

IN THE SUPREME COURT OF FLORIDA

JEREMY HAYGOOD,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. SC11-294

ON DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL, FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Statement of Facts presented by Petitioner for purposes of this appeal, with the following additions, corrections and/or clarifications, or as otherwise argued herein:

Petitioner was charged and convicted of second degree murder in the death of his girlfriend, Jeanne Tuckey. (R. 1, 35, 38). Four months before her death, Petitioner discovered that Tuckey had been unfaithful. (Trial Tr., p. 106, 122, 137). He brooded on this fact. (Trial Tr., p. 106, 116-117, 119, 121-122, 137-141). During the evening on November 25, 2008, the couple argued. (Trial Tr., p. 31, 119-119, 151-152). They stepped outside together. (Trial Tr., p. 31, 42, 123, 151). Suddenly, Petitioner reappeared yelling for Tuckey's family to call 911. (Trial Tr., p. 31, 42, 128). Tuckey was out behind the house, lying limp on the ground. (Trial Tr., p. 32, 34).

Paramedics arrived and transferred her to the hospital. (Trial Tr., p. 47). Paramedic Juarbe observed marks on the victim's neck and, suspicious, questioned Petitioner. (Trial Tr., p. 49, 51-53). Initially, Petitioner contended that Tuckey just collapsed. (Trial Tr., p. 51). At the hospital, Petitioner admitted to the victim's mother that he elbowed Tuckey twice in the chest, causing her to fall over backwards, while they were

seated in the rear of his truck. (Trial Tr., p. 35-36). The mother encouraged Petitioner to tell doctors what happened. (Trial Tr., p. 35-36). He did so. (Trial Tr., p. 53).

Doctors determined that Tuckey was suffering from a brain hemorrhage. (Trial Tr., p. 61, 64). Tuckey was virtually brain dead and her family was advised that she would never recover. (Trial Tr., p. 66). Tuckey's mother made the decision to take Tuckey off life support. (Trial Tr., p. 66).

Post Miranda, Petitioner gave a videotaped interview with police. (Trial Tr., p. 113). Consistent with his statement to the paramedic, Petitioner admitted only to elbowing the victim. (Trial Tr., p. 124-125, 141). He explained the marks on the victim's throat by stating that she enjoyed being choked during sex. (Trial Tr., p. 132-136). He denied choking the victim on the night in question. (Trial Tr., p. 148).

There was a break in the interview. (Trial Tr., p. 18). When it resumed, police advised Petitioner that the victim was taken off life support. (Trial Tr., p. 180-181). Petitioner confessed that he also head butted the victim. (Trial Tr., p. 182, 184). He admitted the couple was fighting over the affair. (Trial Tr., p. 183). Petitioner was upset. (Trial Tr., p. 183). At his urging, Tuckey called the other man to advise that Petitioner knew of the affair. (Trial Tr., p. 192, 198-199). Petitioner became enraged. (Trial Tr., p. 193-194, 200, 213). He head

butted Tuckey, knocking her down. (Trial Tr., p. 184-185, 188, 201). When she got up, he grabbed her neck, briefly choking her. (Trial Tr., p. 185-187, 202). Petitioner let Tuckey go, but tripped her as she walked. (Trial Tr., p. 206). Tuckey fell and hit her head. (Trial Tr., p. 206-207, 210). She then followed him to his truck where the two sat side by side on his truck's toolbox. (Trial Tr., p. 188-189, 203). At this point, Petitioner elbowed Tuckey twice in the chest. (Trial Tr., p. 203). She fell backwards. (Trial Tr., p. 204). When she sat up again, she slumped against him. (Trial Tr., p. 127, 145-146, 156, 204). Petitioner told police he thought she was merely seeking sympathy. (Trial Tr., p. 127, 146-147). He quickly realized the extent of her injuries, when she slumped to the floor. (Trial Tr., p. 128, 146-147). During the interview, Petitioner expressed remorse and denied any intent to hurt the victim. (Trial Tr., p. 182, 189, 196, 209).

At the charge conference, the manslaughter instructions were addressed, as follows:

THE COURT: . . .we have the manslaughter instruction. Obviously, there's two different kinds. . . .I would assume you want both; is that correct?

MS. ACHOLONU: Yes, Your Honor.

THE COURT: Okay. So I'll give both.

(Trial Tr., p. 246).

The State then objected that the evidence did not support a culpable negligence manslaughter instruction and a lengthy argument followed. The Court concluded that it would give the instruction and then turned to the defense:

THE COURT: Okay. Now does the defense want both intentionally caused the death of Jeanine Tuckey and the culpable negligence instruction for manslaughter?

MS. ACHOLONU: Yes, Your Honor.

THE COURT: Okay. So if they're asking for both and I don't give both, it may not only be fundamental error, but if it's not fundamental error, it may just be error because they're asking for both, and I really don't see any harm in giving both . . .

(Trial Tr., p. 252-253).

The defense closing argument centered on the theory that Petitioner's actions were reckless, not imminently dangerous actions reflective of a depraved act. (Trial Tr., p. 284, 287, 289). The argument concluded by the defense asking the jury to reject the second degree murder charge and "make a determination of whether he is guilty of the manslaughter charge." (Trial Tr., p. 289).

In addition to being instructed on manslaughter by

intentional act, the jury was also instructed as to manslaughter by culpable negligence. The instruction stated:

Each of us has a duty to act reasonably toward others. If there is a violation of that duty without any conscious intent to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care towards others.

In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence **is a course of conduct** showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness or a grossly careless disregard for the safety and welfare of the public, **or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.**

The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is **consciously doing an act or following a course of conduct** that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.

(Trial Tr., p. 269-270)(emphasis added).

On direct appeal, a three judge panel of the Second District Court of Appeal affirmed Petitioner's conviction in reliance on the Court's precedent which held that the giving of a culpable negligence manslaughter jury instruction cured any fundamental error caused by a flawed manslaughter by act

instruction under Montgomery. Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 20011)(Altenbernd, J. concurring in part, dissenting in part). The Second District Court of Appeal certified the following question to this Court as one of great public importance:

IF A JURY RETURNS A VEDICT FINDING A
DEFENDANT GUILTY OF SECOND DEGREE MURDER IN
A CASE WHERE THE EVIDENCE DOES NOT SUPPORT A
THEORY OF CULPABALE 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?

SUMMARY OF THE ARGUMENT

The District Courts of Appeal correctly concluded that a culpable negligence instruction, when given in conjunction with a flawed manslaughter by act instruction, preserves the jury's ability to exercise its pardon power and cures any error in giving the flawed manslaughter instruction invalidated in Montgomery v. State, 39 So. 3d 252 (Fla. 2010). The Second District Court of Appeal properly applied this standard to the present case.

ARGUMENT

A TRIAL COURT DOES NOT COMMIT FUNDAMENTAL ERROR BY GIVING A FLAWED MANSLAUGHTER BY ACT INSTRUCTION WHEN IT ALSO GIVES AN INSTRUCTION ON MANSLAUGHTER BY CULPABLE NEGLIGENCE, WHETHER OR NOT THE EVIDENCE SUPPORTS A THEORY OF CULPABLE NEGLIGENCE MANSLAUGHTER. (Certified Question As Restated By Respondent)

It is settled that the standard instruction for manslaughter by act, which required the jury to conclude that the defendant intentionally caused the victim's death, is invalid. Montgomery v. State, 39 So. 3d 252, 259-260 (Fla. 2010). A defendant whose jury receives the flawed manslaughter instruction is fundamentally harmed if the defendant is convicted of a crime one step removed from the charged offense. Montgomery, 39 So. 3d at 259-260. Such an error is fundamental because it deprives a defendant of the possibility that the jury would have selected the lesser offense if properly instructed. Id.

Yet, this Court has "consistently held that not all error in jury instructions is fundamental error." Garzon v. State, 980 So. 2d 1038, 1042 (Fla. 2008); Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008)("[W]e disapprove of those district court decisions which hold that an erroneous reading of the forcible-

felony instruction always constitutes fundamental error.”). Thus, citation to Montgomery, alone, cannot answer the question presented by the Second District Court of Appeal.

Instead, this Court must consider the analysis that has developed since its issuance of the Montgomery decision. During this time, the District Courts of Appeal, applying Montgomery, have examined a question not squarely presented in that case; the impact of a jury instruction which includes both the manslaughter by act and manslaughter by culpable negligence instructions. The appellate Courts have uniformly concluded that fundamental error does not occur when the jury receives both manslaughter instructions because the jury retains its ability to convict a defendant of a lesser offense. In such cases, conviction of the one step greater offense does not rise to the level of fundamental error. This rationale is grounded in this Court’s precedents in Montgomery and Pena v. State, 901 So. 2d 781 (Fla. 2005). Review of these authorities establishes that the certified question should be answered in the negative.

Pardon Power Analysis

The Courts of Appeal have relied on this Court’s precedent in Pena v. State, to develop the “pardon power” rationale upon which those decisions addressing dual instructions have been based. Pena, 901 So. 2d at 787. In Pena, the defendant was charged with first-degree murder resulting from the unlawful

distribution of a controlled substance. This Court faced the certified question of whether error arose from failure to give an instruction of excusable and justifiable homicide, even though no evidence supported justification. Although compelled by the facts to apply a harmless error analysis, this Court nevertheless observed 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. 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.” Pena, 901 So. 2d at 787.

This Court reflected on the role of the jury’s “pardon power” in Sanders v. State, 946 So. 2d 953 (Fla. 2006). Justice Cantero, writing for the majority, addressed the pardon power’s role in Florida’s jurisprudence and its integration into Florida’s common law precedent and rules of procedure. This analysis made clear that despite its “suspect” pedigree, the jury’s pardon power is an established aspect of Florida jurisprudence.

Recognizing this Court’s reliance upon the pardon power analysis in Montgomery, the First District in Salonko v. State, 42 So. 3d 801 (Fla. 1st DCA 2010), concluded that the pardon power is preserved when the jury is given an alternate basis to

convict of a lesser crime; even when the alternative does not have factual support. The Court explained:

[In Montgomery] [w]e explained that the fundamental nature of this error resulted from the fact that because the jury found that the defendant did not intend to kill the victim, the instructions the trial court gave essentially directed a verdict for second-degree murder, precluding the jury from choosing the lesser-included offense one step removed. [] This situation does not exist when the trial court gives an instruction on manslaughter by culpable negligence. []

Here, the trial court's erroneous instruction did not interfere with the jury's deliberative process in a way that tainted the underlying fairness of the entire proceeding because it instructed the jury on manslaughter by culpable negligence. . . .based on the instructions given, it 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.

Unlike in Montgomery, the jury in the instant case was not directed to choose the greater offense simply because the lesser-included offense would have improperly required a more depraved level of intent. Therefore, Appellant has not shown that fundamental error occurred under this Court's opinion in Montgomery.

The Courts of Appeal agree. Nieves v. State, 22 So. 3d 691, 692 (Fla. 2d DCA 2009) ("Furthermore, unlike Montgomery and Zeigler, the jury in Nieves' case was also instructed on the lesser-included offense of manslaughter by culpable negligence.");

Cubelo v. State, 41 So. 3d 263 (Fla. 3d DCA 2010) ("In the instant case, the jury was therefore given an opportunity [] to convict the defendant of the lesser included offense of manslaughter by culpable negligence, which clearly does not require an intent to kill. Thus, we conclude, as the First District concluded in Salonko, that because the jury was instructed on both manslaughter by act and manslaughter by culpable negligence, there was no fundamental error requiring a reversal of the defendant's conviction for second-degree murder."); Henry v. State, -- So.3d ----, 2011 WL 2694513 (Fla. 4th DCA 2011) citing Singh v. State, 36 So. 3d 848 (Fla. 4th DCA 2010) ("We found that providing the jury with the second option removed any error 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.'"); Paul v. State, 63 So. 3d 828 (Fla. 5th DCA 2011) ("We align ourselves with the First, Second, and Fourth Districts in holding that giving the manslaughter by culpable negligence instruction distinguishes Montgomery and addresses the primary concern which led to a determination that the giving of the manslaughter by act instruction constituted fundamental error.").

Pardon Power Distinguished

Although phrased in terms of a jury's pardon power, it is

possible that use of the term "pardon power" misstates the juror's actions in a case such as this. The concept of pardon power owes its "suspect" pedigree to its perceived rogue character. In exercising its pardon power, a jury inherently disregards the law in order to dispense mercy or reject the criminalization of a subject act. State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986) (Shaw, J., dissenting) ("The ultimate exercise of the jury pardon power is a not guilty verdict rendered contrary to the law and evidence, thus expressing the jury's refusal to enforce a law of which it disapproves."). In cases such as this, where the jury is attempting to match the facts to the list of crimes presented by the verdict form, the jury is acting within the bounds of the law. Hence, rather than a compromise or an exercise of mercy, the verdict in these cases reflects a rational decision by the jury to follow its oath and the instructions provided.

The error in Montgomery hinged on the jury being misadvised that it needed to find an element which the offense, as defined by Florida law, did not require. Thus, the jury was "coerced" into convicting Montgomery of the greater offense (second degree murder) because the nominally lesser offense was presented as requiring an element (intent to commit murder) which it did not possess. The Montgomery Court reasoned that the jury, finding no intent to kill and lacking another alternative, essentially

pardoned upward by convicting Montgomery of second degree murder.

This error differs from the case where the jury is correctly instructed on two offenses, culpable negligence manslaughter and second degree murder, but the facts presented do not fit squarely into either offense. This second scenario requires the jury to evaluate the facts and determine which statement of the law the facts most closely resemble. Both Florida precedent and Rules of Procedure make such evaluations a matter of common occurrence.

Under Florida law "[a] trial court must instruct a jury completely on all necessarily included offenses, regardless of whether the facts of the case support the instruction." Roberts v. State, 694 So. 2d 825 (Fla. 2d DCA 1997). Further, a defendant is entitled to an instruction on a permissive lesser included offense where any evidentiary support exists for the instruction. State v. Espinosa, 686 So. 2d 1345 (Fla. 1996) ("An instruction on a permissive lesser included offense should be precluded only where "there is a total lack of evidence of the lesser offense."')(internal citations omitted); Fla. R. Crim. P. 3.510 (providing that a jury may convict of any lesser included offense which "is supported by the evidence.")). This authority results in juries being routinely instructed on lesser included offenses whose elements do not fall squarely

within the facts as developed at trial. Selection between offenses to find the most applicable is a matter within the juror's common experience. Fundamental error does not result from the juror's application of facts to a list of potential verdicts to determine which one most completely accords with its understanding of the evidence.

Evidentiary Support for a Culpable Negligence Charge

The certified question presents a hypothesis in which a jury is instructed on culpable negligence manslaughter when no evidentiary basis supports such a charge. Here, the State maintains that the evidence against Petitioner supported application of both second degree murder and culpable negligence theories. However, even if the culpable negligence theory lacked evidentiary support, the mere fact that it presented the jury an alternate, lesser, offense was sufficient to negate any suggestion of fundamental error.

Logically, if a jury rejects a second degree murder charge in favor of a lesser offense, it has necessarily concluded that the evidence does not support the greater offense. This rejection of the second degree murder charge is what leads the jury to examine the lesser offenses. In a case where the lesser culpable negligence offense also lacks evidentiary support, the jury is left to choose which of the offenses bear the greatest resemblance to the facts as the jury has determined them.

Petitioner presumes that a jury in this position will convict of an inapplicable, but greater, offense. However, given the option, a jury could just as reasonably select an inapplicable, but lesser, offense, depending on the facts of the case. Rushing v. State, --- So.3d ----, 2010 WL 2471903 (Fla. 1st DCA 2010) (“If the jury finds that the elements of the main offense were not proved, and that the (erroneously described) elements of a lesser included offense were also not proved, the jury's authority to find a defendant “not guilty” is still fully in force.”)

Thus, even in those cases where a culpable negligence manslaughter instruction is not supported by the evidence, the jury's view of the facts may lead it to select one offense over another. This opportunity to apply the facts to a lesser offense prevents the jury from being narrowly directed towards a single conclusion. It is this freedom, exercised or not, which forecloses a finding of fundamental error.

Intent and the Subject Offenses

In rejecting the pardon power analysis adopted by the District Courts of Appeal, Petitioner relies on the role intent plays in the charged offenses. He argues that these decisions fail to consider that culpable negligence is a crime which requires no intentional act, whereas manslaughter by act requires such intent. Petitioner reasons, then, that the jury

could only have selected culpable negligence manslaughter if it found he had no intent to kill his girlfriend and no intent to act. He hypothesizes that if the jury found an intent to act, but not kill, it would be forced to convict of second degree murder because the faulty manslaughter by act instruction required an intent to kill.

This argument overlooks the role of intentional action under the crime of culpable negligence. Manslaughter is "[t]he killing of a human being by the act, procurement, or culpable negligence of another." § 782.07(2), Fla. Stat. (2008). Florida jurisprudence has long recognized "culpable negligence" as "conduct of a gross and flagrant character, evincing reckless disregard of human life, or of safety of persons exposed to its dangerous effects, or the entire want of care which would raise presumption of conscious indifference to consequences or which shows wantonness or recklessness or grossly careless disregard of safety and welfare of public, or that reckless indifference to rights of others, which is equivalent to an intentional violation of them." Miller v. State, 75 So. 2d 312 (Fla. 1954).

While a negligent act, culpable negligence manslaughter incorporates an element of volitional, as opposed to accidental, conduct. Accordingly, culpable negligence precedent reflects that, while intent to do the act which caused the death is not an element of the offense, some purposeful conduct is typically

required. see e.g. Light v. State, 841 So. 2d 623 (Fla. 2d DCA 2003)(finding culpable negligence manslaughter when defendant killed a fellow concert goer while "slam dancing"); Tillman v. State, 842 So. 2d 922 (Fla. 2d DCA 2003)(finding culpable negligence manslaughter when defendant, who was trained in gun use and safety, never checked to see if gun was loaded and sat next to victim, playing with the gun and pulling the trigger); Ellison v. State, 547 So. 2d 1003 (Fla. 1st DCA 1989)(finding culpable negligence manslaughter when defendant, in effort to avoid arrest, sped through midday traffic, intentionally smashing through closed toll gate and crossing median, causing collision with another car). Such decisions make clear that a jury is capable of returning a verdict for culpable negligence manslaughter based on a defendant's volitional actions.

Thus, a jury finding an intentional act, but no intent to kill could convict of either second degree murder or culpable negligence. The jury would select between the two offenses based on whether it found the conduct depraved and indicative of ill will or merely reckless.

The Role of Fundamental Error

Montgomery does not create a per se rule warranting reversal in all cases where a jury is read an erroneous manslaughter by act instruction. Rather, Montgomery applies a two step analysis to the question of the jury instruction's

validity. Application of this test hinges on the question of fundamental error. Thus, the Montgomery Court's invalidation of the manslaughter by act instruction was only one part of the analysis. The second part required consideration of harm. This is so because fundamental error is, intrinsically, harmful error. Reed v. State, 837 So. 2d 366, 369 (Fla. 2002) ("By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement of being fundamental.").

To avoid application of the contemporaneous objection rule, error claimed to be fundamental must "'reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Garzon v. State, 980 So. 2d 1038, 1043 (Fla. 2008) citing State v. Delva, 575 So. 2d 643 (Fla. 1991). Absent prejudice, no fundamental error can be said to exist.

A fundamental error analysis requires examination of the totality of the circumstances. Joyner, 41 So. 3d at 307("To determine whether an instruction error 'vitiates the "validity of the trial," courts conduct a totality of the circumstances analysis.'). The fundamental error doctrine is to be applied "only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Nesbitt v. State, 889 So. 2d 801, 803 (Fla.

2004) .

The dual instruction cases at issue before this Court also require that the Court undertake a fundamental error analysis. Having done so, the Courts of Appeal are in accord that inclusion of an alternate lesser offense provides the jury an opportunity to reject a greater offense. Jackson v. State, 49 So. 3d 271 (Fla. 1st DCA 2010)(alternate instruction gives "the jury the option of finding the appellant guilty of a lesser included offense which did not require an intent to kill."). "Fundamental error does not occur in such circumstances because it is possible the jury will base its decision only upon the elements of manslaughter by culpable negligence, which [unlike the flawed manslaughter by act instruction] does not require a finding of intent to kill." Sullivan v. State, 50 So. 3d 33 (Fla. 1st DCA 2010).

By preserving an alternative basis for conviction of a lesser offense, the dual instruction cases broaden the availability of lesser offenses which the jury may decide apply. Availability of additional possible lesser included offenses does not narrow the jury's deliberative process, it expands it. In the face of an alternative lesser included offense, "the erroneous manslaughter instruction [does] 'not interfere with the jury's deliberative process in a way that tainted the underlying fairness of the entire proceeding'. . . ." Joyner, 41

So. 3d at 306-307 citing Salonko, 42 So. 3d at 803.

The availability of this lesser charge permits the jury an opportunity to pair the established facts with a lesser offense. The jury having been provided a viable alternative basis for its verdict, a defendant is not prejudiced and the instructions do not rise to the level of fundamental error, redressable on appeal absent preservation.

The Case Against Petitioner

Petitioner fails to establish fundamental error in this case. Review of the closing argument reflects that the defense hinged on culpable negligence manslaughter. In his taped interview with police, Petitioner admitted tripping, elbowing, headbutting and choking the victim. In closing, he argued that these actions were reckless, but did not rise to the level of imminently dangerous actions which justified imposition of a second degree murder charge.

While the Second District has framed the certified question in terms on the evidence not supporting a culpable negligence instruction, this question is too narrow on the facts of this case. Petitioner was entitled to instruction on a lesser offense if any evidence supported the charge. Here, Petitioner's actions- tripping, elbowing, headbutting- are the types of reckless actions which could properly be the subject of a culpable negligence manslaughter conviction. At least two of

these actions have the potential to be the type of innocuous action which generally produces no serious harm. This was the theory relied on in closing argument.

The jury instruction colloquy reflects that the defense requested both manslaughter instructions be given. The culpable negligence instruction advised that the jury is not required to find any "conscious intent to harm" in order to find the defendant guilty of manslaughter. Thus, as in Salonko, Petitioner's jury had the opportunity to return a manslaughter verdict which did not depend on finding an intent to harm the victim; thereby avoiding the error in the flawed manslaughter by act instruction. Nevertheless, unlike the defendant in Montgomery, Petitioner was convicted as charged. Joyner, 41 So. 3d at 306 ("This case is distinguishable from State v. Montgomery because Joyner was convicted as charged, rather than for one of the lesser included offenses.").

The evidence reflected that Petitioner tripped, head-butted, choked and elbowed the victim. Based on this evidence, the jury could reasonably have determined Petitioner, while lacking a "conscious intent to harm" the victim, committed volitional acts which reflected a reckless disregard for the victim. Such a finding would support a verdict of manslaughter under a culpable negligence theory.

Instead, the jury found Petitioner's actions imminently

dangerous and reflective of a depraved mind without regard for human life. §782.04(2), Fla. Stat. (2008). Florida courts have previously affirmed second degree murder convictions on facts similar to those before the Court. Larsen v. State, 485 So. 2d 1372 (Fla. 1st DCA 1986), affirmed 492 So. 2d 1333 (evidence supported second-degree murder conviction of defendant who, when slapped by his wife, struck her down, causing her skull to fracture as she hit the ground); Smith v. State, 314 So. 2d 226 (Fla. 4th DCA 1975)(evidence supported second-degree murder conviction of defendant who killed his girl friend by hitting her head with both his fists and a 15-pound stereo speaker).

The totality of the evidence in this case, both forensic medical evidence and Petitioner's own admissions, demonstrated that Petitioner acted in anger to physically hurt his girlfriend in retaliation for the emotional hurt he suffered as a result of her being unfaithful.

While the culpable negligence instruction provided the jury an opportunity to consider the evidence in a different light, Petitioner's serial cruel actions convinced the jury that those acts were the result of ill will and a depraved heart. Although Petitioner was entitled to a culpable negligence instruction, the evidence presented by the state was such that the jury was compelled to return a verdict of second-degree murder. Therefore, if the manslaughter instruction was error, it was not

fundamental error such that the verdict rendered could not have been reached absent the error.

The evidence against Petitioner supported application of both a second degree murder and culpable negligence theory. However, even if the culpable negligence theory lacked evidentiary support, the mere fact that it presented the jury a alternate, lesser offense was sufficient to negate any suggestion of fundamental error. The certified question should be answered in the negative and the second-degree murder verdict affirmed.

CONCLUSION

Respondent respectfully requests that the certified question should be answered in the negative and Petitioner's conviction and sentence be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Maureen Surber, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831 and Richard Summa, Esq., Assistant Public Defender, Leon County Courthouse, 301 S. Monroe St., ste 401, Tallahassee, Florida 32301 this ____ day of August, 2011.

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,

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