

IN THE SUPREME COURT OF FLORIDA

JEREMY HAYGOOD, :

Petitioner, :

v. :

CASE NO. SC11-294

STATE OF FLORIDA, :

Respondent. :

_____/

AMICUS BRIEF OF PUBLIC DEFENDER,
SECOND JUDICIAL CIRCUIT OF STATE OF FLORIDA
IN SUPPORT OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RICHARD M. SUMMA
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 0890588
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8514
Richard.Summa@flpd2.com
COUNSEL FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JEREMY HAYGOOD, :

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STATE OF FLORIDA, :

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

STATEMENT OF IDENTITY AND INTEREST

Amicus curiae is the Public Defender for the Second Judicial Circuit of the State of Florida. Amicus curiae represents indigent defendants in appeals to the First District Court of Appeal and in proceedings before the Florida Supreme Court. Amicus curiae is interested in this case because it represents a variation on the principles espoused by this Court in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), a case which emanated from the office of amicus curiae. Amicus curiae has several cases pending review in this Court involving the same or closely related issues. In addition, amicus curiae has been active in assisting the Court with the jury instruction revisions necessitated by the Montgomery decision.

STATEMENT OF THE CASE AND FACTS

In conformity with Rule 9.370(b), no statement of the case and facts is presented.

SUMMARY OF THE ARGUMENT

ISSUE

IF A JURY RETURNS A VERDICT FINDING A DEFENDANT GUILTY OF SECOND DEGREE MURDER IN A CASE WHERE THE EVIDENCE DOES NOT SUPPORT A THEORY OF CULPABLE NEGLIGENCE, DOES A TRIAL COURT COMMIT FUNDAMENTAL ERROR BY GIVING A FLAWED MANSLAUGHTER BY ACT INSTRUCTION WHEN IT ALSO GIVES AN INSTRUCTION ON MANSLAUGHTER BY CULPABLE NEGLIGENCE?

Assuming the absence of evidence of culpable negligence and the absence of any claim of culpable negligence by either party, the manslaughter instruction deemed fundamentally erroneous by this Court in State v. Montgomery, 39 So. 2d 252 (Fla. 2010), may be deemed harmless only if the finding of fundamental error was based upon a deprivation of the pardon power. In Montgomery, however, the finding of fundamental error was not based upon a deprivation of the pardon power. In the present case, there was no evidence of culpable evidence, nor did either party argue the theory of culpable negligence. Under these circumstances, manslaughter by culpable negligence was not a viable lesser included offense. In other words, no reasonable jury could have returned a finding of manslaughter by culpable

negligence. The erroneous imposition of an intent to kill element for manslaughter by act was not mitigated by instruction on manslaughter by culpable negligence because culpable negligence was not a viable or reasonable alternative to manslaughter by act. The imposition of an intent to kill element was, therefore, fundamentally erroneous in Haygood's case notwithstanding the superfluous instruction on manslaughter by culpable negligence.

ARGUMENT

ISSUE

IF A JURY RETURNS A VERDICT FINDING A DEFENDANT GUILTY OF SECOND DEGREE MURDER IN A CASE WHERE THE EVIDENCE DOES NOT SUPPORT A THEORY OF CULPABLE NEGLIGENCE, DOES A TRIAL COURT COMMIT FUNDAMENTAL ERROR BY GIVING A FLAWED MANSLAUGHTER BY ACT INSTRUCTION WHEN IT ALSO GIVES AN INSTRUCTION ON MANSLAUGHTER BY CULPABLE NEGLIGENCE?

STANDARD OF REVIEW

This case presents a purely legal question to be reviewed *de novo*.

MERITS

The answer to the question certified by the Second District Court of Appeal depends upon the rationale for finding the error fundamental in State v. Montgomery, 39 So. 3d 252 (Fla. 2010).

If there is no evidence of culpable negligence and no argument based upon the theory of culpable negligence, the erroneous imposition of an intent to kill for the offense of manslaughter by act may be found harmless only if the error is grounded on a deprivation of the pardon power. The reasoning in that circumstance would be that even though there is no rational basis for a verdict of manslaughter by culpable negligence, the jury could have returned such a verdict as a matter of mercy or leniency toward the defendant. The "Montgomery error," however, was not predicated on a deprivation of the pardon power. In the absence of evidence of culpable negligence and argument of that theory to the jury, the Montgomery error must be deemed fundamental.

1. Montgomery v. State, (district court decision).

In Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), the district court held that the then standard jury instruction for manslaughter by act erroneously included an intent to kill element. Furthermore, the district court ruled that the error was fundamental where the defendant was convicted of the greater offense of second degree murder. In explaining why the error was fundamental, the district court made no mention of the pardon power. Rather, the district court

explained that the inclusion of an additional element in the lesser offense tainted the "underlying fairness of the entire proceeding." Id. at D362, quoting Hankerson v. State, 831 So. 2d 235 (Fla. 1st DCA 2002). The district court further opined that the jury

may not have returned a verdict as to a lesser included offense because it found there was insufficient proof of intent to kill.

Id. The district court also adopted Mr. Montgomery's explanation of the nature of the identified error.

[I]f the jury found the defendant did not intend to kill, the erroneous instruction effectively precluded the jury from choosing between two possible verdicts: second degree murder or manslaughter by act. Under the erroneous instruction, the jury was directed to pick the greater of these two offenses Such interference with the jury's deliberative process tainted the underlying fairness of the entire proceeding.

Id. According to the district court, therefore, the error was fundamental because it interfered with the jury's fact finding prerogative to the extent that it "coerced" a conviction for the greater of two offenses.

2. State v. Montgomery, (Supreme Court decision).

In State v. Montgomery, 39 So. 2d 252 (Fla. 2010), this Court affirmed the district court ruling that the contested jury instruction erroneously imposed an intent to kill element. This Court also affirmed the district court ruling that the error was fundamental where the defendant was convicted of second degree murder. With regard to the question of fundamental error, this Court first opined that the error was "pertinent or material to what the jury must consider in order to convict." Id. at 258, quoting State v. Delva, 575 So. 2d 643, 645 (Fla. 1991); Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982).

Thus, we conclude that fundamental error occurred in this case, where Montgomery was indicted and tried for first degree murder and ultimately convicted of second-degree murder after the jury was erroneously instructed on the lesser offense of manslaughter.

Id. at 258.

For comparative purposes, this Court cited Pena v. State, 901 So. 2d 781, 788 (Fla. 2005).

Cf. Pena v. State, 901 So. 2d 781, 788 (Fla. 2005)(holding that the failure to instruct on justifiable or excusable homicide was not fundamental error where the manslaughter charge was three steps removed from the offense for which the defendant was convicted and the facts of the case did "not support any jury argument relying upon the excusable or justifiable homicide instruction.").

Id. at 258. This Court also explained in greater detail that the rationale of Pena was based, in part, upon the pardon power.

The significance of the two-steps removed requirement is more than a matter of number or degree. 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. If the jury is not 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 lower offense.

Id. at 259, quoting Pena, 901 So. 2d at 787.

In the final analysis, this Court concluded that the pardon power/harmlessness analysis articulated in Pena did not apply because manslaughter was only one step removed from second degree murder. Id. at 259. The error was deemed fundamental.

3. District Court interpretations of State v. Montgomery.

Since this Court's decision, the district courts have found a number of cases distinguishable from State v. Montgomery and on that basis affirmed convictions for second degree murder despite the erroneous imposition of an intent to kill element for manslaughter by act. In these cases, the district courts were ambiguous and inconsistent in explaining why the Montgomery error was deemed fundamental. The cases may be generally divided into two camps: (1) those which find the jury was "not coerced" because of the availability of a conviction for

manslaughter by culpable negligence; and (2) those which find that the availability of a conviction for manslaughter by culpable negligence allowed the jury an opportunity to exercise its "pardon power."

A. Mitigation of coercion.

Salonko v. State, 42 So. 3d 801 (Fla. 1st DCA 2010) is a leading example of the first class of cases. The district court explained that Mr. Salonko was convicted of second degree murder. The jury was instructed on manslaughter by act and manslaughter by culpable negligence. In distinguishing the case from Montgomery v. State, the court opined that the jury was not "precluded" from returning a verdict for a lesser manslaughter offense because the jury could have found Salonko guilty of manslaughter by culpable negligence while still honoring a finding that Salonko did not intend to kill.

In Salonko the district court may, or may not have, reached the correct result. We cannot discern whether the result was correct because the Salonko opinion does not provide any information about the facts of the case. If there was evidence of culpable evidence, and if the theory of culpable negligence was argued to the jury, one may easily conclude that a verdict of manslaughter by culpable negligence was a viable alternative to second degree murder and that the jury was not "coerced" into

convicting Salonko for the greater of two offenses. On the other hand, if there was no evidence of culpable negligence and culpable negligence was not argued to the jury, one would be hard pressed to conclude that the jury could reasonably return a verdict of manslaughter by culpable negligence.

This type of analysis has been previously considered in State v. Weaver, 957 So. 2d 586 (Fla. 2007). In Weaver, this Court considered whether a conviction for battery constituted fundamental error where the jury was instructed on two alternative means of committing the offense, i.e., intentional touching or causing great bodily, but the charging document alleged only an intentional touching. According to the defendant, his battery conviction was fundamentally erroneous because the jury may have convicted him of a "crime not charged," i.e., battery by causing great bodily harm. In Weaver, this Court recognized the general rule that an erroneous instruction on a disputed element of the offense constituted fundamental error. Nonetheless, the Court concluded that the same reasoning requiring a dispute on an *omitted* element of the offense applies to the erroneous *inclusion* of an element of the offense. The Court concluded that the erroneous inclusion of an element that (1) the State did not argue was present, and (2) about which it presented no evidence, was not "pertinent of

material to what the jury must consider in order to convict." Id. at 588-89, citing State v. Delva, 575 So. 2d 643, 645 (Fla. 1991)(quoting Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)). In so ruling, the Court rejected the proposition that the jury may have based its verdict on a theory of prosecution not charged. Id. at 589. The Court's reasoning appeared to rest on the practical and common sense view that no reasonable jury could have based its verdict on a theory of prosecution which the state did not argue and for which no evidence was presented. Id.

Apply the same analysis to Salonko. If there was no evidence of culpable negligence, and if culpable negligence was not argued to the jury, there is no reason to conclude that a verdict of manslaughter by culpable negligence was actually presented to the jury. In other words, a verdict of manslaughter by culpable negligence was not a reasonable alternative to the jury. In such a case, the jury was still required to choose between manslaughter by act and second degree murder - the same choice presented in State v. Montgomery. Under these circumstances, Salonko is indistinguishable from State v. Montgomery.

Amicus curiae also notes that the decision in Barros-Dias v. State, 41 So. 3d 370 (Fla. 2d DCA 2010), is just like

Salonko. In Barros-Dias, the district court affirmed a conviction for second degree murder, finding the case distinguishable from State v. Montgomery because the jury was instructed on manslaughter by act and manslaughter by culpable negligence. Like Salonko, however, the district court's decision in Barros-Dias provided no information about the facts of the case. From the opinion, we do not know whether there was any evidence of culpable negligence or whether the theory of culpable negligence was argued to the jury by either party. See also, Joyner v. State, 35 Fla. L. Weekly D1515 (Fla. 1st DCA July 7, 2010).

Amicus curiae notes that the above analysis is consistent with the sentiment expressed by Judge Altenbernd in the decision below.

I simply fail to see the logic by which a fundamental error of this kind becomes harmless merely because a jury receives an alternative instruction that has little or no application to the evidence presented at trial.

Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 2011)(Altenbernd, J., Specially concurring in part and dissenting in part).

B. Pardon power.

The second class of cases are those which, like the case at bar, construe the "Montgomery error" to be based upon a deprivation of the pardon power. Aside from the case at bar, another notable example is Williams v. State, 50 So. 3d 1207 (Fla. 1st DCA 2010). While reversing the defendant's conviction for second degree murder, the district court construed State v. Montgomery in the following manner:

The Montgomery court held that this error was fundamental because it deprived the jury of its inherent "pardon" power by foreclosing a conviction of the lesser-included offense one step removed from the crime of conviction if the jury did not believe the defendant intended to kill the victim, given that the crime of conviction required no intent to kill, while the instructions at issue indicated that intent to kill was an element of the lesser-included offense one step removed.

Williams v. State, 50 So. 3d at 1208, citing State v. Montgomery, 39 So. 3d at 257; see also, Joseph v. State, 42 So. 3d 323 (Fla. 4th DCA 2010); Burton v. State, 36 Fla. L. Weekly D738 (Fla. 5th DCA April 8, 2011)(Lawson, J., concurring).

As partially explained above, the error identified by this Court in State v. Montgomery was not deemed fundamental *because* it constituted a deprivation of the pardon power. The imposition of an intent to kill element for manslaughter by act was "erroneous" because manslaughter by act does not require

proof of intent to kill. The error was fundamental because it interfered with the jury's deliberative processes. Specifically, the error interfered with the jury's fact-finding prerogative and its duty to determine whether the defendant's degree of mental culpability corresponded with manslaughter by act or second degree murder. Moreover, the error effectively coerced the jury to return a verdict for the greater offense of second degree murder, rather than manslaughter by act, if the jury found that the defendant did not act with the intent to kill. In other words, the error misled the jury on a point "pertinent or material" to its ultimate verdict, i.e., the determination of the defendant's degree of mental culpability and the choice between second degree murder and manslaughter by act.

As described, this error has nothing to do with the pardon power. As explained in Sanders v. State, 946 So. 2d 953 (Fla. 2007), the pardon power is a device without legal foundation. A jury pardon is a verdict which may be rendered contrary to the law and the evidence. A jury pardon may be based upon mercy or leniency on the part of the jury. A jury pardon is a "gift" from the jury to the defendant. In State v. Montgomery, however, the defendant did not claim error because he sought a "gift" from the jury. Mr. Montgomery did not claim that he was

deprived of the possibility that the jury may "cut him a break." To the contrary, Mr. Montgomery sought to have the jury properly instructed on the law. Mr. Montgomery sought a jury fully invested in his Sixth Amendment right to a fact-finding jury. Mr. Montgomery sought a jury free to make factual determinations unencumbered by erroneous statements of law. Mr. Montgomery sought a jury whose factual findings were not influenced or coerced by erroneous statements of the law.

In State v. Montgomery, this Court mentioned the pardon power for comparative purposes, i.e, to explain why State v. Montgomery was distinguishable from Pena. Such discussion was helpful to the Bar, and served to bolster confidence in the uniformity of the Court's decisions. The discussion of the pardon power should not be construed as an explanation of why the error was deemed fundamental; that would be a misinterpretation of Montgomery.

Amicus curiae notes that the above analysis is consistent with the sentiment expressed by Judge Altenbernd in the decision below.

I am also not convinced that "pardon power" analysis is the best approach to this particular problem.

Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 2011)(Altenbernd, J., Specially concurring in part and dissenting in part).

4. Application to Haygood.

In accordance with the question certified by the Second District Court of Appeal, amicus curiae accepts the district court's conclusion that the evidence in Haygood's case was inconsistent with a theory of manslaughter by culpable negligence. Mr. Haygood admitted that he "head-butted, choked and elbowed" his girlfriend but claimed her death was "accidental," i.e., he did not intend to kill her. Haygood v. State, 54 So. 3d 1035, 1036 (Fla. 2d DCA 2011). In other words, the acts which caused death were intentional although Haygood did not intend to kill. This is not a claim of negligence or culpable negligence; it is merely a claim of lack of intent to kill. The jury was nonetheless instructed on the alternative theory of manslaughter by culpable negligence. In affirming the conviction for second degree murder, the district court held that the jury could have exercised its pardon power and convicted Haygood of manslaughter by culpable negligence notwithstanding that such a verdict would be unsupported by the evidence.

The district court erred in affirming Haygood's conviction for second degree murder because the pardon power was not the rationale underpinning the finding of fundamental error in Montgomery. In Haygood, a finding of manslaughter by culpable

negligence was not a viable or reasonable alternative for the jury. That is because Mr. Haygood admitted that he intentionally struck his girlfriend. The admission of an intentional act causing death effectively withdrew the alternative of culpable negligence from the jury's consideration. The jury could only return a verdict of manslaughter by culpable negligence by electing to pardon Haygood from the greater offense of second degree murder. The opportunity of a jury pardon did not mitigate the fundamental error because it assumes that the jury first found Haygood guilty of second degree murder. In Montgomery, the error was fundamental because the jury was "coerced" to find the defendant guilty of second degree murder where, if properly instructed, the jury may have preferred a verdict of manslaughter by act.

In sum, a verdict of manslaughter by culpable negligence was not a reasonable alternative for the jury. Mr. Haygood foreclosed such a verdict when he admitted intentionally striking his girlfriend. The jury was thus confronted with the same choice posed in Montgomery, a choice between manslaughter by act and second degree murder. At that point, Haygood's case was indistinguishable from Montgomery. The district court erred, therefore, in affirming Haygood's conviction for second degree murder.

CONCLUSION

Based upon the argument and authority present above, Amicus Curiae urges the Court to disapprove the decision below, reverse Haygood's conviction and remand for further consistent proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Ms. Maureen E. Surber, Assistant Public Defender, 255 N. Broadway Ave., Bartow, FL 33830-3912 and to Ms. Marilyn Beccue, Concourse Center #4, 3507 Frontage Rd., Suite 200, Tampa, FL 33607-7013, on this 1st day of August, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier
New, 12 point.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
FLA. BAR NO. 242705

RICHARD M. SUMMA
Assistant Public Defender
Fla. Bar No. 0890588
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8514
Richard.Summa@flpd2.com

COUNSEL FOR APPELLANT