IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – INSTRUCTION 7.7
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Case No. SC10-113

RESPONSE TO THE COMMENTS OF MR. BART SCHNEIDER, MR. RICHARD M. SUMMA, MR. MICHAEL T. KENNETT, AND MS. CHARMAINE M. MILLSAPS

The Court, on April 8, 2010, on its own motion, amended standard jury instruction 7.7 – Manslaughter, in light of the Court's opinion in Montgomery v. State, No. SC09-332 (April 8, 2010). The Court solicited the comments of the committee, along with any suggested changes to the interim instruction that the committee deemed appropriate. The Court also asked for comments from any other interested parties. All of the comments were due to the Court no later than June 7, 2010. The committee filed its comments with the Court on June 7, 2010. The committee was directed to respond to any comments filed no later than June 28, 2010.

Four additional comments were received by the Court on June 7, 2010, from the following individuals: Mr. Bart Schneider, a committee member, Mr. Richard M. Summa, Assistant Public Defender in the Second Judicial Circuit, Mr. Michael T. Kennett, Assistant Attorney General, and Ms. Charmaine M. Millsaps, Assistant Attorney General.

The committee met via a telephone conference on June 17, 2010, to discuss the comments filed with the Court. Twelve of the seventeen committee members participated in the conference.

The committee did not dissect the individual comments received by the Court to determine if there was agreement or disagreement among the members regarding any recommended changes the commentators may have had. Mr. Schneider thought that there were three approaches the committee could take in responding to the Court. First, if the committee believed that the Court's holding

in *Montgomery* was correct, and the interim instruction reflected the holding of the Court, then the comments filed with the Court could be rejected by the committee. Second, if the committee felt that the holding of the Court in *Montgomery* was not correct, there might not be anything the committee could do. Third, the committee could consider *Montgomery* in light of other case law and attempt to harmonize the two in a way that would make sense. A fundamental question with which the committee struggled was whether this Court has eliminated all vestiges of common law in favor of a strict statutory construction of s. 782.07(1), Florida Statutes (2009), and in so doing, repudiated its prior decisions and those of the appellate courts. Additionally, the committee questioned whether the Court has determined that an act of simple or ordinary negligence that results in a death rises to the level of manslaughter. It was noted by the committee that the Court stated in *Montgomery*: "We further hold that the intent which the State must prove for the purpose of manslaughter by act is the intent to commit an act that was not justifiable or excusable, which caused the death of the victim." Some members of the committee felt that this Court may have decided that the commission of any unlawful act, no matter how minor, which causes the death of the victim, may result in a conviction for the offense of manslaughter. This interpretation of the *Montgomery* opinion may be bolstered by the Court's issuance of the interim instruction that states in element 2a: (Defendant's) **act(s) caused the death of** (victim). However, members of the committee also noted that the Court did not set forth an analysis in the *Montgomery* opinion suggesting or stating that previous case law was being overturned by the Court.

A review by the committee of the comments filed with the Court has reached certain conclusions. Mr. Schneider, Mr. Kennett, Mr. Summa, and Ms. Millsaps all believe that the holding in *Montgomery* is incorrect and their comments reflect why they disagree with the opinion. One concern of these individuals is that the Court has now created case law that permits the State to prosecute a violation of s. 782.07(1), Florida Statutes, even if the act of the defendant was one of simple or ordinary negligence. All four commentators have suggested various modifications of the interim instruction to cure this perceived defect. Regardless of the varying approaches to rewrite the interim instruction, the committee accepts that the opinion of the Court is a correct statement of the law. All of the comments filed with the Court are inconsistent with the Court's opinion and should be rejected.

Several committee members have concluded that the *Montgomery* opinion may stand for the proposition that an act of simple negligence that causes the death of another is manslaughter in the State of Florida. However, these members are not convinced that this end result is what the Court intended.

At least two committee members believe that the Court has consciously decided to change the law in Florida and follow a strict interpretation of s. 782.07(1), Florida Statutes. Therefore, an act of simple negligence rises to the level of manslaughter when the negligent act causes the death of the victim.

Other committee members do not reach the same conclusion. These members take a narrower view of the holding in *Montgomery*. They believe the case stands solely for the proposition that the State is not required to prove that the defendant intended to kill the victim when the crime alleged is manslaughter by act. Since manslaughter by act does not require this proof, the standard instruction that was given to the jury in that case was incorrect. There is nothing in the opinion that suggests the Court has held that simple negligence is sufficient to convict a person of manslaughter. That issue was not before the Court, and the Court did not need to reach that conclusion in order to issue its ruling in *Montgomery*. These members have suggested that the committee advise the Court that the interim instruction may appear to criminalize mere negligence. Therefore, the interim instruction would change the existing case law. This group of members felt that an instruction should be submitted by the committee that makes it clear that simple negligence does not rise to the level of manslaughter. These members rely on the following Florida cases: Cannon v. State, 91 Fla. 214, 107 So. 360 (Fla. 1926) (manslaughter conviction reversed because trial court incorrectly instructed jury that defendant could be convicted for "[t]he omission to do something which a reasonable, prudent, and cautious man would do, or the doing of something which such a man would not do"); Timmons v. State, 214 So.2d 11 (1st DCA 1968) (manslaughter conviction reversed where jury instructions "could well have the effect of misleading a jury into convicting a defendant charged with manslaughter … upon evidence constituting proof of simple negligence only"); see also State v. Smith, 638 So.2d 509 (Fla.1994) ("on several occasions this Court has found statutes criminalizing simple negligence to be unconstitutional. State v. Hamilton, 388 So.2d 561 (Fla.1980); State v. Winters, 346 So.2d 991 (Fla.1977)"); Russ v. State, 191 So. 296 (Fla. 1939) ("this Court is committed to the rule that the degree of negligence required to sustain imprisonment should be at least as high as that required for the imposition of punitive damages in a civil action. The burden of proof authorizing a recovery of exemplary or punitive damages by a plaintiff for negligence must show a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of

others, which is equivalent to an intentional violation of them"). This statement was repeated in State v. Greene, 348 So.2d 3 (Fla. 1977). See also Carraway v. Revell, 116 So. 2d 16 (Fla. 1959) (We agree with the district court that the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages. There is a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter. The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. This definition appears to be in line with the weight of authority as to the character of negligence necessary to be shown to sustain criminal liability; Chrysler Corp. v.Wolmer, 499 So 2d 823 (Fla. 1986) (In *Carroway* this Court made it clear that the character of negligence necessary to sustain an award of punitive damages is the same as that required to sustain a conviction for manslaughter. A showing of even gross negligence, the degree of negligence that lies between ordinary negligence and willful and wanton conduct, is not enough)).

The committee recognizes that it is not a prerogative of the committee to rewrite court opinions. However, the committee, after reviewing the comments filed with the Court, is concerned that juries will give a different meaning to the holding in *Montgomery* through the use of the interim instruction than what was intended by the Court. Even though the majority of the committee does not feel that the holding in the case permits a conviction for manslaughter based on simple or ordinary negligence, the committee feels it is important to send a modified instruction to the Court that makes this clear to juries. Therefore, the committee recommends an amendment to the interim instruction which incorporates the previously suggested amendment filed by the committee in its comments to the Court, and is offered to the Court as an alternative. The following underlined language has been added to the committee's original proposal:

However, the defendant cannot be guilty of manslaughter by committing a merely negligent act or if the killing was either justifiable or excusable homicide:

If approved by the Court, the complete text of the two elements of manslaughter would read:

To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:

1. (Victim) **is dead.**

Give 2a, 2b, or 2c depending upon allegations and proof.

2. **a.** ~~(Defendant's) **act(s)**~~ (Defendant) **intentionally committed an act that caused the death of** (victim).

b. (Defendant) **procured the death of** (victim).

c. **The death of** (victim) **was caused by the culpable negligence of** (defendant).

However, the defendant cannot be guilty of manslaughter by committing a merely negligent act or if the killing was either justifiable or excusable homicide:

The committee debated whether to add a definition for the term "negligence" to the proposal. The committee notes that the term "culpable negligence" will be defined for the jury when a defendant is charged with manslaughter by culpable negligence. However, this definition would not be read to the jury if the defendant was charged with manslaughter by act. This Court has defined "negligence" in State v. Winters, supra. "Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances." The committee has not added this definition in the proposed amended instruction, but offers it to the Court as a suggestion if the Court believes a definition would be useful.

No other changes to the interim instruction or the original proposed instruction by the committee have been made. The recommended changes are attached at Appendix A. The committee approved this proposal by a vote of 11 to 1. Mr. Schneider cast the dissenting vote.

Respectfully submitted this 22nd day of June, 2010.

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The Honorable Lisa T. Munyon
Ninth Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
425 North Orange Avenue, Room 1130
Orlando, Florida 32801
Florida Bar Number 513083

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Response has been furnished to:

Mr. Bart Schneider, Esquire
203 Live Oak Court
Lake Mary, Florida 32746

Mr. Michael T. Kennett, Esquire
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Ms. Charmaine M. Millsaps, Esquire
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Mr. Richard M. Summa, Esquire
Assistant Public Defender
Leon County Courthouse, # 401
301 South Monroe Street
Tallahassee, Florida 32301

By U.S. mail delivery this 22nd day of June, 2010.

The Honorable Lisa T. Munyon
Ninth Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
425 North Orange Avenue, Room 1130
Orlando, Florida 32801
Florida Bar Number 513083

CERTIFICATE OF FONT SIZE

I hereby certify that this Response has been prepared using New Times Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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The Honorable Lisa T. Munyon
Ninth Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
425 North Orange Avenue, Room 1130
Orlando, Florida 32801
Florida Bar Number 513083