 327) The victim tried to get up, and he was on one knee when Respondent extended his arm and shot the victim from behind, and the victim did not get up again. (T3 328, 349) Respondent shot the victim from six to ten feet away. (T3 346-47) Everything happened quickly. (T3 341) There was a very short period of time between the first and last gunshots, like within seconds. (T3 342) Respondent was shooting with one hand. (T3 346) Respondent fired immediately after he extended his arm; it was not like he stood there and sighted on the victim before he took the shot. (T3 346) The last shot was fired a matter of a second or two after the victim fell to the ground. (T3 346)

Officer Murphy happened to be in the area and heard five to seven shots with little delay in between. (T4 455-56)

Chantel Jackson stated she saw Respondent returning up the street by himself within three or four minutes of running down the street after Clementson. (T3 289) Police stated that Respondent was running back up the street when they arrived but cooperated by laying his gun down and getting on the ground. (T3 289-90, 377-78, 407-08)

Vonshell Lindsay and Chantel Jackson's parents' address was 7740 Juniper Street. (T3 352) Chantel stated there was only a porch light with a single bulb outside her parents' house that night. (T3 295) Other witnesses stated it was dark outside; there was a street light at the end of the street (the end of the street where the body was found, 846 feet away) but it was not very bright. (T3 428, T4 509) The whole street was not very well lit. (T3 434-35)

The victim's body was located at 7794 Juniper Street. (T3 424) The distance from 7740 Juniper to the victim's body was approximately 846 feet and there were twelve single family homes in between. (T4 592)

The police found, scattered down Juniper Street from Vonshell's parents' home at 7740 Juniper to the victim's final resting place at 7794 Juniper, four spent shell casings and two live rounds of ammunition as well as some blood drops. (T4 475-

82, 486) The evidence was on both even and odd sides of the street, suggesting a zig-zagging chase. Specifically, two of the spent shell casings were found in the street at 7741 Juniper, across the street from Vonshell's parents' home and the victim's car in that driveway. (T4 474-75) Another shell casing was found on the road in front of 7751 Juniper, near the victim's blue flip flops. (T4 475, 492) The flip flops were separated; one was in a grassy area and one was more on an asphalt area. (T4 493) A work vehicle at 7750 Juniper Street had a projectile strike mark. (T4 476-77) There were blood drops on the roadway at 7767 Juniper, and one live, unfired, round of ammunition. (T4 477) There were blood drops across the street at 7774 Juniper, and blood drops at 7782 Juniper. (T4 479) The blood trail continued to 7786 Juniper. (T4 480) There was smears of blood in the driveway at 7794 Juniper and a spent shell casing found within six feet of the victim's body at 7794 Juniper and about, two to three feet further away, another live, unfired round. (T4 481) The victim was still holding his car keys. (T4 485-86)

Respondent's (sister's) car was found parked down the street on Juniper, about 250 feet away from Vonshell's parent's home with open windows and the keys in the ignition. (T3 432, 436, T4 469, 508, T6 655)

There were six loose live rounds found in Respondent's jacket pocket. (T4 510) The clip and chamber of Respondent's semi-

automatic gun was empty. (T4 489, T5 581) It was registered to him. (T4 453, T5 567) It would be difficult to reload this gun while running. (T5 582-83)

There was no evidence of stippling on any of the victim's wounds, indicating the gun was at least three feet away. (T5 664-665) There was an entrance gunshot wound to the back of the head, and an entrance gunshot wound on the right side of the lower leg. (V 550, 552-553, 560) The trajectory of the wound to the leg was consistent with a person running. (T5 561-62) The trajectory of the wound to the head was slightly upward. (T5 565) The wound to the head would render the victim instantly unconscious. (T5 559)

The police interviewed Respondent; the taped interview was played for the jury. (T5 589, 599) Respondent stated that he had been dating Vonshell for three years. (T5 604) They had recently broken up. (T5 604) Respondent agreed Vonshell was his "first true love." (T5 610)

Respondent stated that, on the night of the shooting, Vonshell told him that she had been "messing" with the victim for a long time. (T5 613)

Q So, what did she tell you tonight? She told you she's been messing with him for the longest?

A Yeah, yeah, fucked up.

Q That is fucked up.

A Yeah, man. I drove home like twice. I drive - after I drove away twice, I turned back like, I got to talk

to her. And I was trying to go in the house to talk to her. He just pulled up and that just fuckin' did it.

Q So, you're trying to talk to her about the shit she just laid on you?

A Yeah.

Q Then he comes rolling up; wrong place, wrong time, huh?

A Yeah, because if he didn't pull up at that time, I would have been good. I would have just went home.

Q You were on the phone with her at the time?

A I was on the phone.

(T5 613-614)

Vonshell told Respondent that she was not going back with him, ever. (T5 614) She told Respondent that Clementson was always there for her. (T5 615)

Respondent stated he was walking towards Vonshell's home when he saw the victim's car pull up. (T5 616-17) Respondent stated that he did not talk to the victim prior to the shooting that night, nor had he ever "exchanged words before." (T5 617, 621-22) But, that night, Respondent felt like he was on automatic, that he had no control, it just all happened. (T5 617)

Respondent stated that he always carried his gun with him but he usually left it in the car. (T5 616, 621-22) He did not buy the ammunition that day; he always had some for the gun range. (T5 642) He described his gun as a .9 millimeter Ruger which he bought from a pawn shop. (T5 619-20) He had pawned the gun at the pawn shop because he needed money to pay off some friends and he had just gotten it out. (T5 643) It held ten rounds plus

one in the chamber. (T5 620) It was fully loaded. (T5 620)
Respondent had the gun in his jacket when he got out of the car.
(T5 621)

Respondent explained what happened as follows:

Q Do you remember firing a lot of rounds in your gun?

A Tell the truth, yeah.

Q Did your gun jam, at all?

A No.

Q The reason I ask is cause there were some unspent rounds on the ground. Did you have more rounds in your pocket, or something?

A Yeah, I did. Yeah, I did.

Q Okay. They can't tell if they're cycled through the chamber or if they just came falling out as you were running.

SGT. DIMLER: How are you sure that you fired all of the rounds?

A I don't know. I'm pretty sure cause I -- that lock part on the back here. No, it stay open.

Q It locks back? It locked back? Did you have to reload, at all?

A Did I? I think I do remember reloading.

Q As you were running?

A Yeah.

Q Did you reload at full capacity, or did you still have a few rounds in there?

A I reload to full capacity.

(T5 623-624)

Respondent also said:

Q You think he is dead, Nicolas?

A I hope not. Is he?

Q What gave you hope that he may still be alive? You thought you just wounded him?

A I was -- I didn't pay attention. I was just --

Q Were you just firing erratically as you were running, or --

A Yeah.

Q Cause you caught up to him at one point.

A I was firing while I was running.

SGT. DIMLER: When you got to that corner and he turned the corner -

A He fell down.

Q He fell down? Then what did you do?

A Turned around.

SGT. DIMLER: When he fell down, how close were you to him, approximately?

A Oh, I'm pretty sure like this and the door; this distance between me and the door.

SGT. DIMLER: Ten feet?

A Yeah.

SGT. DIMLER: Did he ever say anything, at that point?

A (Inaudible response.)

SGT. DIMLER: No?

Q Could you see if, visually, if he -- if you got him, if he was hurt? .

A No, no.

Q What did -- what did he do? How was he moving when he fell down?

A I don't know.

SGT. DIMLER: At some point in time you did, but once he fell to one knee --

A I turned around.

SGT. DIMLER: Well, would it be surprising to you if they said -- they told us that you fired another shot while he was on one knee.

A I don't think so. I just remember firing a whole bunch of shots.

(T5 625-627)

Respondent stated he wished he could hit the rewind button.

(T5 627) Respondent explained that he would not have done what

he did if Vonshell had not "egged" him on. (T5 631-32, 636) It was the phone call that night; he got pissed off. (T5 636)

The police asked Respondent if he shot the victim in the heat of the moment:

Q There's no reason why I can't talk to anybody that's gonna say something like, yeah, he told me he was gonna do it, or nothing like that? Cause what -- correct me if I'm wrong, but what we're grasping at here is just the heat of the moment? Shit just built up and --

A Yeah, she --

Q (Inaudible) -- snap?

A It just -- it was like (inaudible), like --

Q All right.

A Yeah, this is fucked up.

Q As opposed to something like premeditation, like it was planned?

A Nah, it was like, you know, like a - it wasn't like -- I just had the gun in my car. This fucks shit up, man, cause I didn't even expect her to call me. I was just trying to -

Q Just trying to what?

A I was just trying to talk to her, that's it. I was trying to talk to her.

(T5 644-645)

Defense counsel argued to the jury in closing argument that Respondent was not guilty of murder because he was just shooting wildly and erratically. (R6 744) Defense counsel also argued: "Where is the evidence that this wasn't just a continuous shooting, a wild exercise of shooting off a bunch of rounds?" (R6 753) "The whole thing was over in less than a minute from start to finish... ." (R6 754) "There was no evidence that he took

the gun and steadied it and made aim. The evidence was to the contrary, boom." (R6 755) Finally, defense counsel argued: "It's manslaughter. The judge will read you a lot more, concerning manslaughter; by culpable negligence, by being so wild and reckless in the shooting off of a gun that it has the effect of being an intentional disregard for a safety or well being. And it could be that, too." (R6 759)

Following closings, the trial court instructed the jury on first degree murder, second degree murder, manslaughter by act, and manslaughter by culpable negligence. (R6 773-780) Defense counsel did not object to the giving of instructions on the lesser included offense of manslaughter; in fact, he requested it. (R6 688) Accordingly, the manslaughter instructions were part of the lesser-included offense instructions read by the court:

Manslaughter: To prove the act of manslaughter, the State must prove the following two elements beyond a reasonable doubt. Dwayne Clementson is dead; 2, A, Nicolas Dominique intentionally caused the death of Dwayne Clementson; or B, the death of Dwayne Clementson was caused by the culpable negligence of Nicolas Dominique.

However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide, as I previously explained those terms.

In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death.

I will now define culpable negligence for you. Each of us has a duty to act reasonably toward others. If

there is a violation of that duty, without any conscious intention to harm, that violation is negligence.

Culpable negligence is more than the failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant.

Culpable negligence is a course of conduct showing reckless disregard for human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The negligent act or omission must have been committed with an utter disregard for the safety of others.

Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

In order to convict of manslaughter by intentional act, it is not necessary for the State to prove the defendant had a premeditated intent to cause death.

(R6 778-780).

The jury found Respondent guilty of second degree murder. (R2 356) Following conviction and sentence, Respondent appealed to the District Court of Appeal, Fourth District (hereinafter "the Fourth District"), in case number 4D08-2031. Briefs and supplemental briefs were filed by the parties below. In a supplemental brief on appeal, Respondent asserted that the instruction on manslaughter by act was error. Respondent acknowledged that no objections were lodged, however. To avoid this procedural bar, he asserted the instruction on manslaughter by act as read constituted fundamental error.

On June 23, 2010, the Fourth District affirmed Respondent's conviction and sentence. Dominique v. State, 40 So. 3d 33 (Fla. 4th DCA 2010) (Dominique I). The appellate court rejected Petitioner's argument that the trial court fundamentally erred in instructing the jury on the lesser included offense of manslaughter.

The Court stated:

Regarding the manslaughter instruction, we affirm pursuant to our recent holding in Singh v. State, 36 So.3d 848 (Fla. 4th DCA 2010). As in Singh, we find that the trial court's use of the erroneous manslaughter instruction was not fundamental error because the instruction gave the jury two options on the crime's second element: either that the defendant "intentionally caused the death" of the victim, or that the death of the victim "was caused by the culpable negligence" of the defendant.

Id. at 36.

In 2010, following the issuance of the appellate court's opinion, Respondent sought the discretionary review of this Court in case number SC10-1746, and this case was stayed pending the disposition of Haygood v. State, SC11-294. In 2013, this Court issued Haygood v. State, 109 So. 3d 735 (Fla. 2013). In Haygood, this Court ruled that this manslaughter instruction could indeed constitute fundamental error under certain circumstances.

This Court stated:

[G]iving the erroneous manslaughter by act instruction, which we found to be fundamental error in

State v. Montgomery, 39 So.3d 252 (Fla.2010), is also fundamental error even if the instruction on manslaughter by culpable negligence is given where the evidence supports manslaughter by act **but does not support culpable negligence** and the defendant is convicted of second-degree murder.

Haygood, 109 So. 3d at 737 (emphasis added).

This Court also said:

We have long held that fundamental error occurs in a jury instruction where the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict.

Haygood, 109 So. 3d at 741 (citation omitted).

Subsequent to Haygood, on December 30, 2014, this Court quashed the decision of the Fourth District and "remanded for reconsideration upon application of our decision in Haygood v. State, 109 So. 3d 735 (Fla. 2013)." Dominique v. State, 160 So. 2d 894 (Fla. 2014) (slip copy) (Dominique II).

On remand, Petitioner moved the appellate court for an opportunity to respond in light of the order directing remand. The appellate court granted the request and directed supplemental briefing from both parties addressing the application of Haygood. In the supplemental brief on remand, the State argued that the error in the manslaughter instruction was not fundamental error under the factual circumstances of this case. Not only did the evidence support the manslaughter by culpable negligence instruction, but defense counsel actually

argued that the evidence supported a finding of manslaughter by culpable negligence. Therefore, the jury had a viable alternative to manslaughter by act. manslaughter by culpable negligence. The error in the giving of the manslaughter by act instruction was, consequently, not fundamental error.

Despite the State's contention that the error was not fundamental in this case, the Fourth District issued an opinion rejecting the State's argument and reversing for a new trial. Dominique III, 171 So. 3d at 204. The Fourth District acknowledged that the evidence arguably did support the manslaughter by culpable negligence instruction. Dominique III, 171 So. 3d at 205. However, the appellate court asserted that:

that factual distinction was not central to the Supreme Court's reasoning in Haygood. Instead, as cited above, central to the Supreme Court's reasoning in Haygood was that the erroneous manslaughter by act instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in that case. Similarly here, the erroneous manslaughter by act instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in this case. Thus, fundamental error occurred.

Dominique III, 171 So. 3d at 206.

In other words, the Fourth District ruled that the giving of the erroneous manslaughter instruction would always be fundamental error, and per se reversible error. Yet, the Fourth

District certified conflict with the Third District's decision in Dawkins v. State, 170 So. 3d 81 (Fla. 3d DCA), rev. pending, SC15-1322 (Fla. September 2, 2015), on the issue of whether Montgomery¹ error in the manslaughter by act instruction is always fundamental error, even in a case where there is evidence supporting manslaughter by culpable negligence and the manslaughter by culpable negligence instruction was given.

Based on that certified conflict, the State sought the discretionary review of this Court. This Court has accepted jurisdiction and ordered briefing on the merits. This is the State's initial brief on the merits.

SUMMARY OF ARGUMENT

By holding that the giving of the manslaughter by act instruction is always fundamental error, the Fourth District has misinterpreted or improperly disregarded this Court's clear explanation, in Haygood v. State, 109 So. 3d 735 (Fla. 2013), the manslaughter by act instruction is not always fundamental error. That is, it is not fundamental error in a case where the manslaughter by culpable negligence instruction is also given and the evidence, as the appellate court acknowledged here, **supports a finding of culpable negligence.** Haygood, 109 So. 3d at 737. Petitioner's conviction and sentence for second degree

¹ State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010).

murder can, and should, be affirmed even after application of the Haygood decision. This Court must quash the decision of the Fourth District and remand with directions to reinstate Petitioner's conviction.

ARGUMENT

ISSUE I: WHETHER THE FOURTH DISTRICT MISINTERPRETED, AND THUS WRONGLY APPLIED, HAYGOOD TO THE FACTS OF THIS CASE?

The State submits that the District Court of Appeal, Fourth District (hereinafter the Fourth District), misinterpreted, and thus wrongly applied, Haygood v. State, 109 So. 3d 735 (Fla. 2013), to the instant case. Because Haygood clearly indicates that the manslaughter by act instruction is not always fundamental error, and that such a determination depends on the facts of each case, the Fourth District's holding that it is always fundamental error is in clear contradiction to Haygood. And because the Fourth District held that such an instruction will always be fundamental error regardless of the facts of any case, the Fourth District wrongly ignored that the instruction was not actually harmful in light of the facts of the instant case.

A. PRESERVATION.

Section 924.051(3), Florida Statutes, provides:

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only

when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

See also Fla. R. Crim. P. 3.390(d).

Thus, jury instructions are subject to the contemporaneous objection rule. Garzon v. State, 939 So. 2d 278 (Fla. 4th DCA 2006), approved, 980 So. 2d 1038 (Fla. 2008). See also, State v. Delva, 575 So. 2d 643 (Fla. 1991). To properly preserve a jury instruction issue, one must object before the jury retires to consider its verdict. See Wilson v. State, 786 So. 2d 632, 633 (Fla. 4th DCA 2001) (citing Many v. State, 756 So. 2d 169 (Fla. 4th DCA 2000) (refusing to review alleged jury instruction error where defendant raised question during preliminary, informal discussion but failed to object during formal charge conference or before jury retired to deliberate); Anderson v. State, 639 So. 2d 609 (Fla. 1994) (holding that legal grounds must be specifically stated before jury retires for objection to be reviewable on appeal) (citing Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)); Rayner v. State, 286 So. 2d 604 (Fla. 2d DCA 1973) (declining to review error in jury instruction where it was raised during charge conference but there was no objection before jury retired to deliberate). "The requirement of a contemporaneous objection to preserve an issue for appeal 'is based on practical necessity

and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.'" Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

Here, defense counsel did not object to the giving of the manslaughter instruction at any time below. In fact, he requested it. (R6 688) As a consequence, this issue was not preserved in the trial court. Respondent therefore was forced to argue that it was fundamental error to give the instruction in the instant case. But, although it was error, it was not fundamental error.

B. THE STANDARD OF REVIEW PERTAINING TO FUNDAMENTAL ERROR.

Generally, a trial court has wide discretion in instructing the jury, and the trial court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Carpenter v. State, 785 So. 2d 1182, 1199-1200 (Fla. 2001). However, in cases involving fundamental error, an erroneous jury instruction "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Delva, 575 So. 2d at 644-645 (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)); see also Floyd v. State, 850 So. 2d 383, 403 (Fla. 2002). This means that an erroneous jury

instruction is fundamental error "when the omission is pertinent or material to what the jury must consider in order to convict." Delva, 575 So. 2d at 645 (quoting Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)); accord Reed v. State, 837 So. 2d 366, 369-370 (Fla. 2002). For example, "[f]ailing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error..." Delva, 575 So. 2d at 645.

Moreover, "[a] possibility of what the jury 'could' do in response to a jury instruction is not the stuff of *fundamental* error. The law presumes that the jury has followed all of the trial court's instructions, in the absence of evidence to the contrary." Garzon v. State, 939 So. 2d 278, 285 (Fla. 4th DCA 2006), approved, 980 So. 2d 1038 (Fla. 2008). See Sutton v. State, 718 So. 2d 215, 216 n.1 (Fla. 1st DCA 1998).

In addition, "[a] proper approach to fundamental error considers the jury instructions as a whole, in the context of the case that was tried; a proper approach does not nitpick at the instructions to manufacture a fundamental error that was overlooked by all the participants at trial." Garzon, 939 So. 2d at 285.

Such a determination cannot be made in a vacuum or as a categorical matter. Rather, the effect of the error - whether it reached down into the validity of the trial itself - must be evaluated in the context of the trial, considering the nature

and credibility of the factual issues, the defenses and argument presented to the jury, and the nature of the error itself. See Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) (“[i]f the error was not harmful, it would not meet our requirement for being fundamental”).

In the instant case, considering the totality of the circumstances, it is clear the erroneous instruction on manslaughter by act did not “reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” Delva, 575 So. 2d at 644-645.

C. THE MERITS.

In State v. Montgomery, 39 So. 3d 252 (Fla. 2010), this Court concluded that an instruction on manslaughter requiring the State to prove the defendant “intentionally caused the death” of the victim was erroneous. Under this instruction, the Court held, “a reasonable jury would believe that in order to convict [the defendant] of manslaughter by act, it had to find that he intended to kill [the victim],” which is not actually required under Florida law. Id. at 257. Because manslaughter by act was a lesser offense only one step removed from the second degree murder conviction, a new trial was required for Montgomery.

A similarly erroneous instruction on manslaughter by act was given here. However, in the instant case, a manslaughter by

culpable negligence instruction was also given. This distinction was not addressed in Montgomery.

The Fourth District initially ruled in Dominique I, that Montgomery was distinguishable and "the trial court's use of the erroneous manslaughter instruction was not fundamental error because the instruction gave the jury two options on the crime's second element: either that the defendant 'intentionally caused the death' of the victim, or that the death of the victim 'was caused by the culpable negligence' of the defendant." Dominique v. State, 40 So. 3d 33, 36 (Fla. 4th DCA 2010) (Dominique I). Following the issuance of Dominique I, Respondent sought the discretionary review of this Court.

While discretionary review was pending in the instant case, this Court issued Haygood v. State, 109 So. 3d 735 (Fla. 2013), in which this Court clarified the application of Montgomery in situations where both the manslaughter by act and manslaughter by culpable negligence instructions were given. In Haygood, the Court held that giving the erroneous manslaughter by act instruction might be fundamental error even if the instruction on manslaughter by culpable negligence was given, **but not in all cases**. That is, the error would be fundamental only when it made a realistic difference at trial.

Initially, the error in the instruction must involve a disputed element of the crime - that is, intent must be an issue

at trial. Haygood, 109 So. 3d at 742. This does not end the inquiry, however. Even if intent is a disputed element, reversal is required only in those cases "where the evidence **supports** manslaughter by act but **does not support** culpable negligence," and the defendant is convicted of second-degree murder. Haygood, 109 So. 3d at 737 (emphasis added). In other words, the error requires a new trial only **when the error made a difference**, by effectively eliminating from consideration any viable lesser offense and compelling a verdict for a greater crime.

Thus, in cases where an instruction on manslaughter by culpable negligence is not supported by any evidence, the error in the manslaughter by act instruction harmed the defendant by compelling a verdict of second-degree murder if the jury concluded that the defendant had no intent to kill. If the jury believed that the defendant's act was intentional but he did not possess the intent to kill, and, in addition, culpable negligence did not apply to the facts presented at trial, then neither form of manslaughter would actually provide a viable lesser offense. Accordingly, the jury would be left with no choice but to convict of second degree murder. As a result, this Court found in Haygood that Montgomery error was fundamentally erroneous in those situations where manslaughter by act was the only viable lesser offense based on the instructions given and the evidence at trial. Cf. Hill v. State, 124 So. 3d 296, 301

(Fla. 2d DCA 2013) (Montgomery error required new trial where "the only homicide offense not requiring a finding of intent to kill remaining for the jury's consideration was attempted second-degree murder.").

This Court applied this reasoning to the totality of the circumstances and found that fundamental error had occurred in the Haygood case because the manslaughter by act instruction was erroneous **and there was no evidence to support the alternative manslaughter by culpable negligence instruction.** As this Court went to some pains to point out:

Significantly, there was no evidence to support a finding that Tuckey's death resulted from culpable negligence. Haygood's unambiguous admission that he intended to strike, headbutt, choke, and trip Tuckey essentially eliminated the alternate means of committing manslaughter - manslaughter by culpable negligence - as a viable lesser offense. **Thus, second degree murder was the only offense realistically available to the jury under the evidence presented in this case and the instructions given** - instructions that required the jury to find intent to kill in order to convict Haygood for manslaughter by act.

The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, **the only non-intentional homicide offense remaining for the jury's consideration in this case was second-degree murder.**

We hold that giving the manslaughter by culpable negligence instruction does not cure the fundamental error in giving the erroneous manslaughter by act

instruction where the defendant is convicted of an offense not more than one step removed from manslaughter and the evidence supports a finding of manslaughter by act, **but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant.**

Haygood, 109 So. 3d at 742-43 (emphasis added). Also see Daniels v. State, 121 So. 3d 409, 419 (Fla. 2013) ("In reaching the verdict that it did - second-degree murder - the jury necessarily concluded that Daniels had no intent to kill. Because of the continuing requirement in part of the 2008 instruction that the jury find intent to kill in order to convict for manslaughter by act, the jury was left with second-degree murder as the **only other non-intentional alternative.**").

But, in the instant case, in contrast to Haygood, there was indeed evidence which "reasonably supported" the manslaughter by **culpable negligence** instruction because there was ample evidence that Respondent acted with **culpable negligence**. In the instant case, the evidence showed that Respondent and Vonshell Lindsay had recently broken up but Respondent still felt strongly about Lindsay, his first true love, and wanted to get back together. (T3 354, 370, T5 610) By sad coincidence, the victim, Dwayne Clementson, pulled up at Lindsay's parents' house at the very moment that Respondent was walking towards Lindsay's home and Lindsay was telling Respondent over the phone that she and Clementson were exploring a romantic relationship and that she

and Respondent would never be getting back together. (T3 371-72, 386-88; T5 613-14, 616-17) Respondent stated that Lindsay told him that she had been "messing" with the victim for a long time. (T5 613) The connection abruptly ended after Respondent said, "there he goes right now." (T3 388) Respondent stated that Clementson was in the wrong place, the wrong time; if Clementson had not pulled up just then, Respondent would have just gone home. (T5 613-14)

Vonshell Lindsay ran to the front door and saw Respondent running down the street after Clementson. (T3 373-76) Vonshell stated Respondent was shooting **with his arm extended while running**. (T3 373-76) Vonshell stated Respondent did not stop and aim the gun with two hands and fire. (T3 394) Chantel Jackson, Vonshell's sister, looked out the window and saw Respondent running down the street after Clementson while shooting. (T 286)

Multiple witnesses stated that they heard between four and seven **rapid fire** shots. (T3 276, 287, 299-300, 325-27, 341, T4 455-56) Chantel Jackson testified that she heard four or five continuous, quick shots. (T3 287, 299-300) Ingrid Bazelais testified that all of the shots were fired within two to four seconds, and that the sound of the shots was **travelling** closer. (T3 272, 276) Margarita Lopez stated everything happened quickly. (T3 341) There was a very short period of time between the first and last gunshots, like within seconds. (T3 342)

Margarita Lopez stated that she heard shots, saw the victim drop to the ground, start getting up, and drop again when Respondent fired again with his arm extended. (T3 328, 349) Lopez stated Respondent was shooting with one hand and with his arm extended. (T3 346) He fired from six to ten feet away. (T3 346-47) Respondent agreed he fired from about ten feet away. (T5 625-27) The last shot was fired a matter of a second or two after the victim fell to the ground the first time. (T3 346) Respondent fired immediately; it was not like he stood there and sighted on the victim before he took the shot. (T3 346)

It was dark out at the time, eight or nine o'clock at night, and the street was not very well lit. (T3 295, 428, 434-35, T4 509)

The physical evidence showed that a zig-zagging chase occurred and that the victim fell at 7794 Juniper Street, **846 feet and twelve single family homes away** from Lindsay and Jackson's parents' home at 7740 Juniper Street. (T3 352, 424, T4 474-86, 592) The police found, scattered down Juniper Street from Vonshell's parents' home at 7740 Juniper to the victim's final resting place at 7794 Juniper, four spent shell casings and two live rounds of ammunition as well as some blood drops. (T4 475-82, 486)

There was no evidence of stippling on either of the victim's wounds, indicating the gun was at least three feet away. (T5

664-665) There was an entrance gunshot wound to the back of the head, and an entrance gunshot wound on the right side of the lower leg. (V 550, 552-553, 560) The trajectory of the wound to the leg was consistent with a person running. (T5 561-62) The trajectory of the wound to the head was slightly upward. (T5 565) The wound to the head would render the victim instantly unconscious. (T5 559)

Within three minutes, the incident was over; Chantel Jackson saw Respondent coming back up the street alone. (T3 289)

Respondent left the windows in his car open and the keys in the ignition suggesting Respondent had exited it quickly. (T3 432, 436, T4 469, 508, T6 655)

Respondent in his statement to police, which was played for the jury, asserted **he was not paying attention to whether he shot the victim and was just firing erratically as he was running**; he said he hoped the victim was not dead. (R5 625-27) Also, Respondent asserted he was distraught and suffering from an extreme emotional disturbance upon finding his first love had cheated on him and he claimed he acted in the heat of the moment rather than acting with premeditation; he said he "felt like [he] had no control. It just all happened." (R6 613-17, 644)

In sum, there was evidence based on which the jury could conclude that Respondent, acting under an extreme emotional disturbance and with no intent to kill, was just shooting

quickly and wildly and erratically with an extended arm as he chased the victim down a dark street at night; that all of the shots were fired quickly and continuously within a matter of seconds; that Respondent, exhausted at having run more than eight hundred feet, fired the fatal shot, not with both hands, but with a single unstable extended hand, while Clementson was ten feet away in the dark, and while Clementson was not standing still; and that the fact the shot hit the head was accidental, albeit culpably negligent.

Thus, defense counsel argued in closing argument that Respondent was not guilty of murder because he was just shooting wildly and erratically. (R6 744) Defense counsel also argued, "Where is the evidence that this wasn't just a continuous shooting, a wild exercise of shooting off a bunch of rounds?" (R6 753) "The whole thing was over in less than a minute from start to finish..." (R6 754) "There was no evidence that he took the gun and steadied it and made aim. The evidence was to the contrary, boom." (R6 755) **Finally, defense counsel argued that "It's manslaughter. The judge will read you a lot more, concerning manslaughter; by culpable negligence, by being so wild and reckless in the shooting off of a gun that it has the effect of being an intentional disregard for a safety or well being. And it could be that, too."** (R6 759) (emphasis added)

Although the prosecutor, not surprisingly, argued that this was a first degree premeditated murder case, this was not dispositive of the matter. Significantly, what the defense's closing argument showed was that defense trial counsel **admitted** that the evidence reasonably supported manslaughter by culpable negligence. And, defense trial counsel argued to the jury that it could find manslaughter by culpable negligence under the facts of this case. Thus, even though, as Respondent pointed out below, defense counsel told the jury that manslaughter by act fit like a glove, defense counsel **also** told the jury that they could indeed consider manslaughter by culpable negligence. Clearly, the evidence reasonably supported a conviction for manslaughter under the culpable negligence theory, as correctly argued by defense trial counsel.

Notably, what this also means is that defense counsel conceded that Respondent had the requisite state of mind that would render him guilty of manslaughter by culpable negligence. Thus, although intent was at issue in a very general sense in that the State contended that Respondent intended to commit first degree premeditated murder and defense counsel contended that Respondent was guilty of, **at most**, manslaughter by act or manslaughter by culpable negligence, defense counsel did not dispute that Respondent was **at least** guilty of manslaughter by act and manslaughter by culpable negligence. So, there was no

dispute on the part of the defense regarding whether Respondent had the state of mind to commit manslaughter by act or manslaughter by culpable negligence. Thus, the Fourth District's statement that fundamental error occurred because "the erroneous manslaughter by act instruction pertained to **a disputed element of the offense (the defendant's state of mind)** and the error was pertinent or material to what the jury had to consider to convict the defendant in this case" is simply not sound in the instant case. Dominique III, 171 So. 3d at 206 (emphasis added). Cf. Griffin v. State, 160 So. 3d 63, 69 (Fla. 2015) ("where a defendant expressly concedes one or more elements of a crime, those elements can be characterized as no longer in dispute for purposes of a fundamental error analysis").

Be that as it may, because there was evidence to support the alternative theory of manslaughter by culpable negligence, and because the jury was invited to consider that theory by defense counsel himself, as distinct from Haygood, **the jury in the instant case had a viable "non-intentional alternative" to second-degree murder**. Thus, the jury did have a choice, and knew they had a choice, unlike the jury in Haygood. Yet, they still chose to find Respondent guilty of second-degree murder.

Following Haygood, this Court quashed the decision of the Fourth District and "remanded for reconsideration upon application of" the decision in Haygood v. State, 109 So. 3d 735

(Fla. 2013).” Dominique v. State, 160 So. 3d 894 (Fla. 2014) (Dominique II) (table). On remand, the Fourth District, relying on Haygood, ruled that the error was **always** fundamental and harmful, and that Respondent Nicolas Dominique was entitled to a new trial due to an error in the manslaughter by act instruction.

Specifically, the Fourth District said,

We recognize the state's factual distinction from Haygood that giving the erroneous manslaughter by act instruction is fundamental error where the evidence does not support the accompanying manslaughter by culpable negligence instruction, whereas here the evidence arguably supported the accompanying manslaughter by culpable negligence instruction.

However, that factual distinction was not central to the Supreme Court's reasoning in Haygood. Instead, as cited above, central to the Supreme Court's reasoning in Haygood was that the erroneous manslaughter by act instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in that case. Similarly here, the erroneous manslaughter by act instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in this case. Thus, fundamental error occurred.

By rejecting the State's "factual distinction" as "not central" to the Haygood decision, the Fourth District deliberately, and improperly, ignored this Court's multiple references in Haygood to the sufficiency of the evidence to support a manslaughter by culpable negligence instruction and

this Court's discussions of whether the evidence in Haygood was, in fact, sufficient to support a manslaughter by culpable negligence conviction. Haygood, 109 So. 3d at 742-43 Recall that Haygood said: "**Significantly, there was no evidence to support a finding that Tuckey's death resulted from culpable negligence.**" Haygood, 109 So. 3d at 742 (emphasis added). Thus, despite the Fourth District's assertion otherwise, the insufficiency of the evidence in Haygood was not merely a distinction that Haygood was noting in passing; rather, it was one of which this Court, in Haygood, chose to emphasize the importance, or significance. Why would it be "significant" that there was no evidence in Haygood to support the culpable negligence instruction if the existence of such evidence could not affect whether the error was fundamental and make a difference in the outcome of the case. The Fourth District improperly decided to relegate the sufficiency of the evidence to a simple aside which was meaningless.

Because, as explained above, Haygood clearly indicates that an erroneous manslaughter by act instruction is not always fundamental and harmful error, and that such depends on the facts of each case, the Fourth District's holding that the instruction is always fundamental and harmful error regardless of the facts of each case is in clear contradiction to Haygood. Thus the Fourth District's opinion must be quashed.

The Fourth District at least acknowledged, and certified conflict with, the Third District in Dawkins v. State, 170 So. 3d 81 (Fla. 3d DCA), rev. pending, SC15-1322 (Fla. September 2, 2015) .² In Dawkins, the Third District stated:

Upon review of the record in Dawkins' case, there was conflicting testimony regarding intent, and although Dawkins did not rely on a culpable negligence defense, the record shows there existed, in all of the disputed evidence below, some evidence from which the jury reasonably could have found Dawkins guilty of manslaughter by culpable negligence, in contrast to the facts in Haygood. With that in mind, where the jury was also instructed in manslaughter by culpable negligence *and the evidence could reasonably support so finding*, the error in giving the flawed Montgomery manslaughter by act instructions was not per se fundamental error. We conclude Haygood is not applicable to these facts, and therefore deny the petition for Habeas Corpus.

Dawkins, 170 So. 3d at 82-83 (citations omitted). Also cf. Berube v. State, 149 So. 3d 1165 (Fla. 2d DCA 2014) (erroneous manslaughter by act instruction was not harmful given facts of case). Dawkins properly acknowledges what the Fourth District has expressly chosen to disregard: that Haygood holds that Montgomery errors are not harmful under the facts of certain cases, and that the totality of the facts in each case must be considered to determine whether an error is in fact harmful.

² Dawkins has sought this Court's discretionary review in case number SC15-1322, and this Court has stayed the proceedings in that case pending the disposition of the instant case.

To reiterate, the Fourth District has clearly misinterpreted and misapplied this Court's decision in Haygood. When Haygood is properly applied to the facts of this case, it is apparent that the erroneous manslaughter instruction was not harmful, and therefore, Respondent is not entitled to a new trial. This Court must quash the Fourth District's opinion in Dominique III, and remand for reinstatement of Respondent's conviction and sentence for second degree murder.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court QUASH the decision of the Fourth District in Dominique v. State, 171 So. 3d 204 (Fla. 4th DCA 2015), and remand for reinstatement of Respondent's conviction for second degree murder.

CERTIFICATE OF SERVICE

I certify that a copy of the instant initial brief on the merits as well as the accompanying appendix containing a copy of the appellate court's opinion have been furnished to the following by E-MAIL via the Florida Courts Portal on January 15, 2016: Patrick Burke, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 at pburke@pd15.state.fl.us, jharring@pd15.state.fl.us, and appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using
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