In the Supreme Court of Florida

STATE OF FLORIDA,

Appellant,

v. CASE NO. SC10-1791

ROBERT N. STURDIVANT,

Appellee.

_____/

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellee, ROBERT N. STURDIVANT, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellant, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. All double underlined emphasis is supplied.

SUMMARY OF ARGUMENT

Sturdivant asserts, based on *Brooks v. State*, 918 So.2d 181 (Fla. 2005), that the merger doctrine prohibits aggravated child abuse from being the underlying felony for first-degree felony murder when the aggravated child abuse consists of a single act. The merger doctrine in Florida is a rule of statutory construction. Based on the legislative history of the amendment to the first-degree felony murder statute, the legislature intended for prototypical child abuse murders involving torturing, maliciously punishment, or caging, pursuant to § 827.03(2)(b), to be prosecuted as first-degree felony murder with aggravated child abuse as the underlying felony and only those types of murders. This Court should reformulate its merger doctrine in light of that legislative history. The *Brooks* Court's single act test is an improper form of double jeopardy analysis. The conviction for first-degree felony murder should be affirmed.

ARGUMENT

ISSUE I

WHETHER A FIRST-DEGREE FELONY MURDER CONVICTION BASED ON AGGRAVATED CHILD ABUSE IS PROHIBITED BY THE MERGER DOCTRINE FOR A PROTOTYPICAL CHILD ABUSE MURDER? (Restated)

Sturdivant asserts, based on *Brooks v. State*, 918 So.2d 181 (Fla. 2005), that the merger doctrine prohibits aggravated child abuse from being the underlying felony for first-degree felony murder when the aggravated child abuse consists of a single act. The merger doctrine in Florida is a rule of statutory construction. Based on the legislative history of the amendment to the first-degree felony murder statute, the legislature intended for prototypical child abuse murders involving torturing, maliciously punishment, or caging, pursuant to § 827.03(2)(b), to be prosecuted as first-degree felony murder with aggravated child abuse as the underlying felony and only those types of murders. This Court should reformulate its merger doctrine in light of that legislative history. The *Brooks* Court's single act test is an improper form of double jeopardy analysis. The conviction for first-degree felony murder should be affirmed.

Legislative history of the amendment to the felony statute

Sturdivant claims that there is no support in the statutory language for the State's argument limiting use of aggravated child abuse as the underlying felony for first-degree felony murder to caregivers and subsection (b). AB at 26. But there is significant support for that limitation in the legislative history of the

amendment to the first-degree felony murder statute that create this crime. The actual crime that led to the amendment was a caregiver punishing a child. Moreover, caregivers are the only persons that can maliciously punish a child under § 827.03(2)(b). Both the statutory language of § 827.03(2)(b) and the legislative history of the amendment support the State's proposed merger test.
This Court should reformulate the merger test of *Brooks* and limit aggravated child abuse as the underlying felony for first-degree felony murder to caregivers and § 827.03(2)(b).

Opposing counsel refers to the "narrow instances of aggravated child abuse" under § 827.03(2)(a) or § 827.03(2)(c). AB at 27. The State is simply baffled by this observation. One subsection of this statute, § 827.03(2)(a), defines "aggravated child abuse" as "aggravated battery on a child." Another subsection of this statute, § 827.03(2)(c), defines "aggravated child abuse" as "knowingly or willingly abuses a child and in so doing causes great bodily harm, permanent disability or permanent disfigurement to the child." Any major harm to a child is aggravated child abuse under both subsection (a) and (c), which in turn can be used as the underlying felony for first-degree felony murder under the current law. This could not be any broader. If these two sections were narrow, there would have been no reason for this Court to have invoked the merger doctrine in *Brooks* in the first place. It was a concern that all murders of children automatically became first-degree felony murders that motivated the *Brooks* Court.

Merger doctrine versus double jeopardy

Sturdivant improperly relies on the old common law doctrine of merger which does not exist in Florida. There are actually two versions of the merger doctrine. One version, the old common law merger doctrine, is judicial version of double jeopardy. *Callanan v. United States*, 364 U.S. 587, 589-590, 81 S.Ct. 321, 323, 5 L.Ed.2d 312 (1961)(explaining the common law merger doctrine which provided that a misdemeanor would merge into a felony and noting that the merger concept has lost significance and has been abandoned citing *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) and referring to the doctrine as the "archaic law of merger."). The other version of the merger doctrine is a rule of statutory construction. Only the latter exists in Florida.

Florida follows *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as codified in the statutes, not the common law of merger. *Gaber v. State*, 684 So.2d 189, 192 (Fla. 1996)(observing that "absent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of the *Blockburger* 'same-elements' test pursuant to section 775.021(4) is the sole method of determining whether multiple punishments are double-jeopardy violations."). The common law version of the doctrine does not exist in Florida because the Legislature codified the test for double jeopardy which totally abrogated the common law version of the merger doctrine. § 775.021(4), Florida Statutes (2010). As this Court has observed numerous times,

the Florida legislature overruled the same evils test of *Carawan v. State*, 515 So.2d 161 (Fla. 1987). *Valdes v. State*, 3 So.3d 1067, 1072-1073 (Fla. 2009)(explaining the legislative history of the double jeopardy amendment and noting "during the next legislative session following *Carawan*, the Legislature effectively overruled *Carawan* by amending section 775.021(4)."). The logic of *Carawan* was a version of the old common law merger doctrine. *Carawan* spoke of same evils and also of single acts. The *Carawan* Court noted that "although there is some question as to the number of shots that actually struck Knighten, we find that the record does not establish beyond a reasonable doubt that he was struck by more than one blast. Thus, we must conclude that both offenses in question are predicated on one single underlying act." *Carawan*, 515 So.2d at 170. This Court in *Brooks* with its single act reasoning has wandered back into *Carawan* territory. The *Brooks* Court's single act test is *Carawan* redux. The only version of the merger doctrine that exists in Florida is the rule of statutory construction.

Under the proper use of the merger doctrine, the issue becomes what types of acts did the Legislature intended be prosecuted as first-degree felony murder. Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology*, 41 New Eng. L.Rev. 259 (2007)(describing the courts' use of the merger doctrine as "a mess" and explaining that merger is not a constitutional issue; rather, it "is, from beginning to end and in all particulars, an issue of statutory construction" and exploring the proper merger test); *State v. Schoonover*, 133 P.3d 48 (Kan.

2006)(distinguishing between the merger doctrine and double jeopardy and concluding that the single act of violence/merger analysis should no longer be applied when analyzing double jeopardy or multiplicity issues where a defendant has been convicted of violations of multiple statutes arising from the same course of conduct). The Legislature history, as recounted in the State's initial brief, establishes that the Legislature intended for prototypical child abuse murders involving torturing, maliciously punishment, or caging, pursuant to § 827.03(2)(b), to be prosecuted as first-degree felony murder with aggravated child abuse as the underlying felony and only those types of murders.

Other states and the merger doctrine

The vast majority of State Supreme Courts, when faced with a specific list of enumerated felonies including aggravated child abuse, much less a legislative amendment to their respective state's felony murder statute to include child abuse as an underlying felony, have upheld their state's statute and the resulting convictions for felony murder. These courts have reasoned that their legislatures intended this result. *State v. Godsey*, 60 S.W.3d 759, 774 (Tenn. 2001)(rejecting, in a capital case where the first-degree felony murder conviction was based on aggravated child abuse, a due process argument because due process does not require that the underlying felony be based upon acts separate from those causing death and explaining the General Assembly has expressed an unmistakable intent to have aggravated child abuse as a qualifying offense); *Cotton v.*

Commonwealth, 546 S.E.2d 241, 243 (Va. App. 2001)(holding that felony child abuse could be a predicate offense for felony murder and rejecting merger doctrine where defendant contended a single act cannot form the basis for both the murder and the predicate felony); *State v. Lopez*, 847 P.2d 1078, 1089 (Ariz. 1992)(rejecting a merger challenge to child abuse as a underlying felony for felony murder and noting that Arizona has enumerated felonies and observing that even in those states that follow the merger doctrine recognize that if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no merger occurs); *Faraga v. State*, 514 So.2d 295, 302-303 (Miss. 1987)(rejecting a merger challenge, in a capital murder case where child abuse was the underlying felony and the defendant threw a child to the pavement three times which resulted in skull fractures, because the "intent of the Legislature was that serious child abusers would be guilty of capital murder if the child died" where Mississippi has enumerated felonies). As one law review observed, "[i]n states where the legislature has listed explicitly the felonies that can trigger the felony-murder doctrine, courts will likely not apply the merger limitation to those specific felonies." Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute*, 93 IOWA L. REV. 1565, 1576 (2008).

Kansas is a good example. The Kansas Supreme Court in *State v. Lucas*, 759 P.2d 90 (Kan. 1988), held that the merger doctrine precluded a felony-murder conviction with child abuse as the

underlying felony where the child died as a result of a single assaultive incident. Kansas' felony murder statute at the time did not specifically enumerate the underlying felonies. Rather, Kansas' felony murder statute, § 21-3401, provided "Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony." The Kansas Supreme Court invited the Kansas Legislature to amend the felony murder statute to specifically include child abuse if they disagreed with their application of the merger doctrine. The Kansas Supreme Court stated: "[i]f additional protection for children is desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first- or second-degree felony murder." *Lucas*, 759 P.2d at 99. The Kansas Legislature then accepted that invitation and amended the felony-murder statue to specifically include child abuse as one of the enumerated felonies. The Kansas Supreme Court in *State v. Hupp*, 809 P.2d 1207 (Kan. 1991), noted that the Kansas Legislature had amended the statute and affirmed a conviction of first-degree murder with child abuse as the underlying felony. The Kansas Supreme Court noted that the Kansas legislature responded by amending the first-degree murder statute twice. The first-degree murder statute, § 21-3401, now provided "the killing of a human being committed: ... or (c) in the perpetration of abuse of a child, as provided in K.S.A. 21-3609 and amendments thereto." The Kansas Supreme Court stated

that the "legislature intended felony murder and the rules concerning lesser included offenses in felony-murder cases to apply to child abuse murder." *Hupp*, 809 P.2d 1213.

Sturdivant also points to the Arizona Supreme Court's case of *State v. Moore*, 213 P.3d 150, 162-163 (Ariz. 2009) as support for his position. However, the Arizona Supreme Court rejected a merger challenge to the use of burglary as the underlying felony for felony murder and affirmed the felony-murder conviction in *Moore*. The Arizona Supreme Court discussed their prior merger case of *State v. Essman*, 403 P.2d 540 (Kan. 1965), noting that Arizona's statute did not identify assault as a predicate for felony murder but Arizona Supreme Court noted that the statute did list burglary as a predicate offense. The *Moore* Court found several out-of-state cases "unpersuasive" because Arizona's felony-murder statute identifies burglary based on assault as a valid predicate offense. Here, like the statute in *Moore*, but unlike the statute in *Essman*, Florida's felony murder statute does specifically enumerate aggravated child abuse as a underlying felony for felony murder.

Sturdivant's reliance on the California Supreme Court's case of *People v. Sarun Chun*, 203 P.3d 425 (Cal. 2009), is seriously misplaced. AB at 12, 20. The California Supreme Court has more recently held that the entire merger doctrine does not apply to first-degree felony murder. *People v. Farley*, 210 P.3d 361 (Cal. 2009)(rejecting a merger challenge to burglary as an underlying

felony).[1] The California Supreme Court, receding from prior cases, explained that when the state's felony murder statute specifically lists that particular felony as a proper underlying felony "there is no need for interpretation of the Legislature's clear language" and "[p]olicy concerns regarding the inclusion of burglary in the first degree felony-murder statute remain within the Legislature's domain, and do not authorize this court to limit the plain language of the statute." *Farley*, 210 P.3d at 409,411. Both California law and Arizona law support the State's position, not Sturdivant's.

Accordingly, the First District's decision should be reversed; the certified question should be answered by reformulating the merger doctrine and the conviction should be affirmed.[2]

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[1] California's first-degree felony murder statute list specific felonies as proper underlying felonies, whereas; its second-degree felony murder statute does not list the underlying felonies. The Court explained that the merger problem only occurs with the second-degree felony murder statute. So, the merger doctrine still applies to California's second-degree murder statute but not the first-degree felony murder statute.

[2] Sturdivant for the first time in this Court raises a claim that his conviction violates this Court's recent decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), because one of the two manslaughter instructions given in this case erroneously included an intent to kill. First, the *Montgomery* claim is outside of the certified question. *Chames v. DeMayo*, 972 So.2d 850, 853, n.2 (Fla. 2007)(declining to address additional issues that outside the scope of the certified question citing numerous cases and noting that as a rule, this Court eschews "addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution"); *State v. Perry*, 687 So.2d 831, 831 (Fla. 1997)(refusing to review an issue because it was "unrelated to the certified question upon which this Court's jurisdiction is based."). The First District did not certify the *Montgomery* issue to this Court. Indeed, the First District did not even address the *Montgomery* issue because it was not raised in the

First District. The *Montgomery* issue is being raised for the first time on appeal in this Court.

Montgomery does not apply to this conviction for first-degree felony murder. *Montgomery* is limited to cases where the defendant is charged with, or convicted of, second-degree murder. This Court in *Montgomery* held that because the defendant was convicted of second-degree murder, which "was only one step removed from the necessarily lesser included offense of manslaughter, under *Pena*," the erroneous manslaughter instruction was fundamental error. *Montgomery*, 39 So.3d at 259 (citing *Pena v. State*, 901 So.2d 781 (Fla. 2005)). This Court in *Montgomery*, however, noted that if a "trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." *Montgomery*, 39 So.3d at 259 (quoting *Pena*, 901 So.2d at 787). This Court explained the rationale behind the one step and two step distinction, explaining that a "jury must be given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." This Court explained that "if the jury is not properly instructed on the next lower crime, then it is impossible to determine whether, having been properly instructed, it would have found the defendant guilty of the next lesser offense." *Montgomery*, 39 So.3d at 259 (quoting *Pena*, 901 So.2d at 787).

Sturdivant, however, was convicted of first-degree felony murder. First-degree felony murder is two steps removed from manslaughter. Therefore, the error was not fundamental. So, Sturdivant was required to preserve this claim in the trial court and raise the claim in the First District. He may not raise the claim for the first time in this Court.

Montgomery does not apply where the defendant is charged and convicted of first-degree felony murder. *Montgomery* was charged with first-degree premeditated murder but convicted of second-degree murder. Felony murder does not include an intent to kill. Intent is kill not an issue in a felony-murder prosecution. If this jury wanted to exercise its pardon power it had a lesser degree crime available that did not include an intent to kill element - second-degree murder - that it could have employed. The error in the manslaughter instruction did not interfere with this jury's pardon power.

Moreover, even if the jury had convicted Sturdivant of second-degree murder, *Montgomery* still would not apply in this particular case. The jury was instructed on two types of manslaughter - voluntary manslaughter and manslaughter by culpable negligence. While the manslaughter instruction on voluntary manslaughter included an intent to kill, the other manslaughter instruction, the manslaughter instruction on manslaughter by

culpable negligence did not include an intent to kill. The logic of this Court's decision in *Montgomery* was that once the jury rejected the idea that the defendant had an intent to kill the only option available to the jury was second-degree murder. This Court reasoned that the *Montgomery* jury did not have a real lesser available to it because the alleged lesser, voluntary manslaughter, by including an intent to kill, actually had a greater mental state than second-degree murder which does not have an intent to kill. So, manslaughter was not a true lesser and the *Montgomery* jury was "forced" back up to second-degree murder.

But none of this type of logic applies in a case where the jury has a lesser that did not include an intent to kill available. If a jury convicts a defendant of second-degree murder but was contemplating convicting the defendant of the lesser of manslaughter, a jury that was instructed on both types of manslaughter would have an option of a lesser that also did not include a intent to kill - the option of manslaughter by culpable negligence. The lesser of manslaughter by culpable negligence is a true lesser in the sense that it contains the same or lesser state of mind element, not a greater intent element as in *Montgomery*. Neither second-degree murder nor manslaughter by culpable negligence have an intent to kill. Manslaughter by culpable negligence would be a true lesser of second-degree murder to such a jury. And so, such a jury would not be forced to convict the defendant of second-degree murder as the *Montgomery* jury was forced to do. Such a jury could convict the defendant of the lesser of manslaughter by culpable negligence rather than second-degree murder while still honoring its finding of no intent to kill.

Montgomery does not apply when a jury is instructed on manslaughter by culpable negligence as well voluntary manslaughter. Here, the jury was instructed on two types of manslaughter, not just one as in *Montgomery*. This jury was instructed on both voluntary manslaughter and manslaughter by culpable negligence. Therefore, no *Montgomery* error occurred.

All five district courts of appeal have held that, when a jury is instructed on both types of manslaughter, no *Montgomery* error occurs. *Salonko v. State*, 42 So.3d 801, 802 (Fla. 1st DCA 2010)(finding no *Montgomery* error occurred because the jury was instructed on manslaughter by culpable negligence as well voluntary manslaughter because the jury "could have returned a verdict for the lesser-included offense of manslaughter by culpable negligence while still honoring its finding that there was no intent to kill."); *Barros-Dias v. State*, 41 So.3d 370 (Fla. 2d DCA 2010)(finding no *Montgomery* error occurred where jury was given the option of finding manslaughter by culpable negligence citing *Salonko*); *Cubelo v. State*, 41 So.3d 263, 267 (Fla. 3d DCA 2010)(finding no *Montgomery* error occurred because the jury was instructed on manslaughter by culpable

negligence as well voluntary manslaughter, explaining that "the jury was therefore given an opportunity (an opportunity not available to the *Montgomery* jury) to convict the defendant of the lesser included offense of manslaughter by culpable negligence, which clearly does not require an intent to kill."); *Singh v. State*, 36 So.3d 848 (Fla. 4th DCA 2010)(finding no *Montgomery* error occurred citing *Salonko*); *Colorado v. State*, 42 So.3d 342, 343 (Fla. 5th DCA 2010)(summarily affirming citing *Salonko*). There is no conflict among the district courts regarding the issue

Accordingly, the *Montgomery* claim is not fundamental error in this case and cannot be raised for the first time in this Court and is meritless according to all five district courts.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's conviction for first-degree felony murder.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF has been furnished by U.S. Mail to Paula S. Saunders, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301 and via email at paula.saunders@flpd2.com this 31st day of January, 2011.

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief, which has been typed using Courier New 12 point, complies with the font requirement of rule 9.210(a)(2), Fla. R. App. Pro.

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