

IN THE SUPREME COURT OF FLORIDA

JEREMY HAYGOOD, :
 :
 Petitioner, :
 :
 vs. : Case No. SC11-294
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Mr. Haygood relies on the Statement of the Case and Facts in his Initial Brief with the following addition:

At trial, the prosecutor objected to the giving of the manslaughter by culpable negligence instruction, stating the evidence did not support giving the instruction. (V2/T252-253)

ARGUMENT
ISSUE I

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?

Although the certified question above, as crafted by the Second District, is premised on the fact that the evidence at trial did not support a theory of culpable negligence, the Respondent now argues, for the first time on appeal, that the evidence did support a theory of culpable negligence. However, at trial, the Respondent argued the exact opposite position. Specifically, the prosecutor objected to the giving of the manslaughter by culpable negligence jury instruction, arguing the evidence did not support the theory. This is wholly adverse to and inconsistent with the Respondent's position on appeal. Because the Respondent presented a wholly inconsistent position below, this Court should not consider the Respondent's altered position on appeal.

The jury was given accurate jury instructions for second-degree murder and manslaughter by culpable negligence, but was given an inaccurate manslaughter by act instruction, misleading the jury by requiring an intent to kill element. The Respondent acknowledges that the facts of the case "do not fit squarely into either offense." (Respondent's Brief, pg. 14) That is, the facts

don't fit squarely into either second-degree murder or manslaughter by culpable negligence. Yet, Respondent takes the position that the giving of the incorrect and misleading manslaughter by act instruction was insignificant. The Respondent incorrectly believes that this merely requires the jury "to evaluate the facts and determine which statement of the law the facts most clearly resemble." (Respondent's Brief, pg. 14) While it is true that this would normally be "a matter of common experience" for a jury, this presumes that the jury has been instructed properly on all the offenses; this is not what occurred here.

It is impossible to speculate on what a jury would do when provided the accurate jury instructions. Instead, the jury was given the instruction for second-degree murder, which includes no intent to kill, but requires an act "imminently dangerous to another and demonstrating a depraved mind without regard for human life." The jury was given the incorrect manslaughter by act instruction, which included an intent to kill element. Finally, the jury was given the manslaughter by culpable negligence instruction, which included no intent to kill element and no intent to commit an act. The Respondent acknowledges that the manslaughter by culpable negligence offense does not include "an intent to do the act which caused the death" element. (Respondent's Brief, pg. 17) Giving the manslaughter by culpable negligence instruction was not a viable alternative because the corrected manslaughter by act instruction was also not given. The

manslaughter by culpable negligence option was not a cure for the fundamental error. If the jury found Mr. Haygood had no intent to kill but had an intent to commit an act, it was precluded from choosing either second-degree murder or manslaughter by culpable negligence.

The error was harmful. Further, because it is impossible to speculate which offense a jury would choose if provided with the accurate jury instructions, the error is fundamental as it "is pertinent or material to what the jury must consider to convict." State v. Delva, 575 So. 2d 643 (Fla. 1991)(quoting Stewart v. State, 420 So. 2d 862 (Fla. 1982)).

Mr. Haygood was charged with and convicted of second-degree murder. Because Mr. Haygood's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter, fundamental error occurred. See, State v. Montgomery, 39 So. 3d 252 (Fla. 2010). Because fundamental error similar to Montgomery occurred in this case, and because this fundamental error was not cured with the addition of the manslaughter by culpable negligence instruction, Mr. Haygood respectfully requests that this Court quash the decision of the Second District.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Cerese Crawford Taylor, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of September, 2011.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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