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IN THE SUPREME COURT OF FLORIDA

STEVE LAWRENCE GRIFFIN, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-2450

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State of Florida charged Petitioner with one count of second degree murder with a firearm for the shooting death of Thomas Mills (R. 16-17). At trial, Petitioner testified that he saw another person kill the victim:

> COUNSEL: All right. Now, the next question I'm going to ask you is very important, Steve. At any point in time, did you notice or observe an individual approach either your vehicle or TJ's?
>
> DEFENDANT: Yes, I did.
>
> COUNSEL: Okay. Tell the jury what you saw.
>
> DEFENDANT: Well, I was laid back in my seat listening to music. I had my window rolled up, and I seen somebody walk in front of Ester's SUV. And I leaned up real quick and they had on a black jacket. So I really couldn't tell who it was. And all of a sudden, he walked up to TJ's window and he pulled a gun out and shot him.
>
> COUNSEL: Did you hear anything?
>
> DEFENDANT: Yes, a little pow. That was it.
>
> ...
>
> COUNSEL: And what did you do next, Steve?
>
> DEFENDANT: I took off and left.
>
> COUNSEL: All right. Why did you do that?
>
> DEFENDANT: Because I was scared, didn't know what to do. I just left.

(T. 626-628)

There was no objection to use of the standard manslaughter

by act instruction as a lesser included offense of second degree murder (T. 795, 810). Although it was given to the jury, neither the State nor the defense talked about manslaughter during closing argument. There was only one brief, non-specific reference to lesser included offenses during the entirety of closing arguments, occurring in the State's initial argument:

> And I'll just talk briefly about lesser-included offenses. I submit, you don't need to get there because how you will be instructed is, once the State has met the highest charge, murder in the second-degree, you don't even address the lesser-included offenses; okay? So you will be given some lesser-included offenses, but it's our position that you won't even need to get there. But they are included within that higher charge.

(T. 746)

The lesser offense was not addressed at all in the defense closing. Rather, defense counsel's argument focused on the alleged inability of the State's evidence to prove that Petitioner was the person who killed the victim:

> In many ways, this is a he-said, she-said case. We have Ester Deneus saying, Steve Griffin had the gun; he must have done it. And we have Steve Griffin saying, I didn't have a gun; somebody else walked up and shot TJ.
>
> ...
>
> So the ultimate question here is not: Oh, do I think maybe Steve Griffin was involved or am I suspicious? The question: Did the State prove beyond and to the exclusion of

each and every reasonable doubt that Steve, and not somebody else, pulled that trigger?

(T. 748)

Did Steve or Ester seem to have an opportunity to see and know the things about which the witness testified?

Steve Griffin clearly had that opportunity. He was right there parked in close proximity to the shooting.

(T. 759-760)

Steve Griffin says, Yeah, I pulled into the parking lot, but I was there for two or three minutes before the shooting occurred. Isn't that consistent with the other evidence in the case?

(T. 762)

The question is solely: Is it possible? Is it reasonably plausible that somebody else besides Steve Griffin walked up and shoots – and shot TJ Mills?

(T. 767)

You heard evidence that TJ Mills, this guy who carries this cash, drugs, you heard evidence that he's been shot before. So I ask, members of the jury, we have a drug dealer who carries large sums of cash, been shot before, doing drug deals that day. Can you rule out the possibility that somebody else shot him besides his friend, Steve Griffin?

(T. 769)

Following his conviction for second degree murder as charged, Petitioner appealed to the Second District Court of Appeal. The Second District affirmed, observing that the intent

element of the manslaughter instruction was not in dispute:

> In this case, the State presented eyewitness testimony that Griffin pulled up next to the victim's vehicle in a convenience store parking lot and had words with him through the windows. Then Griffin pulled out a long black gun, put it through the window, and shot the victim in the neck where he sat. Griffin's sole defense was mistaken identity. Griffin admitted that he pulled his vehicle up next to the victim's vehicle and had a conversation with him. He claimed that an unknown individual walked between the vehicles to the victim's window, pulled out a shotgun, pointed him at the victim, and shot him.
>
> Griffin did not argue that the manner of the shooting did not establish the requisite intent; he simply argued that he was not the perpetrator. There is no dispute regarding the elements of an offense when the manner of the crime is conceded and the sole defense is mistaken identity. Because there was no dispute regarding the element of intent, the erroneous jury instruction on the intent element of the lesser included offense of manslaughter did not constitute fundamental error.

Griffin v. State, 128 So. 3d 88, 90 (Fla. 2d DCA 2013)(citations omitted).

Petitioner filed motions for rehearing and rehearing en banc in the Second District, which were both denied. This proceeding follows.

SUMMARY OF THE ARGUMENT

State v. Montgomery, 39 So. 3d 252 (Fla. 2010) did not create a "per se reversible error" rule that use of the 2006 manslaughter by act instruction is fundamental error. Because a challenge to the instruction was not preserved for appeal, the instruction in Montgomery was necessarily reviewed for fundamental error rather than harmless error. "Per se reversible error," however, applies only to cases in which the alleged error is preserved. Thus, this Court could not have created, or even intended, automatic fundamental error determinations where there was no objection to the instruction at the trial level.

Even so, this Court has long held that a jury instruction does not constitute fundamental error where it does not pertain to a disputed element. Montgomery departed from this Court's precedent by finding fundamental error without first determining whether the intent element of the manslaughter instruction had been disputed at trial. However, this Court has returned to that required finding in post-Montgomery cases and should continue to employ it in the instant case.

The test, properly expressed, is that use of the 2006 manslaughter by act instruction is fundamental error only where: (1) the defendant was convicted of an offense no more than one step removed from manslaughter by act; (2) the intent element of

the instruction was disputed at trial; and (3) the instruction was pertinent and material to what the jury had to consider in order to convict.

The Second District adhered to this test, finding that the instruction did not arise to fundamental error because intent was never in dispute. This finding was supported by the record, which shows that Petitioner at all times maintained, through his counsel and through his own testimony, that someone else killed the victim. Because the Second District engaged in the appropriate analysis of whether the instruction was fundamental error in this case, this Court should affirm its holding.

ARGUMENT

ISSUE

DOES USE OF THE 2006 MANSLAUGHTER BY ACT INSTRUCTION ALWAYS CONSTITUTE FUNDAMENTAL ERROR, EVEN WHERE THE INTENT ELEMENT OF THE OFFENSE IS NOT DISPUTED AT TRIAL? (Restated by Respondent)

Petitioner challenges the Second District's holding that use of the 2006 manslaughter by act instruction did not constitute fundamental error. According to Petitioner, this Court's opinion in Montgomery requires reversal *whenever* the erroneous manslaughter instruction is given, as long as that offense is no more than one step removed from the offense for which the defendant is convicted. In so arguing, Petitioner relies on a single segment of the Montgomery opinion:

> Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter...fundamental error occurred in his case which was per se reversible where the manslaughter instruction erroneously imposed upon the jury a requirement to find that Montgomery intended to kill Ellis.

Montgomery, 39 So. 3d at 259.

Contrary to Petitioner's assertion, this passage does not announce a rule that giving the instruction is per se reversible error. Indeed, "per se reversible error" applies "only if the issue is properly preserved for appellate review." Johnson v. State, 53 So. 2d 1003, 1007, n. 5 (Fla. 2010). Montgomery did

not involve a preserved error, and was therefore reviewed for fundamental error. Grammatically, the phrase "per se reversible" as used in Montgomery modifies the preceding phrase "fundamental error." Its use in that opinion operates as a mere restatement of a basic appellate tenet: fundamental error *is* reversible error.[1]

Petitioner erroneously relies on State v. Abreau, 363 So. 2d 1063 (Fla. 1978), for the proposition that the manslaughter instruction is per se reversible error. Although not expressly stated in this Court's opinion, that case involved a *preserved* challenge to a jury instruction. See Abreau v. State, 347 So. 2d 819, 820 (Fla. 3d DCA 1977). Thus, this Court's subsequent determination that "[o]nly the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible," Abreau, 363 So. 2d at 1064, was appropriate. Had the issue been unpreserved in that case, a "per se reversible error" rule could not have applied.

Petitioner also cites to State v. Wimberly, 498 So. 2d 929 (Fla. 1986), as one of the "binding" cases from the Montgomery opinion. However, it too involved a *preserved* challenge. Id. at 930. Moreover, its holding is simply that a trial judge must

[1] Of course, reversible error is not always fundamental, and harmful error is not always reversible. However, fundamental error is always harmful.

instruct on necessarily lesser included offenses. Id. at 932. Thus, it is irrelevant to the question now before this Court, i.e., whether use of the 2006 manslaughter by act instruction always constitutes fundamental error, even where the intent element is not in dispute.

Further, Petitioner fails to recognize that Montgomery requires more than the one-step-removed conviction to find fundamental error; as this Court relayed earlier in its opinion, it also requires the manslaughter instruction to have been "pertinent or material to what the jury must consider in order to convict." Montgomery, at 258 (quoting State v. Delva, 575 So. 2d 643, 645 (Fla. 1991)). Thus, under Montgomery, giving the erroneous manslaughter instruction can constitute fundamental error *only* when: (1) the defendant was convicted of an offense no more than one step removed from manslaughter by act; and (2) the instruction was pertinent and material to what the jury had to consider in order to convict.

The Montgomery opinion does not express exactly why the instruction was "pertinent and material." However, it seems that this Court determined it to be so because the defendant was charged with first degree murder, but convicted of second degree murder. First degree murder requires intent to kill, while second degree murder does not. In convicting the defendant of the lesser offense, the jury necessarily rejected the theory

that the defendant intended to kill the victim. This fact rendered the faulty instruction for the lesser included offense of manslaughter – which incorrectly added an intent to kill element – "pertinent and material":

> [W]e 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 included offense of manslaughter.

Montgomery, 39 So. 3d at 258.

However, it is not clear that the two-prong test from Montgomery is what this Court intended, as there has not been adherence to it in subsequent jury instruction cases. For historical reference, the "pertinent and material" standard espoused in Montgomery appears to have originated in Stewart v. State, 420 So. 2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983). In deciding whether the jury instruction on robbery was fundamental error for failure to include the intent element, this Court in Stewart relied on the district courts' analyses in like cases:

> The district courts of appeal have considered this issue and have held that fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict. Gibson v. State, 403 So. 2d 1019 (Fla. 3d DCA 1981), review granted, Feb. 15, 1982; Williams v. State, 400 So. 2d 542 (Fla. 3d DCA), review denied, 408 So. 2d 1096 (Fla.

> 1981). See Leary v. State, 406 So. 2d 1222 (Fla. 4th DCA 1981).

Stewart, 420 So. 2d at 863.

Thereafter, this Court determined that the instruction was not fundamental error because intent was not "at issue":

> In the instant case Stewart took the stand in his defense and admitted that he stole personal property from the victim. Intent to permanently deprive another of property, therefore, was not at issue due to Stewart's admission. We find no merit to Stewart's claim on this issue.

Id. at 863-864.

Subsequently, in Delva, 575 So. 2d at 645, this Court repeated that an omission to a jury instruction must be "pertinent and material." But it also stated that "[f]ailing to instruct on an element of the crime over which the record reflects *there was no dispute* is not fundamental error." Id. (emphasis added). This Court reasoned that the intent element was not in dispute because "[t]here was no suggestion that Delva was arguing that while he knew of the existence of the package he did not know what it contained." Id. at 645. Thus, knowledge that the substance in the package was cocaine "was not at issue as a defense..." Id. The language in Delva, building upon that in Stewart, indicated that to constitute fundamental error, an instruction had to both pertain to a disputed element *and* be pertinent and material to what the jury had to consider

in order to convict.

Later, in Reed v. State, 837 So. 2d 366 (Fla. 2002), this Court combined the "pertinent and material" requirement of Stewart with the "disputed element" requirement of Delva to craft a test for identifying a jury instruction as fundamental error:

> It is fundamental error if the inaccurately defined malice element is disputed, ***and*** the inaccurate definition "is pertinent or material to what the jury must consider in order to convict." Otherwise, the error is not fundamental error.

Id. at 369 (internal citations omitted)(emphasis added).

Pursuant to that test, this Court made separate determinations as to whether the instruction was pertinent and material, and whether the element challenged on appeal was disputed at trial:

> Because the inaccurate definition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict the petitioner. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously" was a disputed element in the trial of this case.
>
> ...
>
> The record in the present case demonstrates that the malice element was disputed at trial. Therefore, fundamental error occurred when the trial court instructed the jury using the erroneous definition for "maliciously."

Id. at 369-370.

And the year before Montgomery issued, the standard was again expressed in Garzon v. State, 980 So. 2d 1038 (Fla. 2008):

> We have consistently held that not all error in jury instructions is fundamental error..."Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error..."

Id. at 1042 (quoting Delva, 575 So. 2d at 645).

Petitioner cites to Pena v. State, 901 So. 2d 781 (Fla. 2005) as alleged support for creation of a "per se reversible error" rule in Montgomery, as it was cited by this Court in the latter case. However, Pena involved an unpreserved challenge, and, once again, "per se reversible error" is a concept that applies only to cases in which an appellate challenge has been preserved at the trial level. Further, this Court in Pena again relied on Delva and Reed in finding that, because the challenged instruction did not pertain to a disputed element, it did not constitute fundamental error. Pena, 901 So. 2d at 784-785. Thus, Pena supports the State's position that Montgomery did not - and could not - create a "per se reversible error" rule. Moreover, it reaffirms that an instruction that does not pertain to a disputed element will not be fundamental error.

In Montgomery, this Court gave passing reference to Delva's dictate that "'[f]ailing to instruct on an element of the crime

over which the record reflects there was no dispute is not fundamental error[.]'" Montgomery, 39 So. 3d 252 at 258 (quoting Delva, 575 So. 2d at 645). However, Montgomery never actually addressed whether the intent element of manslaughter was at issue at the defendant's trial.[2] This was a departure from Delva and Reed, which required the element at issue on appeal to have been disputed at trial in order to characterize the instruction as fundamental error.

Even so, this Court returned to the Reed test in its numerous post-Montgomery decisions. The opinion in Haygood v. State, 109 So. 3d 735 (Fla. 2013) expressly relied upon Reed in assessing whether the manslaughter instruction was fundamental error:

> As we held in Reed v. State, 837 So. 2d 366 (Fla. 2002), if an erroneous instruction is given as to a disputed element of the offense, and the instruction is pertinent or material to what the jury must consider in order to convict, it is fundamental error; and "fundamental error is not subject to harmless error review." Id. at 369-70.

Haygood, 109 So. 3d at 740 (emphasis added).

> We have long held that fundamental error occurs in a jury instruction where the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict. See Delva, 575 So. 2d at 644-45. We

2 Nor did the district court engage in any analysis of whether the intent element of manslaughter had been in dispute. See Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009).

> reiterated in Reed that it is fundamental error to give a standard jury instruction that contains an erroneous statement as to an element of the crime which is disputed. We reiterated in Reed that it is fundamental error to give a standard jury instruction that contains an erroneous statement as to an element of the crime which is disputed.

Haygood, 109 So. 3d at 741 (emphasis added).

In observance of this test, this Court specifically determined that "[t]he elements of the offense were disputed ***and*** the instructions were pertinent and material to what the jury must consider in order to convict Haygood of any of the offenses."(emphasis added).

In Daniels v. State, 121 So. 3d 409, 419 (Fla. 2013), this Court expressly held that the 2008 amended instruction on manslaughter by act was not fundamental "because the record reflects that the issue of whether Daniels intentionally caused [the victim's] death was disputed ***and*** was pertinent and material to what the jury had to consider[.]" (emphasis added). And in Williams v. State, 123 So. 3d 23, 28 (Fla. 2013), this Court again acknowledged that:

> [W]hen the defendant is convicted of a crime not more than one step removed from the crime for which an erroneous instruction is given, fundamental error occurs if the instruction pertains to a disputed element of the crime.

Moreover, "if an erroneous instruction is given as to a disputed element of the offense, ***and*** the instruction is

pertinent or material to what the jury must consider in order to convict, it is fundamental error." Id. at 27-28 (emphasis added).[3]

To the extent that Petitioner relies on Lucas v. State, 645 So. 2d 425 (Fla. 1994) for the position that an erroneous manslaughter instruction always constitutes fundamental error, that case was incorrectly decided. Lucas involved a manslaughter instruction that did not include an explanation on justifiable and excusable homicide. Id. at 426. Although Delva issued three years earlier, this Court in Lucas did not analyze whether the instruction pertained to a disputed element. The First District recently recognized this inherent conflict in Moore v. State, 114 So. 3d 486, 493 (Fla. 1st DCA 2013):

> [I]f we were not constrained by Lucas, we would find the error was not fundamental ***because there was no dispute in the trial*** as to whether the killing was justifiable or excusable homicide.

Nevertheless, this Court has since returned to Delva and Reed, and adopted a standard for finding fundamental error in

3 Although neither a challenge to the 2008 amended manslaughter instruction (Daniels) nor the 1994 attempted manslaughter by act instruction (Williams) is before the Court in this case, the State's arguments and reasoning would apply in such cases. That is, use of that instruction would constitute fundamental error only where: (1) the defendant was convicted of an offense not more than one step removed from manslaughter; (2) the intent element was disputed at trial; and (3) the instruction was pertinent and material to what the jury had to consider in order to convict.

jury instructions that is faithful to the concept of fundamental error, itself. Where the instruction does not pertain to an element that was in dispute at trial, the inquiry will end there, and there will be no finding of fundamental error.

The Second District in Griffin followed this precedent by holding that use of the 2006 manslaughter by act instruction did not constitute fundamental error because the intent element was never in dispute at Petitioner's trial. This was the correct finding, where Petitioner adopted a straightforward defense of mistaken identity. Petitioner' theory of defense was not that he shot the victim but did so accidentally. It was not that he intended to shoot the victim but did not intend to kill him. Instead, Petitioner's theory of defense was that he observed an unknown male walk up to the vehicle in which the victim was sitting and shoot him. The trial transcript reveals a clear, defined strategy to challenge the State's evidence that Petitioner was the one who shot the victim. Every question directed to a witness and every argument made to the jury was designed to promote this defense. The result is that the intent element of manslaughter by act was never in dispute.

As to Petitioner's reliance on Willis v. State, 70 So. 3d 739 (Fla. 5th DCA 2011), the district court in that case failed to analyze whether the attempted voluntary manslaughter instruction pertained to a disputed element or was pertinent or

material to what the jury had to consider to convict. However, that opinion pre-dated Haygood, Williams, and Daniels, and the court therefore did not have the benefit of the correctly expressed test for fundamental error in such cases. The Second District in Griffin *did*.

The State notes Petitioner's assertion that Griffin is a "disparate" result from Hill v. State, 124 So. 3d 296 (Fla. 2d DCA 2013), which also involved a mistaken identity defense. At issue in that case was the use of the attempted manslaughter instruction. Id. at 297. The Second District, citing Haygood, determined that the instruction was fundamental because it was material to the jury's deliberation, and because the intent element was in dispute. Id. at 301. It was disputed, however, because the *prosecutor* made it so:

> During Mr. Hill's trial, the prosecutor argued to the jury that "[t]he real question here is [sic] was it [attempted] first[-] or second[-]" degree murder, the issue being whether Mr. Hill formed a premeditated intent to kill. Although the prosecutor argued that the facts supported a conviction for first-degree murder, he implicitly acknowledged that the jury could find a lack of premeditation. Thus, even though the defense argued that Mr. Hill had been misidentified as the shooter, the State placed Mr. Hill's intent at the time of the shooting at issue. Although the prosecutor conceded that the evidence would support a conviction for aggravated battery or battery, he argued to the jury that the evidence supported a verdict for a greater offense.

Id.[4]

Such argument was wholly absent from Petitioner's trial. And as Petitioner was not charged with first-degree murder, no such argument would have been necessary or appropriate. Because Hill involved different facts, its finding of fundamental error was neither inconsistent with Griffin nor arbitrary, as Petitioner suggests.

Moreover, Petitioner in incorrect in asserting that Griffin espouses a "new requirement" to claim a lack of intent to kill in order to later find fundamental error on appeal. Petitioner alleges that Griffin departs from Curry v. State, 64 So. 3d 152 (Fla. 2d DCA 2011), because it ordered a new trial due to use of the 2006 manslaughter by act instruction. This allegation is based entirely on a footnote in Curry observing that defense counsel "argued to the jury that the State did not prove beyond a reasonable doubt that he was the person who strangled the victim. He did not discuss the offense of manslaughter." Curry, 64 So. 3d at 156, n. 4. However, this footnote must be viewed in its proper context. The State had argued that a challenge to the instruction was waived when defense counsel agreed to it. Id. at 155. This Court rejected that argument, determining that "Curry did not agree to the manslaughter by act

4 The State does not concede that such statements to the jury put the intent element of the attempted manslaughter instruction in "dispute" for purpose of a fundamental error analysis.

instruction, and he did not incorporate it into his closing argument." Id. at 155-156. The footnote at issue attached to this finding, and functioned merely to underscore that the defense did not waive a claim of fundamental error. The opinion is silent as to whether the intent element of manslaughter by act had been put in dispute at trial, whether by the defendant's testimony, by the State's argument, or by some other method.

The three-prong test taken from Haygood, Daniels, and Williams is a sensible approach to those cases raising unpreserved challenges to manslaughter instructions based on the intent element. The test adheres to this Court's precedent that a jury instruction will not be fundamentally erroneous unless it pertains to a disputed element, and the instruction is pertinent and material to what the jury must consider in order to convict. To the extent that it has not already expressly done so, this Court should adopt the three-prong test in cases relating to manslaughter instructions that contain an erroneous intent to kill.

CONCLUSION

Montgomery did not hold that use of the 2006 manslaughter by act instruction always constitutes fundamental error. Even so, it did not express the proper test for determining fundamental error in such cases. Based upon both this Court's pre and post-Montgomery decisions, use of the erroneous manslaughter instruction will only be fundamental error where: (1) the defendant is convicted of an offense no more than one step removed from manslaughter by act; (2) the intent element of manslaughter was disputed at trial; and (3) the instruction was pertinent and material to what the jury had to consider in order to convict. The Second District's holding adhered to this test and should be affirmed accordingly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to Karen Kinney, Assistant Public Defender, kkinney@pd10.state.fl.us, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, on this 8th day of May, 2014.

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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