IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

STEVEN W. MONTGOMERY,

Respondent.
_____/

CASE NO. SC09-332
First DCA no. 1D07-4688

On Discretionary Review from the First District Court: Certified Question & Certified Conflict

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JURISDICITIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Case--The State seeks discretionary review of Montgomery v. State, case no. 1D07-4688 (Fla. 1st DCA Feb.12, 2009) [copy attached].[1] That decision reversed Montgomery's conviction for second degree murder, and announced a rule of *per se*, fundamental error:

> Appellant contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act[.] ... We agree with Appellant because the standard instruction imposed an additional element on the crime of manslaughter by act, and that offense was one step removed from the crime for which Appellant was convicted.

Id. at p.2.

The opinion certified conflict with Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), *rev'd. on other grounds*, 536 So.2d 1194 (Fla. 1988). It also certified this question to be 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?

Id. at p.12-13.

[1]The opinion issued Dec. 31, 2008. The State moved for rehearing, etc. Jan. 7, 2009. That motion was denied upon issuance of the Feb. 12 opinion. The State filed notice to invoke this court's discretionary jurisdiction Feb. 23, and amended that notice March 5. By order of March 4, the First DCA granted the State's motion to stay mandate.

Facts--Charged with first degree murder, Montgomery was convicted for the lesser included offense of second degree murder with the finding he carried, etc. a weapon. (R1:88-9).[2] He was the victim's enraged boyfriend, and engaged her in a fatal struggle throughout their apartment. (Trial4:225-60). She died from strangulation and multiple blunt force injuries, including fractured ribs; and suffocated when fat particles migrated to her lungs as a result of the beating. (Trial4:276-314).

Using the standard jury instructions, the trial court explained that the crime charged (first degree murder) included second degree murder and manslaughter; and that the jury must first decide if Montgomery killed the victim. If so, it then must decide whether the killing was first or second degree murder, manslaughter, or excused. (Trial6:743-44).

The trial court gave the definition of "act." (Trial6:745). It finished the first degree murder instruction, and gave the standard ones for second degree murder and manslaughter. (Trial6:747). The second degree instruction explained that the State did not have to prove "intent" to cause death. (Trial6:747-8). The manslaughter instruction required the State

[2]The record on appeal below consisted of two volumes of filings cited (R[vol. no.]:[page no.]); and four volumes of trial transcript cited (Trial[vol. no.]:[page no.]).

to prove Montgomery "intentionally caused [the victim's] death." (Trial6:748, lines 16-17). The trial court further explained:

> 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[.]

(Trial6:748-9).

SUMMARY OF ARGUMENT

The opinion below passed upon the certified question, establishing the first basis for this court's subject matter jurisdiction. The opinion also certified conflict with the Fifth DCA's "position" in Barton, establishing a second basis for this court's jurisdiction. For both grounds, jurisdiction should be exercised because the opinion has jeopardized every second degree murder conviction in the direct appeal pipeline--by finding *per se* fundamental error to give the previous version of the standard jury instruction on manslaughter by act.

The opinion concluded that fundamental error arose upon one circumstance, beyond use of previous manslaughter instruction--that the offense of manslaughter was only one step removed from the conviction obtained.[3] The opinion declined to reach, as

[3]The First DCA treats Montgomery as announcing a rule of *per se* fundamental error. Already, two decisions have followed it without mention of the facts. *See* Burroughs v. State, 997 So.2d 522 (Fla. 1st DCA 2008) (reversing for "the reasons expressed in Montgomery"); Davis v. State, 2009 Fla.App.LEXIS 137 (Fla. 1st DCA Jan. 9, 2009) ("Because the trial court fundamentally erred

moot, Montgomery's other three issues. *Id*. at p.2. It failed to analyze the error in context of the entire trial, and conflicts with Garzon v. State, 980 So.2d 1038 (Fla. 2008).

ARGUMENT

ISSUE

DOES THIS COURT HAVE JURISDICTION BASED ON CERTIFICATION OF A QUESTION, CERTIFICATION OF CONFLICT, OR NON-CERTIFIED CONFLICT?

A. Standard of Review

Whether the opinion below established jurisdiction in this court is determined *de novo*. *Cf.* Stanek-Cousins v. State, 912 So.2d 43, 48 (Fla. 4th DCA 2005) ("Questions of subject matter jurisdiction are reviewed de novo.").

B. Jurisdiction

Certified Question--The opinion below certified and passed upon a question of great public importance. The State is not required to file a jurisdictional brief to invoke this ground. *See* Fla.R.App.P.9.120(d)

Certified Conflict--When the opinion below certified conflict with Barton, it observed:

> In contrast [to the Second DCA in Hall], the Fifth District opined, based on Taylor, that the words "act" and "procurement" in the manslaughter statute

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in giving the standard jury instruction for manslaughter by act, we REVERSE ....").

> 'obviously refer to acts evidencing an intent to kill, as required at common law for voluntary manslaughter.'

Id. at p.4, *quoting* Barton, 507 So.2d at 641. The opinion elaborated:

> In determining that there is no intent-to-kill element in manslaughter by act, we have come into conflict with the Fifth District. ... [W]e agree with the Second District regarding the elements of the crime of manslaughter by act. We believe that the contrary holding espoused by the Fifth District in Barton leaves a gap in the law, as it would not allow for a manslaughter conviction in cases where the defendant commits an unlawful act that unintentionally results in the death of the victim. Because we are unable to reconcile our holding with the Fifth District's position, we certify conflict with Barton.

Id. at p.12.

Barton challenged his convictions for attempted manslaughter and aggravated battery, based on the single act of cutting the victim "across the neck with a single swipe of a hawk-billed knife." *Id*. at 639. The court ultimately held the convictions were mutually exclusive. *Id.* at 640.

To reach this conclusion, the court turned to the statutory definition of manslaughter, said to codify the common law. *See* 507 So.2d at 641. It observed:

> Voluntary manslaughter at common law ... has been statutorily enacted in Florida as "the killing of a human being by the act (or) procurement . . . of another, without lawful justification." §782.07, Fla. Stat. (1985). The words "act" and "procurement" obviously refer to acts evidencing an intent to kill, as required at common law for voluntary manslaughter.

Id. [e.s.]. As the opinion below certified, the underlined sentence gives rise to the conflict.

The logical flaw in Barton is that a person can deliberately act unlawfully, to cause the victim's death; but without contemplating death or any particular victim before so acting. The opinion below reaches the opposite conclusion, that manslaughter by act requires proof of "only an intentional unlawful act, rather than intent to kill." (opinion, p.9).

Non-Certified Conflict--In Garzon v. State, 980 So. 2d 1038 (Fla. 2008), this court said:

> We likewise agree that this is not a case where the court failed to correctly instruct on an element of the crime over which there was a dispute, as in Delva and Reed. Since this case does not present a Delva/Reed error, the Fourth District was correct in examining the totality of the record to determine if the "and/or" instruction met the exacting requirements of fundamental instruction error.

Id. at 1043.

In this case, there was not a failure to instruct on a disputed element. To the contrary, the previous version of the standard manslaughter by act instruction was given. The instruction did not reduce the State's burden of proof; but, as the opinion below declared, "imposed an additional element on the crime." (opinion, p.2).

In State v. Delva, 575 So. 2d 643 (Fla. 1991), the court failed to instruct the jury on the knowledge element of cocaine possession. *See id.* at 645("Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element ...."). In Reed v. State, 837 So.2d 366 (Fla. 2002), the standard jury instruction for "malice" was erroneous; so it "reduc[ed] the state's burden of proof on an essential element of the offense charged." *Id*. at 369 [e.s.; internal quote omitted].

Because this case did not involve a total failure to instruct, or an erroneous instruction reducing the State's burden of proof; it did not involve Delva or Reed error. However, the opinion below did not look at the "totality of the record." It thus conflicts with controlling precedent; that is, Garzon, by misapplying it. *See* Anstead, Kogan, et. al., *The Operation & Jurisdiction of the Supreme Court of Florida*, Nova L. Rev., 87-90 [12/28/2005 update] (conflict jurisdiction arises when the opinion below misapplies controlling precedent).[4]

C. Exercise of Jurisdiction

The opinion below has jeopardized every second degree murder conviction in the direct appeal pipeline in which the

[4]The updated version of 12/28/2005 is available at: http://www.floridasupremecourt.org/pub_info/documents/juris.pdf

instruction for manslaughter by act was given. It announces, contrary to recent decision by this court, a rule of *per se* fundamental error. Based on the certified question and certified conflict, jurisdiction should be exercised.

Recently, this court amended the standard manslaughter-by-act jury instruction to clarify that the State does not have to prove "premeditated intent to cause death:"

> [W]e modify instruction 7.7 as follows:
>
> 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). We authorize publication and use of the instruction as modified. [emphasis original].

In re Std. Jury Instructions in Crim. Cases--Report No. 2007-10, 2008 Fla. LEXIS 2377 (Fla. Dec. 11, 2008) at *2. However, the court also declared that it "express[ed] no opinion on the correctness of this instruction." *Id*. at *4. Therefore, the certified question has not been answered on the merits, and the certified conflict has not been resolved.

As to the non-certified conflict, jurisdiction should be exercised to correct the misapplication of Garzon. Not only did the opinion below announce a rule of per se fundamental error, but did so without looking at the entire trial.

CONCLUSION

This court has jurisdiction to review the opinion below. It should accept jurisdiction, and announce whether jurisdiction rests on the certified question, certified conflict, or non-certified conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this JURISDICTIONAL BRIEF has been sent by U.S. mail to Montgomery's attorney: **RICHARD M. SUMMA**, Assistant Public Defender, Leon County Courthouse, Suite 410, 301 South Monroe Street, Tallahassee Florida 32301; on March 9, 2009. I also certify this brief complies with Fla.R.App.P. 9.210.

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Senior Assistant Attorney General

APPENDIX

Decision Under Review