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IN THE SUPREME COURT OF FLORIDA

STEVE GRIFFIN, :

Petitioner, :

vs. : Case No. SC13-2450

STATE OF FLORIDA, :

Respondent. :

_____ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In May 2011, Steve Lawrence Griffin, Jr. was tried in the circuit court of Sarasota County for the second-degree murder of Thomas Mills (R16; T223, 232). Mills was shot while sitting behind the wheel of an SUV, which was stopped in front of a store, on the night of January 15, 2011 (T249-55, 258,297).

The trial was essentially a credibility contest between Griffin, who testified that he witnessed another unknown person shoot Mills (T627), and Mills' girlfriend, Ester Deneus, who was the State's key witnesses. (See T400-401, where trial judge comments that State's case rests on the veracity of Deneus; and T747, 769 (closing arguments)).

Both Griffin and Deneus testified that Griffin and Mills were friends who often clowned around and teased each other (T369, 375, 612). Deneus testified that on the day of the shooting Mills had picked up Griffin around his waist and put him out of Deneus's house, at which time Griffin's pants fell down, causing the people in the house to laugh at and mock Griffin (T373-75). Griffin explained that Mills carried large sums of cash, and he sold drugs, specifically, cocaine and Ecstasy (T613). Mills did not have a driver's license and, on the day of the shooting, Mills wanted Griffin to give him a ride so that Mills could deliver some drugs, but Griffin had refused (T614-15).

That night, Mills was driving an SUV that belonged to Deneus's mother (T379). Griffin was driving a white pickup truck (T384). Mills and Griffin were both stopped, with their vehicles next to each other, in a store parking lot (T384). There were a lot of people standing outside the store, as usual (T403). Deneus said she exited the SUV and was behind both vehicles, walking toward the store at the time of the shooting (T388, 414). She said that Griffin's passenger, Michael Wilcox, was also walking toward the store (T408, 481). But according to Wilcox, he was inside the store at the time of the shooting (T506, 512).

Deneus testified that just after she heard a shot, she saw Griffin pull what appeared to be a shotgun through the window of his truck and saw him speed off (T388). However, Wilcox said that he never saw a gun inside Griffin's truck (T524).

Griffin testified that he witnessed another man shoot Mills, and he drove off because he was afraid:

> 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.
>
> Q. Did you hear anything?
>
> A. Yes, a little pow. That was it.
>
> * * * *
>
> BY MR. O'NEIL:
>
> Q. Now, did you observe a gun?

A. Yes.

Q. Okay. Can you describe what you saw for the jury.

A. Looked like a sawed-off shotgun with a pistol grip.

Q. Approximately how big was it?

A. About, like, this big.

Q. And what did the individual who was holding it do with it?

A. He pulled out his pants and shot TJ.

Q. All right. Did you see where the gun was in relation to TJ or in relation to the Expedition, inside or outside?

A. Well, he was right up to his window, pointing it at him.

Q. Okay. Now, did you indicate that you did hear a gunshot?

A. Yes.

Q. And what did you do next, Steve?

A. I took off and left.

Q. All right. Why did you do that?

A. Because I was scared, didn't know what to do. I just left.

(T626-28).

The defense was focused on exposing Deneus's bias and challenging her credibility (T244-45) and, in closing, the defense attorney emphasized the many contradictory statements that Deneus made to the police and others after the incident (T758-768). The

prosecution was focused on challenging Griffin's credibility. The prosecutor asserted in closing that Griffin was not credible and the jury should not believe his testimony because he was the only person in the courtroom that had an interest in the outcome of the case and because he could tailor his testimony since he was able to sit in the courtroom and hear the State witnesses before he testified (T742-43, 745, 771-76, 779, 783, 789).

During the State's closing, the prosecutor conceded that the State bore the burden of proving, as an element, the mens rea of the offense, telling the jury:

> And just briefly, you're going to hear that the State has to prove three elements. Some are pretty easy.
>
> First element that the State has to prove to you beyond a reasonable doubt is that Thomas Mills, the victim, is dead. Now, you saw, you heard the medical examiner. That's one of the three elements that the State has to prove.
>
> The second element: The death was caused by Steven Griffin. And I'm going to spend some more time talking about that.
>
> And the third element is that there was an unlawful killing by an act imminently dangerous to another and demonstrating a depraved mind without regard to human life. And I submit to you, that is a very easy element based upon the facts of this case.
>
> When you take a shotgun, point it, and pull a trigger at someone, I submit to you that evidences a depraved mind. And that should be very clear to you. When someone points a shotgun at another human being and pulls the trigger and leaving a hole that kills someone, clearly, that evidences a depraved mind.

(T737, emphasis added). The parties agreed that the jury would be

instructed on the lesser offense of manslaughter (T795). The prosecutor specifically addressed the lesser offense in his closing 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.

(T746, emphasis added).

The trial judge instructed the jury on the lesser offense of manslaughter, as follows:

> Now we'll go to 7.7, Manslaughter.
>
> 7.7, Manslaughter. Do you all have it?
>
> To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1) Thomas J. Mills is dead; and,
>
> 2(a) Steve Griffin intentionally caused the death of Thomas J. Mills.
>
> However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide.

(T816, emphasis added).

The jury convicted Griffin as charged, and the trial court sentenced him to forty-five (45) years in prison, with a twenty-five (25) year mandatory minimum (T840; R207-08). Griffin appealed to the Second District Court of Appeal, arguing in part that the

trial court committed fundamental error by giving the erroneous instruction on the lesser-included offense of manslaughter by act.

The Second District agreed with Griffin that the trial court erred by giving the 2006 version of the standard manslaughter by act instruction which requires an intent to kill. But the Court nevertheless affirmed, reasoning that "the error in giving the instruction did not rise to the level of fundamental error because the error did not pertain to a disputed element of the offense." Griffin v. State, 128 So. 3d 88, 89 (Fla. 2d DCA 2013).

The court determined that because Griffin had advanced a defense of mistaken identification, he did not dispute the manner that the crime occurred. The court indicated that Griffin had "conceded" the manner of the crime; therefore, the court reasoned, the failure to provide the jury with an accurate manslaughter instruction was not fundamental error.

> 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 it 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. Battle v. State, 911 So.2d 85, 89 (Fla. 2005). 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. See Ingraham v. State, 32 So.3d 761, 767-68 (Fla. 2d DCA 2010) (holding that the error of omitting the element of intent to commit larceny from the jury instruction was not fundamental because the only disputed issue at trial was identity); Davis v. State, 839 So.2d 734, 735 (Fla. 4th DCA 2003) (holding that the error in failing to instruct the jury on the guilty knowledge element for a drug possession crime was not fundamental because the only disputed issue at trial was identity). Accordingly, we affirm.

Griffin, 128 So. 3d at 90.

SUMMARY OF THE ARGUMENT

This Court should quash the opinion of the Second District Court of Appeal and remand for a new trial because the Second District failed to adhere to this Court's binding opinion in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), which holds that when a defendant is convicted of second degree murder, it is per se reversible and fundamental error for a trial court to give the 2006 standard manslaughter jury instruction that includes an intent to kill element. The Second District's failure to follow the Montgomery decision in this case is based on faulty logic and reliance on cases that do not address error regarding lesser-included offenses.

The remedy for Montgomery error should be settled law by now. The Second District's opinion results in disparate outcomes for similarly situated appellants raising Montgomery error in that court. For instance, the Second District's decision in the instant case should be considered in tandem with the contrary result reached in Hill v. State, which was decided in that court two days after the instant Griffin opinion was issued. When considered with the Hill decision, it becomes abundantly clear that the instant case has created confusion and led to disparate results.

This case should have been reversed for a new trial under the

proper application of Montgomery. The correct approach is illustrated by Willis v. State, 70 So. 3d 739, 740 (Fla. 5th DCA 2011), which applied Montgomery to reverse for a new trial in a case where the defense was, as in the instant case, that of mistaken identification.

Because the Montgomery decision rests on this Court's decisions in State v. Wimberly, 498 So. 2d 929 (Fla. 1986), Pena v. State, 901 So. 2d 781 (Fla. 2005), and State v. Abreau, 363 So. 2d 1063 (Fla. 1978), the Second District has also failed to adhere to that entire line of binding cases from this Court.

ARGUMENT

ISSUE I

THE SECOND DISTRICT'S OPINION FAILS TO ADHERE TO THE BINDING PRECEDENT SET FORTH BY THIS COURT AND SHOULD BE QUASHED.

This Court has long recognized that "failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible." State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978). A defendant is entitled to an accurate instruction for a necessary lesser-included offense regardless of the facts of the case. State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986) ("The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense.").

In State v. Lucas, 645 So. 2d 425, 426 (Fla. 1994), the defendant was charged with, among other things, attempted second-degree murder. The defense advanced by Lucas was mistaken identity: "[a]t trial, Lucas' defense was that although the crimes charged had occurred, he was not the perpetrator." 645 So. 2d at 426. This court addressed the following certified question: "When a defendant has been convicted of either manslaughter or a greater offense not more than one step removed, does failure to explain justifiable and excusable homicide as part of the manslaughter

instruction always constitute both 'fundamental' and per se reversible error, which may be raised for the first time on appeal and may not be subjected to a harmless-error analysis, regardless of whether the evidence could support a finding of either justifiable or excusable homicide?" This Court answered the question by reaffirming that "failure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second-degree murder." 645 So. 2d at 427.

This Court in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), applied these principles, citing to Pena v. State, 901 So. 2d 781 (Fla. 2005), and held that the failure to provide an accurate instruction for the lesser-included offense of manslaughter was per se reversible fundamental error because the defendant was convicted of second-degree murder, which is only one-step removed.

> Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter, under Pena [v. State, 901 So. 2d 781 (Fla. 2005)] 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.

39 So. 3d at 259.

The Second District's opinion in the instant case, however, applies a different analysis, a quasi-harmless-error analysis, to

deny the relief that the binding Montgomery decision required. Although the Second District acknowledged that Mr. Griffin's jury was given a manslaughter instruction which included the intent-to-kill phrase that was the subject of Montgomery, the court nevertheless affirmed the second-degree murder conviction after concluding that the error was not reversible because the intent element of the murder charge was not an element that Griffin explicitly disputed during his trial. The Second District holds that the same error discussed in Montgomery is not per se reversible and is not fundamental error because Griffin never raised a challenge to his mental state at trial or otherwise claimed that he lacked the intent to commit the crime since his defense was based on mistaken identity.[1]

To reach this result, the Second District overlooked the legal principles underpinning the Montgomery decision and relied instead on cases that do not address instructions for lesser included offenses. Griffin cites cases[2] that were not even cited by the State in its Answer Brief submitted in that court. In

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1 This is a new requirement in that court because the Second District previously granted Montgomery relief where the defense put forth at trial was, like that of the instant case, misidentification. See Curry v. State, 64 So. 3d 152, 156 n.4 (Fla. 2d DCA 2011) ("Curry 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.").

2 Battle v. State, 911 So. 2d 85 (Fla. 2005); Ingraham v. State, 32 So. 3d 761 (Fla. 2d DCA 2010); Davis v. State, 839 So. 2d 734, 735 (Fla. 4th DCA 2003).

response to the Appellant's Montgomery argument, the State cited to only one case in its Answer Brief filed in the Second DCA, that of Joyner v. State, 41 So. 3d 306 (Fla. 1st DCA 2010). And in its opinion, the Second DCA specifically rejected the State's Joyner argument. Griffin, 128 So. 3d at 90 ("We therefore decline the State's invitation to follow Joyner.").

The Second District's opinion espouses a faulty analysis based on cases that were not advanced by the State below. In doing so, the opinion disregards this Court's clear holding in Montgomery. The Second District's analysis turns on the fact that "Griffin did not argue that the manner of the shooting did not establish the requisite intent." 128 So. 3d at 90. This is a particularly puzzling analysis when one considers that neither manslaughter nor second-degree murder requires proof that the defendant intended to kill the victim, as this Court explained in Montgomery.

> Although in some cases of manslaughter by act it may be inferred from the facts that the defendant intended to kill the victim, to impose such a requirement on a finding of manslaughter by act would blur the distinction between first-degree murder and manslaughter. Moreover, it would impose a more stringent finding of intent upon manslaughter than upon second-degree murder, which, like manslaughter, does not require proof that the defendant intended to kill the victim. Thus, we conclude that under Florida law, the crime of manslaughter by act does not require proof that the defendant intended to kill the victim.

Montgomery, 39 So. 3d at 256; see also Daniels v. State, 121 So. 3d 409, 415 (Fla. 2013)(quoting Montgomery). Since neither

second-degree murder nor manslaughter requires the State to show that a defendant had the intent to kill the victim, the Second District's Griffin rationale—turning on whether the defendant sufficiently disputed his intent—is an illogical legal basis by which to distinguish Montgomery.

The Second District appears to have overlooked what this Court recognized in Haygood v. State, 109 So. 3d 735 (Fla. 2013), that the jury found no intent to kill when it found the defendant guilty of second-degree murder.

> The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, the only non-intentional homicide offense remaining for the jury's consideration in this case was second-degree murder. The result of incorrectly instructing on a necessarily lesser included offense, or even jettisoning the requirement of instruction on necessarily lesser included offenses as the dissent suggests, is that the jury is deprived of all the tools it needs to reach a proper verdict in the case before it.

Haygood, 109 So. 3d at 742.

It is unclear what the Second District envisions that a defendant must argue at trial regarding his intent in order to preserve his right to an accurate manslaughter instruction under the logic of the Second District's Griffin decision. The opinion does not address this question. And to take the opinion literally, a defendant who sat silent during his trial would not

be entitled to an accurate manslaughter instruction because he did not specifically put the intent element of the charge in dispute. Under the Second District's logic, any identity defense would relinquish the defendant's right to an accurate instruction on the necessary lesser-included offense. However, if the defense attorney at trial were to argue in the alternative that (1) the State has the wrong person and (2) the State has not proved the mens rea of whoever committed the offense, then presumably the Second District would apply Montgomery and find per se reversible fundamental error.

However, one need only look to the Second District's decision in Hill v. State, 124 So. 3d 296 (Fla. 2d DCA 2013), issued two days after the Griffin opinion was issued[3], to see the arbitrariness of the Second District's refusal to apply Montgomery relief in the instant case. The Second District granted Montgomery relief and reversed for a new trial in Hill, where the defense was like that in Griffin, misidentification of the shooter. In Hill the court implicitly distinguished the Griffin rationale on the basis that the prosecutor had put Hill's mental state in dispute when he discussed the lesser-included offenses during his closing argument.

> 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

[3] The Griffin opinion was issued on September 18, 2013. Hill was issued on September 20, 2013.

> 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.

Hill, 124 So. 3d at 301 (emphasis added). It would seem, then, that the Second District will grant Montgomery relief in a mistaken identity case if any mention of lesser-included offenses is made by either the defense or the prosecution during the closing argument. But if this is, in fact, the test, then relief should have been granted in this case because Griffin's prosecutor remarked on the lesser offense, similar to what occurred in Hill. (See T746).[4] So the Second District is choosing to apply this Court's binding precedent set forth in Montgomery in a most arbitrary manner.

The Second District, apparently, has begun applying its Griffin decision to "per curiam" deny relief for Montgomery error, without any further explanation. See Crenshaw v. State, 129 So. 3d 1073 (Fla. 2d DCA 2013) (table decision citing Griffin). The Griffin opinion thus erodes this court's Montgomery decision to the extent that the error discussed therein can no longer be called per se reversible fundamental error. The Second District

[4] In its Answer Brief filed in the Second DCA, the State quoted the prosecutor's remarks in closing concerning the lesser-included offense. See Answer Brief in 2D11-4728 at 15.

has redefined Montgomery error to be far less serious than it was categorized by this Court. By creating a false litmus test that turns on whether the intent or mental state of the defendant was affirmatively placed in issue during the trial, the opinion of the Second District creates an end-run around the fundamental error that this Court defined and established as the law of Florida in Montgomery.

The Second District's analysis is wrong in any event because it fails to account for the fact that when a defendant advances a mistaken identity defense, he does not admit any element of the charge. A defendant's exculpatory statement, even if deemed false by the trier-of-fact, does not provide evidence that supplies any element of the offense. United States v. Morrison, 220 F. App'x 389, 397 (6th Cir. 2007) ("Morrison's unbelievable narrative cannot be used as a sword against him where the Government has not otherwise proffered sufficient evidence of his guilt."); United States v. Rahseparian, 231 F. 3d 1257, 1263 (10th Cir. 2000) ("False exculpatory statements cannot by themselves prove the government's case."). Mr. Griffin never "conceded" any element of the State's case when he put forth a mistaken identity defense because (as the prosecutor acknowledged) the State was still required to prove every element of the charge beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970); Sandstrom v. Montana, 442 U.S. 510, 520 (1979); see also United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976) ("[F]ailure to establish

an alibi does not properly constitute evidence of guilt since it is the burden of the government to prove the complicity of the defendant, not the burden of the defendant to establish his innocence").

Griffin's intent or mental state at the time of the events remained an issue that the jury was required to determine in order to reach a verdict. In the event that the jury disbelieved the defendant's mistaken identity defense, it still could find that the prosecution failed to prove every element of the crime charged, and could return a verdict of guilty of some lesser offense. Therefore, a correct manslaughter by act instruction "was critical to what the jury had to consider in this case" to determine if Griffin was guilty of second-degree murder or manslaughter by act. Williams v. State, 123 So. 3d 23, 28 (Fla. 2013).

The Second District erroneously assumes that the jury could find Mr. Griffin guilty simply by rejecting his mistaken identity defense by erroneously equating the mistaken identity defense with an affirmative defense like insanity or self-defense, for which a defendant concedes some aspect of the State's case in order to raise the defense. See Stump v. Bennett, 398 F.2d 111, 119 (8th Cir.) ("The defense of alibi is readily distinguishable from the plea of insanity."), cert. denied, 393 U.S. 1001 (1968). Taken to its logical conclusion, the Second District's decision would permit a trial judge to refuse to give a necessary lesser-included

instruction whenever the defense advances an alibi or identity defense because such a defense would be considered a de facto concession of all other elements except identity. This logic inevitably will result in a constitutional violation. Cf. People v. Johnson, No. 246937, 2004 WL 2314551 (Mich. Ct. App. Oct. 14, 2004) (unpublished) (holding that trial court infringed on appellant's constitutional right to present a defense when it required the defendant to choose between receiving the lesser-included offense instructions and presenting an alibi defense).

The Second District's opinion achieves a result that the dissenters on the Florida Supreme Court advocated in cases following Montgomery, in an argument that did not prevail.

> A retrial is ordered to correct an error in instruction regarding a lesser included offense, when it is manifest beyond any doubt that no rational juror, acting on the basis of the facts and a correct understanding of the law, could determine the defendant to be guilty of the lesser offense and innocent of the charged offense. This result is reached because under Florida law—as articulated by this Court in the jury pardon doctrine—defendants have a fundamental right for the jury to be correctly instructed on one-step-removed necessarily lesser included offenses.

Haygood v. State, 109 So. 3d 735, 746 (Fla. 2013) (Canady, J., dissenting); see also Williams, 123 So. 3d at 30 (Canady, J., dissenting) (urging rejection of claim of fundamental error, based on the facts of case). In the present case, the Second District has acted in line with the sentiments of the Haygood and Williams dissents by dismissing Mr. Griffin's "fundamental right" for his

jury to be correctly instructed on the one-step-removed necessarily lesser included offense, in favor of a case-by-case fact-based approach.

In Willis v. State, 70 So. 3d 739, 740 (Fla. 5th DCA 2011), the Fifth District reversed for a new trial based on Montgomery where "Willis' defense was mistaken identity." The Fifth District correctly followed this Court's Montgomery precedent in Willis. Because the Second District devised an end-run around Montgomery that is based on an incorrect understanding of the nature of the fundamental error discussed in Montgomery, and the nature of a mistaken identity defense, the Second District is now in direct conflict with this Court's established precedent, and with the Fifth District in Willis.

CONCLUSION

This Court should quash the Second District's decision in this case and remand with directions that Mr. Griffin be granted a new trial consistent with this Court's holding in Montgomery.

APPENDIX

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

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Dawn A. Tiffin at the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 14th day of March, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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128 So.3d 88
District Court of Appeal of Florida,
Second District.

Steve Lawrence GRIFFIN, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. 2D11–4728. | Sept. 18, 2013.
| Rehearing Denied Dec. 2, 2013.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court, Sarasota County, Rochelle Curley, J., of second-degree murder with a firearm. After his motion for new trial was denied, defendant appealed.

[Holding:] The District Court of Appeal, Silberman, J., held that trial court did not commit fundamental error by giving standard jury instruction for lesser-included offense of manslaughter by act.

Affirmed.

Attorneys and Law Firms

*89 Howard L. Dimmig, II, Public Defender, and Deana K. Marshall, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Dawn A. Tiffin, Assistant Attorney General, Tampa, for Appellee.

Opinion

SILBERMAN, Judge.

Steve Lawrence Griffin, Jr., seeks review of his judgment and sentence for second-degree murder with a firearm. Griffin argues that the trial court committed fundamental error by giving the standard instruction on the lesser included offense of manslaughter by act and that the court abused its discretion by denying his motion for new trial based on several alleged incidents of State misconduct. We find no abuse of discretion in the denial of the motion for new trial and do not discuss that issue further. As to the jury instruction issue, we agree that the manslaughter instruction given by the court was erroneous. However, we conclude that the error in giving the instruction did not rise to the level of fundamental error because the error did not pertain to a disputed element of the offense. Accordingly, we affirm.

[1] [2] Griffin was tried by a jury for second-degree murder in violation of section 782.04(2), Florida Statutes (2010). During the jury charge conference, the parties agreed that the lesser included offense of manslaughter by act should be read to the jury. Despite the fact that the date of the offense was January 2011, the court was provided with the 2006 version of the standard manslaughter by act instruction which the Florida Supreme Court has held erroneously requires an intent to kill. *See State v. Montgomery,* 39 So.3d 252, 257 (Fla.2010). The supreme court has concluded that it is fundamental error to give this instruction when the defendant is convicted of an offense that is only one step removed from the lesser included offense of manslaughter and the element of intent is disputed at trial. *See Daniels v. State,* 121 So.3d 409, 38 Fla. L. Weekly S380, S383, (Fla. June 6, 2013); *Haygood v. State,* 109 So.3d 735, 742 (Fla.2013); *Montgomery,* 39 So.3d at 258–59.

The State does not dispute that the jury instruction given by the trial court was erroneous under *Montgomery.* However, the State asserts that the error in giving the instruction was not fundamental because Griffin was convicted of second-degree murder as charged, as opposed to as a lesser included offense. The State cites to *Joyner v. State,* 41 So.3d 306 (Fla. 1st DCA 2010), in support of this argument.

In *Joyner,* the defendant was charged with and convicted of second-degree murder. *Id.* at 306. On appeal, the defendant argued that the standard jury instruction on the lesser included offense of manslaughter *90 by act constituted fundamental error under *Montgomery.* The First District distinguished *Montgomery* on three bases. *Id.* at 306–07. As one of those bases the court stated, without elaborating, that the defendant was not convicted of a lesser included offense but was convicted as charged. *Id.* at 306.

We do not find this to be a valid basis on which to distinguish *Montgomery.* We recognize that the defendant in *Montgomery* was charged with premeditated first-degree murder and convicted of the lesser included offense of second-degree murder. *See* 39 So.3d at 254. However, the charged offense did not factor into the court's fundamental error analysis. Instead, the court focused on whether the erroneous instruction pertained to a crime that was one step

removed from the crime for which the defendant is *convicted. Id.* at 259. We therefore decline the State's invitation to follow *Joyner.*

[3] The State also argues that giving the instruction in this case did not constitute fundamental error because the intent element was not disputed at trial. We agree. The supreme court has "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." *Haygood,* 109 So.3d at 741 (citing *State v. Delva,* 575 So.2d 643, 644–45 (Fla.1991)). This standard is equally applicable in the context of the *Montgomery* instruction on manslaughter by act. *See Daniels,* 121 So.3d at 409, 38 Fla. L. Weekly at S383; *Haygood,* 109 So.3d at 742; *Montgomery,* 39 So.3d at 258.

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 it 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. *Battle v. State,* 911 So.2d 85, 89 (Fla.2005). 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. *See Ingraham v. State,* 32 So.3d 761, 767–68 (Fla. 2d DCA 2010) (holding that the error of omitting the element of intent to commit larceny from the jury instruction was not fundamental because the only disputed issue at trial was identity); *Davis v. State,* 839 So.2d 734, 735 (Fla. 4th DCA 2003) (holding that the error in failing to instruct the jury on the guilty knowledge element for a drug possession crime was not fundamental because the only disputed issue at trial was identity). Accordingly, we affirm.

Affirmed.

NORTHCUTT and SLEET, JJ., Concur.

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