IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC09-332
L.T. No. 1D07-4688

STEVEN W. MONTGOMERY,

Respondent.
_____/

_____

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

_____

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

This case is before the Court on discretionary review of the decision of the First District Court of Appeal in Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009) (on motion for rehearing, clarification and rehearing en banc). Citations to the state's initial brief will appear as "IB," followed by the appropriate page number, e.g., (IB,1).

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case. Respondent generally accept's Petitioner's statement of the facts, but with the following caveat. The cause of death was disputed. The defense presented an expert witness, Dr. Kessler, who opined that the victim's death was not caused by strangulation. (Trial, V, 575). Dr. Kessler also opined that there was no evidence of suffocation. (Trial, V, 605).

The theory of defense was self-defense. (Trial, VI, 699-700, 708, 709). Defense counsel argued that the injuries to the victim's extremities which appear to have been caused by a stick or pole could have resulted from an attempt to disarm a knife-wielding victim. (Trial, VI, 708). A purple broom handle and a metal rod were found at the scene. (Trial, IV, 230, 233). Either of these items could have been the "weapon" found by the jury. There were stab marks in the bedroom wall which could have been caused by the victim throwing knives at Mr. Montgomery. (Trial, VI, 718).

> There was a fight going on there. There were things being thrown against the walls in the bedroom. We know they were thrown against the walls because of the impacts were there. Who's throwing them and why?

(Trial, VI, 709).

SUMMARY OF THE ARGUMENT

ISSUE

WHETHER THE FORMER STANDARD JURY INSTRUCTION FOR MANSLAUGHTER BY ACT ERRONEOUSLY IMPOSES AN INTENT TO KILL ELEMENT AND, IF SO, WHETHER THE ERROR IS FUNDAMENTAL?

Respondent concurs with the Petitioner's concession that the former standard jury instruction for manslaughter by act, employed in this case by the trial court, erroneously imposes an intent to kill element. See Hall v. State, 951 So. 2d 91, 96 (Fla. 2d DCA 2007)(en banc). The error is fundamental. Under similar circumstances this Court held that an error in defining the offense of manslaughter constituted fundamental error. On more than one occasion this Court held that an erroneous instruction on manslaughter, by omission of instructions on excusable and justifiable homicide, constituted fundamental error. State v. Lucas, 645 So. 2d 425 (Fla. 1994); Miller v. State, 573 So. 2d 337 (Fla. 1991); Rojas v. State, 552 So. 2d 914 (1989). In the present case, the error lies not in the omission of the necessary instructions for excusable and justifiable homicide, but in the erroneous imposition of an "intent to kill" element. The same principle applies, however. Because manslaughter is a "residual offense" defined by what it is not, it is absolutely essential that the jury be given a complete and accurate instruction on manslaughter. Without complete and accurate instruction, the jury cannot properly choose between manslaughter and second degree

murder. The manslaughter instruction was erroneous; the error is fundamental.

ARGUMENT

ISSUE

WHETHER THE FORMER STANDARD JURY INSTRUCTION FOR MANSLAUGHTER BY ACT ERRONEOUSLY IMPOSES AN INTENT TO KILL ELEMENT AND, IF SO, WHETHER THE ERROR IS FUNDAMENTAL?

STANDARD OF REVIEW

The standard of review is *de novo*. McDonald v. State, 957 So. 2d 605, 610 (Fla. 2007).

MERITS

A. CERTIFIED QUESTION

The district court correctly held that intent to kill is not an element of manslaughter. The district court also certified the following question of great public importance:

> IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT?

The district court passed upon the question by holding that "intent to kill is not an element of manslaughter by act. . . ." Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). Section 782.07, Florida Statutes, provides:

> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In Taylor v. State, 444 So. 2d 931 (Fla. 1983), this Court recognized the common law distinction between voluntary and involuntary manslaughter. As codified, voluntary manslaughter is a killing by act or procurement, whereas involuntary manslaughter is a killing by culpable negligence. Bolin v. State, 34 Fla. L. Weekly D619a (Fla. 2d DCA March 20, 2009). There is some divergence of opinion, however, as to whether Taylor stands for the proposition that manslaughter by act (voluntary manslaughter) requires an intent to kill. In Barton v. State, 507 So. 2d 638, 641 (Fla. 5th DCA 1987), rev'd on other grounds, State v. Barton, 523 So. 2d 152 (Fla. 1988), the district court, citing Taylor, held that a conviction for manslaughter by act requires proof of intent to kill. See also, State v. Sherouse, 536 So. 2d 1194, 1194-95 (Fla. 5th DCA 1989)(Cobb, J., concurring). On the other hand, the district court in this case, also in reliance on Taylor, held that a conviction for manslaughter by act does not require proof of intent to kill. See also, Hall v. State, 951 So. 2d 91, 96 (Fla. 2d DCA 2007)(en banc). The confusion can be explained. The cases holding that the offense of manslaughter by act requires proof of intent to kill misinterpret Taylor.

In Taylor, this Court was presented with the question whether the offense of *attempted* manslaughter existed under Florida law. The trial court recognized the offense of attempted manslaughter

and the defendant was convicted of attempted manslaughter. The Court began its analysis by noting that it has long recognized the offense of assault with intent to commit manslaughter. The validity of the offense of assault with intent to commit manslaughter was "premised upon the fact that manslaughter includes certain types of intentional killings." Taylor, 444 So. 2d at 933. An example was provided from Williams v. State, 41 Fla. 295, 26 So. 184 (1899).

> [T]here is nothing in the definition of manslaughter to exclude from its provisions all *intentional* homicides, or to include within the definition of murder all *intentional* killings, unless the intention is so deliberate as to amount to a premeditated design.

Taylor, 444 So. 2d at 933, citing Williams.

> The ordinary case of a sudden combat where the passions are aroused by sudden provocation will furnish a pertinent illustration. Here there may be an intent to take life accompanied by an assault with a deadly weapon to carry out that intent. If the intent does not rise to the degree of a premeditated design, the killing will not be murder, but manslaughter.

Id. In other words, the offense of manslaughter by act may, but does not necessarily, encompass the intent to kill. In Taylor this Court made clear, however, that to sustain a conviction for assault with intent to commit manslaughter, there must be proof of intent to kill. Id. Thus, while analyzing the specific question presented, the Court made two salient points: (1) manslaughter by act (voluntary manslaughter) *may* be accompanied by proof of intent

to kill: (2) the offense of assault with intent to commit manslaughter *requires* proof of intent to kill. The Court did not hold that manslaughter by act (voluntary manslaughter) requires proof of intent to kill.

In approving the trial court's ruling recognizing the offense of attempted manslaughter, the Court noted that there was sufficient proof that the defendant intended to kill the victim. The affirmance comported with the Court's analysis requiring proof of intent to kill for the offense of attempted manslaughter.

The Court's holding in Taylor was more broadly stated, however, to encompass the rule that manslaughter by act does not require intent to kill. The phrase "intent to kill" was subsumed by the phrase "intent to commit an unlawful act."

> [A] verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act.

Id. at 934.

> [W]hen the underlying conduct constitutes an act or procurement, such as aggravated assault, there is an intent to commit the act and, thus, there exists the requisite intent to support attempted manslaughter.

Id. at 934.

This Court's opinion in Taylor may also be understood in the context of its contemporaneous opinion in Gentry v. State, 437 So. 2d 1097 (Fla. 1983). In Gentry, the Court addressed whether attempted second degree murder was a valid offense under Florida

law. The Court held that notwithstanding the fact that second degree murder does not require proof of specific intent to kill, the offense of attempted second degree murder existed under Florida law. If the substantive offense may be satisfied by general intent, then the corresponding attempt offense may be proved by general intent, i.e., intent to commit a criminal act without proof of the specific intent to commit the harm proscribed. See Reynolds v. State, 842 So. 2d 46 (Fla. 2002)(distinguishing general intent from specific intent). The Court, in Gentry, opined that second and third degree murder are general intent crimes. Thus, the state did not have to prove intent to kill in order to prosecute the offense of attempted second degree murder.

Because manslaughter by act does not require the specific intent to kill, it is a general intent crime. See State v. Hubbard, 751 So. 2d 552 (Fla. 1999)(DUI manslaughter is general intent crime); Hopkins v. State, 721 So. 2d 1201 (Fla. 4th DCA 1998)(DUI manslaughter); Wilson v. State, 871 So. 2d 298, 301 (Fla. 1st DCA 2004); Webster v. State, 744 So. 2d 1034 (Fla. 1st DCA 1999); Tollefson v. State, 525 So. 2d 957, 961 (Fla. 1st DCA 1988)(DUI manslaughter). This is true notwithstanding the fact that commission of the unlawful act resulting in death may sometimes be accompanied by intent to kill. This suggests that this Court, in Taylor, intended to treat manslaughter by act (voluntary manslaughter) as it treats second degree murder. Gentry. Since the

offense of manslaughter by act is a general intent crime, the attempt to commit manslaughter by act is legally cognizable upon proof of the attempt to commit an unlawful (criminal) act which could, but did not, result in death.

Under traditional analysis, manslaughter by act or voluntary manslaughter encompasses, inter alia, killings occurring in the "heat of passion," "mutual combat," and by "excessive force" in the course of self-defense. One district court described these as examples of "intentional killings." See Rodriguez v. State, 443 So. 2d 286, 269 (Fla. 3d DCA 1983). If, by the term "intentional killing," the Rodriguez court meant the offense required proof of the "specific intent to kill" the victim, that description does not withstand scrutiny.

A killing may result from a single punch thrown in anger. That is manslaughter. See e.g., J.J.W. v. State, 892 So. 2d 1189 (Fla. 5th DCA 2005); Acosta v. State, 884 So. 2d 112 (Fla. 2d DCA 2004); Valencia v. State, 597 So. 2d 372 (Fla. 3d DCA 1992). In such a case, the law does not impose upon the state the burden to prove that the single punch was thrown with "intent to kill." Similarly, where the defendant uses an excessive degree of force in self-defense and kills the victim, a conviction for manslaughter may be sustained. In this case, too, the state is not required to prove that the defendant acted with "intent to kill" the victim. See Pierce v. State, 376 So. 2d 417 (Fla. 3d DCA 1979); Martinez v.

State, 360 So. 2d 108 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla. 1979). The above authorities demonstrate that the offense of manslaughter by act or voluntary manslaughter does not require proof of "intent to kill," but only proof of an unlawful criminal act which results in death.

The view that voluntary manslaughter does not require intent to kill is recognized in other jurisdictions as derived from the common law. See United States v. Paul, 37 F.3d 496 (9th Cir. 1994); People v. Lasko, 999 P. 2d 666, 672 (Cal. 2000)("Our conclusion that voluntary manslaughter does not require intent to kill is consistent with the common law as well as the statutory law in most states.")(citing 2 *Wharton's Criminal Law* (15th ed. 1994) § 155, pp. 347-348; 1 *Warren on Homicide* (1938) Elements of Voluntary Manslaughter, § 85, pp. 418-419; 2 LaFave, *Substantive Criminal Law* (1986) § 7.10, p. 253).

> Most killings which constitute voluntary manslaughter are of the intent-to-kill sort - so much so that voluntary manslaughter is often defined in the cases (and, sometimes, by statute) as if intent to kill were a required ingredient. But, theoretically at least, they might be of the intent-to-do-serious-bodily-injury, or the depraved-heart types. Thus - to take the most common sort of voluntary manslaughter, a killing while in a reasonable "heat of passion" - in most cases the defendant intentionally kills the one who has aroused this passion in him. But if, in the throes of such passion, he should intend instead to do his tormentor serious bodily injury short of death, or if he should, without intending to kill him, endanger his life by very reckless

> (depraved heart) conduct, the resulting death ought equally to be voluntary manslaughter rather than murder or no crime. Thus, the great majority of modern statutes, either by reference to all cases which would otherwise be murder or by similar general language, take this broad view.

2 Wayne R. LaFave, *Substantive Criminal Law*, (2nd ed.) § 15.2(a)(footnotes omitted). Thus, the overwhelming weight of authority recognizes that manslaughter by act or voluntary manslaughter does not require proof of intent to kill.

In the present case, the trial court gave the former standard jury instruction for manslaughter. The court instructed the jury that the State must prove two things:

> The first, being again that [the victim] is dead and, secondly, that Mr. Montgomery intentionally caused her death.
>
> * * * * *
>
> In order to convict of manslaughter by intentional act it is not necessary for the state to prove that the defendant had a premeditated design to cause death, . . .

(Trial, VI,748). See Fla. Std. Jury Instr. (Crim) 7.7. This instruction is erroneous because reasonable jurors would construe the phrase "intentionally caused her death" to mean "intended to kill."

This Court apparently agrees that the former instruction is erroneous. By approving a recently modified instruction, the Court ttempted to cure the defect. The new instruction states in pertinent part:

> To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Victim) is dead.
> 2. a. (Defendant) intentionally caused the death of (victim).
>
> * * * * *
>
> 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, only an intent to commit an act which caused death. See Hall v. State, 951 So. 2d 91 (Fla. 2d DCA 2007).

In re: Std. Jury Instr. In Crim. Cases - Report No. 2007-10, 997 So. 2d 403 (Fla. 2008). The new instruction, however, is still flawed and prone to misapplication because it still includes the phrase "intentionally caused the death" of the victim. A reasonable jury may regard the phrase "intentionally caused the death" to be inconsistent with the phrase "intent to commit an act which caused death." The inconsistency, or ambiguity, may cause the jury to impose an intent to kill element.

The former standard jury instruction for manslaughter by act, given in this case, is even more erroneous because it imposes an "intent to kill" element. Such an element did not exist at common law. Such an element does not exist under Florida law. Furthermore, this Court, by approving a recent amendment to the standard jury instruction for manslaughter by act, appears to have adopted the holding of Hall v. State, 951 So. 2d 91, 96 (Fla. 2d

DCA 2007)(en banc), stating that manslaughter by act does not require intent to kill; it only requires the intent to commit an act resulting in death.

B. FUNDAMENTAL ERROR

The error is fundamental. Moreover, the error is directly analogous to the fundamental error identified in State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994), Miller v. State, 573 So. 2d 337 (Fla. 1991), and Rojas v. State, 552 So. 2d 914 (Fla. 1989). Like Respondent, Joey Luis Rojas was charged with first degree murder and convicted of second degree murder. In defining the lesser included offense of manslaughter, the trial court neglected to instruct the jury on the defenses of justifiable and excusable homicide. The defense did not object to the omission. Nonetheless, this Court ruled that the failure to instruct on the defenses of justifiable and excusable homicide, in conjunction with the lesser offense of manslaughter, constituted fundamental error.

In Rojas, the Court explained that

> manslaughter was in the nature of a residual offense and that a complete definition of manslaughter requires an explanation that justifiable homicide and excusable homicide are excluded from the crime.

Rojas, 552 So. 2d at 914. Manslaughter is a curiosity because it is a "residual offense, defined by reference to what it is not." State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994)(quoting Stockton v.

State, 544 So. 2d 1006, 1008 (Fla. 1989)). Because manslaughter is a residual offense, a complete instruction on manslaughter requires an explanation that justifiable and excusable homicide are excluded from the crime. Id.

> [F]ailure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second degree murder.

State v. Lucas, 645 So. 2d at 427.

The reason the erroneous imposition of an intent to kill element constitutes fundamental error stems from the amorphous distinction between second degree murder and manslaughter by act. The two offenses differ only in the degree of mental culpability of the offender. In either case, the victim is dead from the defendant's intentional act. For second degree murder, the state of mental culpability is described as the commission of an act "imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, . . ." § 782.04(2), Fla. Stat. For manslaughter by act, the state of mental culpability is described as the intentional commission of an unlawful act which resulted in the death of the victim. Hall v. State, 951 So. 2d 91, 96 (Fla. 2d DCA 2007)(en banc); Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). While

the distinction may be somewhat amorphous, it is one which the jury must make. Whenever a jury finds a defendant guilty of second degree murder, the jury could have found the defendant guilty of manslaughter. That is because the distinction between the two offenses turns upon a single factual finding, i.e., the degree of the defendant's mental culpability. Such a factual finding is always subject to the interpretation of reasonable jurors - and reasonable jurors may differ. In order to make this distinction fairly, as required by due process, the jury must be completely and correctly instructed on the offense of manslaughter by act.

When viewed in this manner, the rationale supporting the finding of fundamental error in the omission of instructions on justifiable and excusable homicide is the same rationale employed by the district court below in finding fundamental error in the erroneous instruction on the elements of manslaughter by act, i.e., the erroneous inclusion of an "intent to kill" element. As stated in Montgomery:

> [I]f the jury found the defendant did not intend to kill, the erroneous instruction effectively precluded the jury from choosing between two possible verdicts: second degree murder or manslaughter by act. Under the erroneous instruction, the jury was directed to pick the greater of these two offenses . . . . Such interference with the jury's deliberative process tainted the underlying fairness of the entire proceeding.

Montgomery v. State, 34 Fla. L. Weekly at D362.

The state argues that the error is not fundamental because the

jury was instructed to return a verdict for the highest offense proved beyond a reasonable doubt. From this standard jury instruction, the state derived a dubious premise.

> Presumably, the jurors worked down from first degree murder to the charge of conviction (second degree murder), and never got to manslaughter. His speculation aside, Montgomery offers nothing to overcome ths presumption.

(IB,16). The state presumes too much. There is no legal "presumption" that the jury considered the highest charged offense first, or started at the top and worked sequentially toward the bottom of the verdict form. The jury would be faithful to the instruction even if it considered the lowest offense first and then considered each higher offense to arrive at the highest offense proved beyond a reasonable doubt. But for the return of the verdict, the deliberations of the jury are generally a mystery. It may well be that the jury started at the bottom, and considered the charges in inverse order. It is the state which resorts to speculation as a means of attacking the reasoning of the district court. Whether the jury started at the top or the bottom or considered all the charges collectively, the erroneous instruction on manslaughter by act dissuaded the jurors from finding Respondent guilty of manslaughter by act if they found, as a matter of fact, that Respondent did not act with the intent to kill.

The state also asserts that this Court's decision in Martinez v. State, 981 So. 2d 449 (Fla. 2008), militates against a finding

of fundamental error. (IB,17). The state's reliance on Martinez is misplaced. In Martinez, the trial court erroneously defined the forcibly-felony instruction in conjunction with the defendant's claim of self-defense. Martinez, however, is inapposite for a number of reasons. First, the erroneous instruction in Martinez pertained to an affirmative defense (self-defense). It is exceedingly difficult to establish that an erroneous instruction on an affirmative defense constitutes fundamental error. That is because the defendant properly bears the burden of producing evidence of the defense and the state must nonetheless prove the existence of all the elements of the offense beyond a reasonable doubt. Id. at 455. Erroneous instruction on an affirmative constitutes fundamental error only where the defendant has been deprived of a fair trial. Id. In the present case, by contrast, the error pertained to an element of manslaughter by act rather than to the affirmative defense of self defense.

Second, this Court's ruling in Martinez was grounded in the fact that the erroneous forcible felony instruction "did not deprive Martinez of his sole, or even his primary, defense strategy." Id. at 456. In the present case, however, self defense was Respondent's sole defense.

Third, properly construed, Martinez permits consideration of the weight of the evidence of self defense only where the erroneous instruction pertains specifically to the theory of self defense.

Since the error in the present case pertains to the elements of manslaughter by act, Martinez does not authorize the weighing of the evidence of self defense in the determination of fundamental error.

Even if Martinez authorizes such inquiry, the evidence that Respondent acted in self defense was far greater than the state is willing to admit. There were knife marks in the wall of the master bedroom. (Trial,IV,373,378,249,250). The victim had small incised wounds that could have been caused by a metal rod. (Trial,IV,289,297). The incised wounds to the victim's hands were relatively minor. (Trial,IV,328). There was some testimony that one who wields a knife could cause such wounds to themselves. (Trial,IV,329). A metal rod was found in the kitchen. (Trial,IV,233). The metal rod tested positive for proteins that "could be blood." (Trial,IV,234). The victim suffered an undoubtedly brutal beating. She did not suffer any significant stab wounds or knife wounds, however.

On the basis of this evidence, defense counsel argued that the victim could have attacked Respondent and wielded the knife. (Trial,VI,707). The stab marks in the wall could have been caused by the victim. (Trial,VI,718). The injuries to her extremities could have been offensive wounds. (Trial,VI,707). The injuries to the victim's extremities that appear to be caused by a pole could have been caused by Respondent's attempt to disarm her.

(Trial,VI,708,709). Defense counsel also argued that Respondent did not intend to kill Tarnesha. (Trial,VI,706). Notwithstanding the claim of self defense, defense counsel argued that if the jury found that appellant's use of force "was excessive you should find him guilty of manslaughter." (Trial,VI,725). This was undoubtedly a reference to the common law doctrine of the excessive use of force in self defense, a type of voluntary manslaughter.

It is seen that the evidence of self defense was greater in the present case than in Martinez. This is yet another reason why Martinez does not militate against the finding of fundamental error. Moreover, defense counsel advanced the theory of self defense but also held out the possibility of a conviction of the lesser offense of manslaughter (by act). Given that the lesser offense of manslaughter was specifically put "in play" by defense counsel who all but conceded that Respondent may be guilty of manslaughter, the erroneous inclusion of an intent to kill element effectively defeated that tactic, precluded a finding of guilt for the lesser offense of manslaughter by act, and thereby deprived Respondent of a "fair trial." The error amounted to a denial of due process and fundamental error.

The error in the proceedings below was substantially similar to the error found to violate due process in Beck v. Alabama, 447 U.S. 625 (1980). In Beck, the defendant was charged with a capital offense. The trial court applied an Alabama statute which denied

the defendant an instruction on the lesser offense of felony murder not subject to the death penalty. The jury thus was presented with only two options, a conviction which required imposition of the death penalty and outright acquittal. The United States Supreme Court concluded that the Alabama statute which deprived the defendant of the option of a conviction for the lesser included offense of felony murder, for which the death penalty was not available, constituted a denial of due process. The distinction between the two offenses was whether the defendant "intended to kill" the victim where the defendant claimed that his accomplice acted independently in killing the victim and the intent to kill could not be supplied by the fiction of felony murder. The United States Supreme Court explained that where the evidence shows that the defendant committed some offense, but leaves some doubt as to an element which would justify conviction for the greater offense, the failure to instruct the jury on the lesser offense "would seem inevitably to enhance the risk of an unwarranted conviction." Id. at 637.

In the present case, the instruction on the lesser offense of manslaughter by act erroneously imposed an "intent to kill" element. The erroneous instruction so altered the character of the manslaughter option as to effectively preclude the jury from finding appellant guilty of manslaughter by act. Specifically, if the jury found that appellant did not intend to kill the victim,

second degree murder was the only option available; the manslaughter option was effectively withdrawn from consideration by the erroneous instruction. On the facts presented, the jury could have found that appellant acted in self defense but thereafter raged out of control in carrying his defense to an unwarranted level, i.e, the common law voluntary manslaughter doctrine of excessive use of force in self-defense. The erroneous instruction, however, substantially interfered with the jury's fact-finding and deliberative process, and amounted to an unwarranted and inexcusable intrusion into the jury room. The jury was forced to convict appellant of the higher offense of second degree murder. The error is properly described as "fundamental," so as to permit argument for the first time on appeal.

The only exception to this rule is explained in Armstrong v. State, 579 So. 2d 734 (Fla. 1991). In Armstrong, this Court explained that failure to give a complete instructions to the jury on the defenses of justifiable and excusable homicide in conjunction with the offense of manslaughter will not be regarded as fundamental where defense counsel affirmatively requested an abbreviated instruction. More precisely, even fundamental error may be waived. Id. Similarly, the error is waived if the defense opts for an "all or nothing" defense and declines instruction on the defenses of justifiable and excusable homicide. Jones v. State, 484 So. 2d 577 (Fla. 1986).

The Armstrong exception is not applicable in the present case. The record does not show an affirmative waiver of a correct jury instruction. The record shows only the mere failure to object.

There are some other considerations which should be addressed in an abundance of caution. Some believe there is a Florida rule that the failure to instruct on a necessarily lesser included offense does not constitute fundamental error. The cases cited for this proposition include Harris v. State, 438 So. 2d 787 (Fla. 1983), cert. denied, 466 U.S. 963 (1984), Jones v. State, 484 So. 2d 577 (Fla. 1986), Parker v. Dugger, 537 So. 2d 969 (Fla. 1989), and McKinney v. State, 579 So. 2d 80 (Fla. 1991). In Harris, this Court held that a defendant in a capital case has the right to instruction on necessarily lesser included offenses. That right, however, may be waived provided that the defendant personally executes a knowing and intelligent waiver. In the subsequent Jones and Parker v. Dugger cases, this Court construed Harris to stand for the proposition that in a non-capital case, the defendant must request instruction on the necessarily lesser included offenses in order to preserve the issue for appellate review, i.e., the error cannot be considered "fundamental" so as to be cognizable for the first time on appeal. The pronouncements in Jones and Parker v. Dugger must be considered dicta because in neither case was it necessary to decide whether the error was fundamental. Each case turned on the finding that defense counsel had validly waived the

right to instruction on the necessarily lesser included offenses because the defendant's personal waiver was not required in a non-capital case. In McKinney, this Court relied on the dicta of Jones and Parker v. Dugger to rule, in the non-capital context, that any error in the trial court's failure to instruct on the necessarily lesser included offense of false imprisonment was barred from appellate review by the lack of a contemporaneous objection. The extremely terse pronouncement in McKinney, however, fails to explain whether the defendant argued that the error was fundamental and therefore does not specifically reject a claim that the error was fundamental.

In sum, respondent argues that there is no established rule in Florida that the failure to instruct, in a non-capital case, on necessarily lesser included offenses cannot constitute fundamental error. In fact, the rule should be otherwise. The failure to instruct on necessarily lesser included offenses intrudes upon the jury's fact-finding prerogative and tends to coerce the jury into returning a verdict for a higher offense than it may otherwise find. In other words, the reasoning of Beck v. Alabama applies equally to necessarily lesser included offenses in non-capital cases. Even if a contemporaneous objection would normally be required, this Court has carved out a well defined exception to the rule for the necessarily lesser included offense of manslaughter. See State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994); Miller v.

State, 573 So. 2d 337 (Fla. 1991); Rojas v. State, 552 So. 2d 914 (Fla. 1989). The exception is well justified due to the fact that manslaughter is a residual offense defined by reference to what it is not, and because the distinction between manslaughter and second degree murder is amorphous.

Petitioner argues that any error in the jury instructions for manslaughter cannot be regarded as fundamental because manslaughter is two steps removed from the charged offense of first degree murder. This argument fails. The "steps" analysis is determined by the offense of conviction, not the highest charged offense. This Court has already considered and rejected Petitioner's argument.

> [F]ailure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second degree murder.

State v. Lucas, 645 So. 2d 425 (Fla. 1994)(emphasis added). In Rojas v. State, the defendant was charged with first degree murder and convicted of second degree murder. This Court held that an error in the manslaughter instruction constituted fundamental error notwithstanding the fact that Rojas had been charged with first degree murder.

> [T]he failure to give an accurate instruction on a lesser included offense which is two steps removed from the crime of which the defendant is convicted constitutes harmless error.

Rojas, 552 So. 2d at 916, n. 1, citing State v. Abreau, 363 So. 2d 1063 (Fla. 1978)(emphasis added).

Lucas and Rojas also negate Petitioner's claim that this case involves the doctrine of the "jury pardon." There is no reasonable contention that the jury pardoned Respondent down from first degree murder to second degree murder. The state cannot get into the minds of the jurors in that respect. The verdict must be accepted on its face for the conclusion that the State failed to prove the element of premeditation. Respondent is not seeking a "pardon" down to the offense of manslaughter, and there is no legal basis to support the claim that a verdict of manslaughter (on retrial) would constitute a jury pardon.

Petitioner also argues that the district court "misapplied" Garzon v. State, 980 So. 2d 1038 (Fla. 2008). Of course, the district court did not "expressly" misapply Garzon because the decision below did not cite Garzon. This is not surprising because Garzon is not applicable to the present case. The "and/or" jury instruction at issue in Garzon was a unique type of instructional error and did not pertain to an erroneous instruction on the elements of a necessarily lesser included offense. Garzon has no application to the present case.

Petitioner cites Garzon for the proposition that the error involved in the manslaughter instruction was not an error in instructing the jury on a disputed element of the crime, as was the

case in State v. Delva, 575 So. 2d 643 (Fla. 1991), and Reed v. State, 837 So. 2d 366 (Fla. 2002). (IB,24). Fortunately, this Court has already addressed this issue by analogy. In Lucas v. State, 630 So. 2d 597 (Fla. 1st DCA 1993), the defendant was charged with attempted second degree murder. He interposed the defense of misidentification. The trial judge failed to instruct the jury on the defense of justifiable and excusable homicide in conjunction with the lesser offense of attempted manslaughter. On appeal, the defendant claimed fundamental error. The district court discussed the tension between Rojas and Delva. Under Rojas, the failure to instruct on justifiable and excusable homicide would be fundamental error. Given the defense of misidentification, however, it would seem that under Delva the error would not be fundamental because the instruction on manslaughter was not "disputed" or germane to the resolution of the case. The district court held that Rojas controlled the analysis and certified a question of great public importance to this Court. In State v. Lucas, 645 So. 2d 425 (Fla. 1994), this Court affirmed the district court's ruling, holding that an erroneous instruction on manslaughter constitutes fundamental error where the defendant is convicted of either manslaughter or a greater offense not more than one step removed, such as second degree murder. This is because manslaughter is a residual defined by reference to what it is not. A complete and correct instruction

on manslaughter is required in order that the jury may distinguish between the crimes of manslaughter and second degree murder. If the jury is improperly instructed on manslaughter, a verdict of guilt for second degree murder is inherently unreliable. The error is fundamental. State v. Lucas; Rojas; Miller.

The same is true in the present case. The error is not materially distinguishable. In Lucas, the failure to instruct the jury on the defense of justifiable and excusable homicide fatally undermined the jury's rejection of the manslaughter option. In the present case, the erroneous addition of the "intent to kill" element similarly undermined the jury's rejection of the manslaughter option. The verdict of guilty of second degree murder did not establish a factual determination of "intent to kill" because "intent to kill" is not an element of second degree murder. Given that the jury's verdict did not encompass a finding of intent to kill, the jury should have been presented with an option of finding Respondent guilty of either manslaughter or second degree murder. The erroneous addition of an intent to kill element, however, withdrew that option from the jury's consideration and, in effect, "coerced" a verdict for the higher offense of second degree murder. Since the verdict was "coerced," no examination of the record could demonstrate the error to be harmless. No view of the record can prove that the jury would have returned the same verdict

irrespective of the error. The state's legal analysis asks the appellate courts to make a finding of fact, i.e., the degree of the defendant's mental culpability, for the first time on appeal. Appellate courts do not make factual findings for the first time on appeal. That is beyond the scope of appellate review. The error is fundamental.

CONCLUSION

Based on the argument and authority presented above, Respondent respectfully requests the Court to answer the certified question in the negative. As to the certified conflict, Respondent respectfully requests that the Court approve the decision below and disapprove Barton v. State, 507 So. 2d 638 (Fla. 5th DCA 1987). If the Court chooses to address the fundamental error issue, Respondent respectfully requests that the Court affirm the district court and find that the error is fundamental.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to respondent, Steven W. Montgomery, #129394, Mayo C.I., 8784 Hwy. 27, West, Mayo, FL 32066, on this ____ day of June, 2009.

I also certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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