IN THE SUPREME COURT OF FLORIDA

AARON DANIELS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC11-2170

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 0238538

SARA MACKS
Assistant Attorney General
Florida Bar No. 0019122
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

The state accepts the Statement of Case and of Facts presented by the defendant, with the following additions, corrections and/or clarifications, or as otherwise argued herein.

At the jury charge conference, both parties, the defendant and the state, agreed to the standard instruction on manslaughter. (T:358)

During closing arguments, after arguing lack of premeditation for first degree murder and lack of malice for second degree murder, the defendant presented an argument on manslaughter. (T:402-08)

> Manslaughter, going down to the third rung of the ladder if you will. Manslaughter is distinguishable from first and second because the State doesn't even have to prove that my client intended to kill anyone. All they have -- and they don't have to prove malice. They don't have to prove premeditation. They didn't have to prove conscious intent to kill. They don't have to do any of that. What they have to prove is that he intended to do the act which caused the death of Amanda Fantner; i.e., the pulling of the trigger on this firearm.
>
> If he intended to pull that trigger and that shot killed Amanda Fanter, and the State has proven that to your satisfaction beyond a reasonable doubt, then there is a case for manslaughter. Restated, they just have to prove that the shot wasn't fired accidently, that it was fired intentionally.

(T:408-09)

SUMMARY OF THE ARGUMENT

The 2008 jury instruction, which was provided to the defendant in this case, is different than the jury instruction provided in State v. Montgomery, 39 So. 3d 252 (Fla. 2010). The instruction used in this case provided the jury with a definition of the intent element of manslaughter. The instruction explains that intent is not premeditated intent to kill, like first degree murder, but intent to commit an act which results in death. The jury instruction was not erroneous. Significantly, because the instruction was not objected to, the instruction did not rise to the level of fundamental error. This Court should find the trial court properly provided the instruction to the jury. The Second District's opinion should be affirmed.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN PROVIDING THE JURY WITH THE STANDARD MANSLAUGHTER JURY INSTRUCTION, AMENDED IN 2008. (restated by Appellee)

The defendant claims that the standard jury instruction on manslaughter was fundamentally erroneous, requiring a new trial. The state respectfully disagrees. The defendant argues the standard instruction, with the 2008 amendment, is virtually the same as the instruction provided in State v. Montgomery, 39 So. 3d 252 (Fla. 2010). In fact, the instruction is different because it contains a line explaining that the intent required for manslaughter is not the intent to kill but intent to commit an act which results in death. This significant difference from the instruction in Montgomery results in not only a lack of fundamental error in this case but a lack of error in the instruction. The state submits this Court should find the trial court properly provided the instruction to the jury and affirm the Second District's opinion.

FUNDAMENTAL ERROR

When no objection to a jury instruction is made at trial, the appellate court must review the error for fundamental error. See Pena v. State, 901 So. 2d 781, 783-84 (Fla. 2005). Fundamental error goes to the foundation of the case, the merits

of the cause of action or the heart of the judicial process, resulting in a miscarriage of justice. Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994). An appellant must satisfy a high threshold to demonstrate fundamental error. See Nicholson v. State, 33 So. 3d 107, 111 (Fla. 1st DCA 2010). Fundamental error should be applied only when justice demands. Nesbitt v. State, 889 So. 2d 801, 803 (Fla. 2004).

Reversal of an erroneous jury instruction, pursuant to fundamental error, can only occur after a determination that the validity of the trial was ruined; this review is conducted by analyzing the complete record, or the totality of the circumstances. See Garzon v. State, 980 So. 2d 1038, 1043 (Fla. 2008). See also § 924.051(2), Fla. Stat. ("A judgment or sentence may be reversed on appeal only when an appellate court determines ***after a review of the complete record*** that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.") (emphasis added). A defendant asserting fundamental error bears the burden to demonstrate the State could not have obtained the conviction but for the assistance of an error that vitiated the fairness of the proceedings.

AMENDED JURY INSTRUCTION

The instruction that proved problematic in Montgomery was last amended in 2006. See In re Std. Jury Instrs. (Crim.) 06-1,

946 So. 2d 1061 (Fla. 2006). The instruction stated,

> 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.

Id. at 1062. This Court's concern in Montgomery arose from line 2.a., regarding the intent element of manslaughter. This Court found that the instruction included an incorrect element of intent to cause death, or intent to kill. 39 So. 3d at 257. This Court reasoned that the correct element was intent to commit an act which caused death. Id. at 255.

The first attempt to clarify the meaning of intent in the manslaughter instruction came in 2008, prior to the entry of the Montgomery opinion, either in the First District or this Court. See In re Std. Jury Instrs. (Crim) 07-10, 997 So. 2d 403 (Fla. 2008). Instead of correcting the elements of the instruction (lines 1 or 2), the clarification added a line to the definition of intent. The new instruction read,

> 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.***

Id. at 404-05 (emphasis added). In Montgomery, this Court explained that this additional language clarified the intent in line 2.a. was intent to commit an act that cause death instead of intent to kill. 39 So. 3d at 257. Line 2.a. did not expressly state "intent to kill" but instead stated "intentionally caused the death." By adding the additional language to define intent, this jury instruction was cured of the error that existed in Montgomery. Juries were now specifically told that "intent to cause death" was "intent to commit an act which caused death."

Along with the release of the Montgomery opinion, this Court issued an interim amended jury instruction to address the problematic language in line 2.a. In re Amends. to Std. Jury Instrs. (Crim.) 7.7, 41 So. 3d 853 (Fla. 2010). The instruction changed line 2.a. to "(Defendant's) act(s) caused the death of (victim)." Id. at 854. The definition of intent was left unchanged, except for removing premeditation from intent to cause death.[1] Id. at 855.

After receiving comments about the 2010 amendment, this

[1] The instruction also added a phrase about the exclusion for justifiable and excusable homicide.

Court issued the most recent instruction, which further clarified line 2.a. In re Amends. to Std. Jury Instrs. (Crim.) 7.7, 75 So. 3d 210 (Fla. 2011). The instruction now reads: (Defendant) intentionally committed an action or acts that caused the death of (victim)." Id. at 211. The definition of intent remained intact. Id. at 212.

DISTRICT COURT OPINIONS

The first court to opine on the effect of the 2008 amendment to the standard jury instruction was the First District in Riesel v. State, 48 So. 3d 885 (Fla. 1st DCA 2010). The First District determined that changes to the 2008 jury instruction (changing the definition of intent), did not improve the instruction from the one provided in Montgomery. Id. at 886. The court believed the instruction was the same because line 2.a. still stated "intentionally caused the death." Id. The First District reiterated this holding in Pryor v. State, 48 So. 3d 159 (Fla. 1st DCA 2010); Williams v. State, 50 So. 3d 1207 (Fla. 1st DCA 2010) and Noack v. State, 61 So. 3d 1208 (Fla. 1st DCA 2011).

In contrast, the Third District decided that the 2008 instruction was materially different from the instruction provided in Montgomery. See Moore v. State, 57 So. 3d 240, 244 (Fla. 3d DCA 2011) (finding that the new instruction and an instruction on culpable negligence provided no fundamental

error). In the case currently before this Court, the Second District further expounded on the difference between the 2008 instruction and the instruction provided in Montgomery. See Daniels v. State, 72 So. 3d 227 (Fla. 2d DCA 2011). The Second District analyzed the 2008 and 2010 amendments, case law from the First and Third Districts and language from this Court's opinion in Montgomery to determine that the 2008 instruction did not require proof of intent to kill. Id. at 230-32. Both the Second and Third Districts have continued to hold that the 2008 manslaughter instruction was not an erroneous instruction. See Black v. State, 2D09-4976 (Fla. 2d DCA Mar. 9, 2011); Page v. State, 37 Fla. L. Weekly D358 (Fla. 3d DCA Feb. 8, 2012); Garrido v. State, 76 So. 3d 378 (Fla. 3d DCA 2011); Figueroa v. State, 77 So. 3d 714 (Fla. 3d DCA 2011); Pharisien v. State, 74 So. 3d 156 (Fla. 2d DCA 2011).

The state submits that the Second and Third Districts are correct. The 2008 manslaughter instruction was not erroneous, let alone fundamentally erroneous, which is the standard required for reversal of an unpreserved complaint regarding a jury instruction. The 2008 jury instruction clarified that the intent element in manslaughter was intent to commit an act which caused death. The jury was told that, when trying to determine if a defendant's actions "intentionally caused death of victim," the jury must determine if the defendant committed an act which

caused death. In fact, this additional language defining intent has held strong in the current (2011) jury instruction, through two subsequent revisions. That is because this language correctly defines the intent element of manslaughter. This case is not the same as Montgomery, which only explained that intent was not premeditation.

ANALYZING THE COMPLETE RECORD

Besides the lack of error in the instruction itself, the defendant cannot show that the totality of the circumstances in this case provide fundamental error for reversal. As explained in the Second District's opinion, the defendant left the scene and returned with a gun. The defendant shot the gun, intending to hit a man from his previous argument. Instead, the bullet from the defendant's gun hit and killed the victim. Daniels, 72 So. 3d at 228.

The defendant's counsel argued, during closing, that the defendant did not have premeditated intent (for first degree murder) and did not have intentional malice (for second degree murder). Counsel argued manslaughter's applicability, focusing on the lack of intent to kill and the State's burden to prove intent to commit an act which caused death. Id.

Defense counsel explained the instruction to the jury, explained that intent meant intent to commit an act which caused death NOT intent to kill and explained that first and second

degree murder did not apply to the facts. The jury looked at the facts of the case and decided, even with an instruction and explanation from counsel, they still believed the defendant committed second degree murder.

This is because the defendant truly committed second degree murder, and the State proved the crime beyond a reasonable doubt. See § 782.04(2), Fla. Stat. ("The unlawful killing of a human being, when perpetrated by any 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, is murder in the second degree[.]"). Three eye witnesses saw the murder of Ms. Fanter occur. (T:139,161-62,185) The defendant was the only person around when the shots were fired. (T:163-64) The bullet in Ms. Fanter's brain was from the defendant's gun. (T:196,198-201,243-44,265-72) The defendant admitted to shooting the victim. (R:69-70,73) The defendant committed an ***act that was imminently dangerous to another and demonstrated a depraved mind without regard to human life***. See, e.g., Gibbs v. State, 904 So. 2d 432 (Fla. 4th DCA 2005) ("Pointing a loaded gun at the head of the victim and then firing has frequently been held to be an act imminently dangerous to another and evincing a depraved mind regardless of human life."); Edwards v. State, 302 So. 2d 479 (Fla. 3d DCA 1975) ("It is well established that

state of mind may be inferred from one's actions, and that murderous intent may be established by the facts and circumstances of the case, such as a weapon being directed at some vital spot on the assaultee's body."). The defendant also admitted to having ***malice, ill will or hatred***. He told law enforcement that he was trying to hurt people who wanted to hurt him (although no one around him wanted to hurt him); he said he felt punked and threatened by the larger group of guys he got into the first argument with. (R:59,65-66) The defendant had so much ill will that he returned to the scene of the first argument after getting a firearm because he wanted to hurt someone. The jury did not err in their conviction, and the judge did not err in his instruction.

CONCLUSION

Because the jury was able to use the instruction provided to determine the defendant intended to commit an act which resulted in the victim's death, the manslaughter jury instruction was not erroneous. The state respectfully requests that this Court affirm the Second District's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bruce Taylor, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this ___ day of March, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief - Tampa Crim. App.
Florida Bar No. 0238538

_____
SARA MACKS
Assistant Attorney General
Florida Bar No. 19122
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813)287-7900
Facsimile: (813)281-5500

COUNSEL FOR RESPONDENT