IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC09-332**

STEVEN W. MONTGOMERY,

Respondent.
_____/

On Discretionary Review from the First District Court of Appeal: Certified Question; Certified Conflict; Non-Certified Conflict

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REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State relies on its statement of the case and facts. It rejects Montgomery's broad "caveat," that the cause of death was disputed. (AB, p.2). This so-called "caveat" concedes victim was dead, but implies all causes of death were disputed. However, even Montgomery does not factually dispute one cause of the victim's death--blunt force trauma. (Trial6:708-9). The fatal struggle took place throughout the victim's apartment. (Trial4:225-60).[1] She died at least from multiple blunt force injuries, including fractured ribs, so severe that fat particles migrated to her lungs as a result. (Trial4:276-314).

SUMMARY OF ARGUMENT

The State agrees it does not have to prove intent to kill to convict for manslaughter by act. The answer to the certified question is "no."

The failure, in the decision below, to examine the entire record of trial led it to wrongly conclude that use of the prior standard instruction on manslaughter by act was fundamental error. When the entire record is considered, it is clear that no reasonable jury would have pardoned Montgomery down to

[1]The record below consisted of two volumes of filings cited (R[1 or 2]:[page no.]), and four volumes of trial transcript cited (Trial[vol. no.]:[page no.]). State-supplied emphasis is noted [e.s.]. Montgomery's answer brief is cited (AB, p.__).

manslaughter. Any error in use of the instruction was harmless; the decision below must be reversed.

ARGUMENT

ISSUE

DOES USE OF THE FORMER, STANDARD JURY INSTRUCTION FOR MANSLAUGHTER-BY-ACT REQUIRE THE STATE TO PROVE "INTENT TO KILL," AND *ALWAYS* RESULT IN FUNDAMENTAL ERROR?

Montgomery's part A addresses the State's first point in Issue I (initial brief, p.6-13). His part B addresses the State's second point in the same issue. (initial brief, p.13-23). He answers the State's second issue within his part B, and does not address the State's third issue. For clarity, the State will follow his format.

A. Certified Question

Montgomery argues that proof of manslaughter by act does not require showing the defendant had intent to kill. (AB, p.5-11). The State agrees with his result only, based on the corresponding part of its initial brief. (p.6-10).

Montgomery relies very heavily on Taylor v. State, 444 So. 2d 931 (Fla. 1983), where this court said:

> We therefore hold that there may be a crime of attempted manslaughter ... only if there is proof that the defendant had the requisite intent to commit an unlawful act. This holding necessitates that a distinction be made between the crimes of "manslaughter by act or procurement" and "manslaughter by culpable negligence." For the latter there can be no corresponding attempt crime. [e.s.].

Id. at 934. However, Taylor did not address proof of "intent to kill" when completed manslaughter-by-act was charged, but was concerned with attempted manslaughter. It is not useful here.

As the State initially argued, the historic perspective of Bautista is more appropriate to this case. The more useful distinction is not "voluntary" versus "involuntary" manslaughter, but whether the defendant acted deliberately upon or toward the victim. If so, manslaughter is by act; if not, it is by culpable negligence. (initial brief, p.8-9).

Montgomery notes his jury was instructed with the prior version of standard instruction 7.7. He then asserts:

> [R]easonable jurors would construe the phrase "intentionally caused her death" to mean "intended to kill."

(AB, p.12). However, his jury did not pose a question about the difference between proof of second degree murder and manslaughter, as occurred in Hankerson v. State, 831 So.2d 235 (Fla. 1st DCA 2002). (See initial brief, p.18-20). Also, he ignores the immediately following instruction which told the jury it was not necessary for the State to prove he had premeditated design to cause death. (Trial6:749). In short, he offers no record support for the quoted assertion.[2]

Again, the State agrees that it need not prove intent to kill, to convict for manslaughter by act. The answer to the certified question is"no."

B. Fundamental Error

[2]Montgomery suggests "the new instruction, however, is still flawed ...." [e.s.]. (AB, p.13). His jury was instructed under the prior instruction, so he lacks standing to challenge the new one.

The State relies on its argument (initial brief, p.13-23), which correctly addresses the entire record of trial. *Cf.* Hankerson, 831 So.2d at 236 (noting the jury asked this question: "Is intent necessary for the second-degree murder to apply?"); Cooper v. State, 905 So.2d 1063 (Fla. 4th DCA 2005) (rejecting argument that fundamental error arose, when the jury was instructed on attempted manslaughter by culpable negligence, "[b]ecause there was sufficient evidence to support the higher degree of crime of which appellant was convicted [attempted second degree murder]").

Montgomery observes that the distinction between second degree murder and manslaughter is "amorphous." (AB, p.15). This observation belittles the jury's role; because, depending on the facts, the distinction between premeditation and deliberately acting maliciously can be just as difficult to make. Yet Montgomery does not fret over the jury's distinction between first and second degree murder, when it convicted for the latter.

Next, Montgomery addresses a point from the State's argument, but out of context. He asserts there is no legal presumption the "jury considered the highest charged offense first ... and worked sequentially toward the bottom of the verdict form." (AB, p.17). As the State fully argued, his jury must be presumed to have followed the instructions given. Among those instructions was that it convict for the highest offense proven. (Trial6:760). Given Montgomery beat his girlfriend to death in a rage, it makes more sense to infer the jury found lack

of premeditation and worked down from first degree murder to second; than it does to infer it found he deliberately caused her death, but his acts were so egregious they rose to second degree murder. (initial brief, p.16, 21-22).

Of course, in either event, the jury would have thoughtfully decided he committed more than manslaughter. In either event, its verdict would have been based on the facts, not on any error in the wording of the manslaughter instruction.

Arguing against the State's reliance on Martinez v. State, 981 So.2d 449 (Fla. 2008), Montgomery finds it "exceedingly difficult to establish that an erroneous instruction on an affirmative defense constitutes fundamental error." (AB, p.18). He reads that decision correctly, to note the error in the forcible felony instruction did not deprive Martinez of his sole or primary defense. 981 So.2d at 456. In other words, pertinent facts from the entire record of trial were considered. The court did not limit itself to the mere number of steps from second degree murder to manslaughter in the verdict form.

The Martinez court also rejected his claim of fundamental error because it was "extremely weak" and "strained even the most remote bounds of credulity." 981 So.2d at 456. Here, Montgomery followed the victim from room to room, beating her with several objects until fat cells were dislodged and migrated to her lungs; among other things. In contrast, the evidence of self defense was so minimal that, in the larger defense closing (Trial6:704-26), counsel made relatively little mention of it. (Trial6:716-

18). Instead, counsel spent more time suggesting Montgomery was guilty of manslaughter only. (Trial6:722-5).

The State finds it exceedingly difficult to discern evidence of self defense, much less evidence of self defense greater than such evidence in Martinez. Thus, the State is unable to discern fundamental error in light of the brutality of the beating, closing arguments, and other pertinent jury instructions.

This leads to the flaw in Montgomery's argument--everywhere present; nowhere addressed. He urges the error was fundamental because convicted-offense was but one step from the offense erroneously instructed. However, he never confronts, even alternatively, the State's point that the error was not fundamental when the entire trial is considered.

Next, Montgomery urges the "error in the proceeding below was substantially similar to the error found to violate due process in Beck v. Alabama, 447 U.S. 625 (1980). (AB, p.20).[3] The State recognizes he is the appellee, and beneficiary of the "tipsy coachman" doctrine. However, Beck was not mentioned in his initial brief to the First DCA; and, according to that court's progress docket, there was no rely brief. Because this new legal point was not advanced to the First DCA, and would be a

[3]On page 20, Montgomery claims the error was fundamental because defense counsel made a strategic choice to concede he could be guilty of manslaughter. Counsel's strategic decision was reasonable, and may have contributed to the jury's willingness to convict for second degree murder. In addition to showing the error was not fundamental, these circumstances show Montgomery's appropriate remedy is rule 3.850.

substantial change in Florida jurisprudence, this court should decline to reach it. *Cf. id.* 447 U.S. at 633 n.8 (noting disposition of case made reaching Beck's equal protection argument unnecessary, and observing: "Moreover, petitioner failed to raise this claim in the courts below.").

Beck was limited to capital cases. *See id.* at 639 n.14 ("We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case." [e.s.]). Also, the Supreme Court has since construed Beck primarily as an Eighth Amendment, sentencing case. *See e.g.* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 279-80 (1998) ("Relying on Eighth Amendment decisions holding that additional procedural protections are required in capital cases, *see, e.g.*, Beck ...."); Hopper v. Evans, 456 U.S. 605, 611 (1982) ("Our holding in Beck, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided.").

In short, Beck dealt with a sentencing issue in a capital case; and has since been treated as an Eighth Amendment matter. None of these circumstances is present here. Montgomery's point invites this court, for the first time, to apply the rationale of a capital, sentencing decision grounded primarily on the Eighth Amendment; to his non-capital case, which involved a jury instruction for a lesser included offense and due process. That invitation should be declined without reaching the merits.

Otherwise, Beck's rationale does not require the decision below be affirmed. To the contrary, this court has already declined to extend one aspect of Beck to non-capital cases. *Cf.* Jones v. State, 484 So.2d 577, 579 (Fla. 1986) ("Far from the situation in Beck, where jury instructions on lesser included offenses were forbidden, petitioner was here offered an opportunity to have such instructions given, and quite clearly waived the opportunity. We decline to apply the formal requirement of Harris to this case ....").

The Alabama statute under which Beck was convicted precluded any lesser included offenses; the only other option was acquittal. *Id.* at 628-9. Under these circumstances, the Supreme Court found the death penalty to be unconstitutionally imposed. *See id.* at 627, 637. Here, the jury was instructed on all pertinent lesser offenses, including manslaughter. Nothing shows it was confused, or compelled to convict for second degree murder through use of the prior manslaughter instruction.

Montgomery advances Armstrong v. State, 579 So.2d 734 (Fla. 1991). However, he omits half the holding, to imply the disclosed half supports his cause. Read fully, Armstrong said:

> [In Ray], [t]his Court ... held that[:]
>
> > it is not fundamental error to **convict** a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense **or** 2) defense counsel requested the improper charge ....

> That analysis applies here.
>
> Ray [v. State, 403 So.2d 956, 961 (Fla. 1981)] (footnote omitted) [Armstrong's emphasis deleted; bold-underlining supplied by State].

Id. at 735.

Montgomery had opportunity to object to the manslaughter instruction, but did not. Manslaughter is lesser in degree and penalty than premeditated murder. Harris v. State, 438 So.2d 787, 796 (Fla. 1983), *cert. den.*, 466 U.S. 963 (1984) (observing: "[T]he necessarily included lesser offenses of first-degree murder are second-degree murder and manslaughter."). His circumstances fit squarely within the first Ray/Armstrong instance in which conviction for the erroneously-instructed lesser offense is not fundamental. If conviction for such offense is not fundamental error; then conviction for a higher, but still lesser included, offense--as here, supported by the evidence--also is not fundamental error.

Montgomery cites Harris, Jones, Parker, and McKinney to urge "some believe" outright failure to instruct on lesser included offenses is not fundamental error. (AB, p.23). Of course, his jury was given the prior standard instruction in full. That aside, Harris found valid personal waiver of jury instructions for lesser included offenses. 438 So.2d at 797. As noted, Jones declined to extend the requirement of personal waiver to non-capital cases. 484 So.2d at 579. As waiver cases, Harris and Jones do not bear on Montgomery's situation.

In McKinney v. State, 579 So.2d 80,84 (Fla. 1991), this court held failure to instruct on false imprisonment as a lesser included offense of kidnaping was not preserved for review absent objection. *Id.* at 84. This holding strongly implies such failure was not fundamental error.

Outright failure to instruct leaves the jury no chance to convict for the omitted lesser offense. If anything, failure to instruct is more likely to cause the jury to convict for a higher offense rather than acquit. Yet, McKinney implies the error was not fundamental. Parker v. Dugger, 537 So.2d 969 (Fla. 1988) does the same. *See id.* at 972 ("[T]he claim as it pertains to the trial judge's failure to instruct on lesser included offenses is procedurally barred for failure to preserve it at trial."). Harris, Jones, Parker, and McKinney either do not apply here, or implicitly support the State's position.

In State v. Lucas, 645 So.2d 425 (Fla. 1994), this court held:

> The district court is correct that this case is controlled by our decisions in Rojas and Miller, which stand for the proposition that failure 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. [e.s.].

Id. at 427 (Fla. 1994). Later, in Reed v. State, 837 So.2d 366 (Fla. 2002), this court held an incorrect instruction on "malice" reduced the State's burden of proof; again without looking at the entire record of trial.

Here, the disputed jury instruction not incomplete or missing altogether, and did not reduce the State's burden of proof. Instead, the instruction was fully given, and made the State's burden harder. The entire record should have been analyzed below, to conclude no fundamental error arose.

Montgomery misunderstands the State's argument, when he observes: "There is no reasonable contention that the jury pardoned Respondent down from first degree murder to second degree murder." (AB, p.26). Nowhere did the State contend the conviction for second degree murder constituted a pardon. Instead, it urged that dropping lower, to manslaughter, would have been a pardon under the facts. His observation is really a complaint that the jury's pardon power was abridged. As this court has said, such power is "without legal foundation" and is an "aberration,"when it flies in the face of the evidence. Sanders v. State, 946 So.2d 953, 957 (Fla. 2006). Any abridgement of the pardon power, through use of the manslaughter instruction, was not fundamental error.

Montgomery advances Rojas v. State, 552 So.2d 914 (Fla. 1989). Read closely, that opinion does not disclose whether there was an objection at Rojas' trial. It cannot stand for the point that not repeating the instruction on justifiable and excusable homicide, when instructing on manslaughter specifically, rises to fundamental error. Even more, it cannot stand for the point that fundamental error always so arises, without regard for the other events of trial.

As the State noted at the outset of its Issue II (initial brief, p.23), Garzon was not cited in the First DCA's decision. If that alone defeats "misapplication jurisdiction," so be it. This court can reach the same point--that the entire trial record must be analyzed to determine whether fundamental error occurred--to fully dispose of this case upon answering the certified question. Otherwise, the State relies on its argument in Issue II. (initial brief, p.23-5).

Montgomery lastly asserts the State has asked this court, for the first time, to make a factual finding as to his mental culpability. (AB, p.29). The State does not do so. Instead, it contends any error was harmless, because the conviction for second degree murder was strongly grounded on the facts--particularly, the brutality of the prolonged beating Montgomery inflicted on the victim. Given that beating, no reasonable jury would have convicted him for manslaughter. Despite the manslaughter instruction, the verdict was not affected.

CONCLUSION

The certified question should be answered negatively. This court should review the entire record, and conclude no fundamental error occurred. It should reverse the decision below, and remand for consideration of the three issues deemed moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this REPLY BRIEF has been sent by U.S. mail to Respondent's attorney: **RICHARD M. SUMMA**, Assistant Public Defender, Leon County Courthouse Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; on June ___, 2009. I also certify this brief complies with Fla.R.App.P. 9.210.

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