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IN THE SUPREME COURT OF FLORIDA

STEVE LAWRENCE GRIFFIN, JR.,	:	
Petitioner,	:	
vs.	:	Case No. 2D11-4728
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Steve Lawrence Griffin, Jr., appealed his conviction for second-degree murder with a firearm to the Second District Court of Appeal. Griffin argued that the trial court committed fundamental error by giving the standard 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."

The court explained that because Griffin had advanced a defense of mistaken identification, he did not dispute the manner that the crime occurred; therefore the failure to provide his jury with an accurate instruction for the one-step removed lesser-included offense of manslaughter 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 v. State, 2D11-4728, 2013 WL 5225303 (Fla. 2d DCA Sept. 18, 2013).

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review the opinion of the Second District Court of Appeal because it is in express and direct conflict with this Court's opinion in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), which holds that 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 when a defendant is convicted of second degree murder. Because the Montgomery decision rests on this Court's decisions in State v. Wimberly, 498 So. 2d 929, 931 (Fla. 1986), Pena v. State, 901 So. 2d 781 (Fla. 2005), and State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978), the Second District is also in conflict with those cases.

By extension, the Second District is in direct conflict with Willis v. State, 70 So. 3d 739, 740 (Fla. 5th DCA 2011), which applies Montgomery to a case where the defense was mistaken identification.

ISSUE

THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE OPINION OF THE SECOND DISTRICT BECAUSE IT EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. MONTGOMERY, STATE V. WIMBERLY, PENA V. STATE, STATE V. ABREAU, AND WILLIS V. STATE.

Although the Second District acknowledged that Mr. Griffin's jury was given a manslaughter instruction that required the jury to find an intent to kill, the court nevertheless affirmed the second-degree murder conviction after concluding that the error was not reversible because, it reasoned, the intent element was not a disputed element at trial. The Second District concluded that Mr. Griffin was not entitled to a new trial pursuant to State v. Montgomery, 39 So. 3d 252 (Fla. 2010), despite the inaccurate manslaughter instruction given at his trial because he did not challenge the intent element for murder at his trial, since his defense was based on mistaken identity. This is a faulty analysis which misapprehends the concept of per se reversible fundamental error and puts the Second District in conflict with opinions of this Court and with another district court.

This Court has long recognized that courts are required to instruct the jury on all necessarily lesser included offenses to the offense charged, regardless of the evidence. 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."). The Second District's decision is grounded on cases that do not involve this principle; the cases cited by

the court in Griffin do not address instructions on lesser-included offenses.

This Court in Montgomery held that the failure to give an accurate instruction for manslaughter by act was per se reversible fundamental error:

> 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.

In the instant case, the Second District holds to the contrary and denies Montgomery relief, concluding 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 intent was a disputed issue.[1]

This Court has recognized that neither manslaughter nor second-degree murder requires proof that the defendant intended to kill the victim.

> 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

[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) (reversing under Montgomery and acknowledging: "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.").

> 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.

State v. 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 intent to kill it is unclear what any defendant would have to argue at trial to preserve his right to an accurate manslaughter instruction under the Second District's Griffin rationale. The opinion leaves this question open, 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 in dispute.

In Hill v. State, 124 So. 3d 296 (Fla. 2d DCA 2013), issued the two days after the Griffin opinion, the Second District granted Montgomery relief in a case where the defense was misidentification of the shooter. The court implicitly distinguished Griffin on the basis that the prosecutor had put the defendant's mental state in dispute by discussing the lesser-included offenses during 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 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.

(Emphasis added).

The Second District is now applying its Griffin decision to "per curiam affirm" Montgomery error, without any further explanation. See Crenshaw v. State, No. 2D11-5460, 2013 WL 5929691 (Fla. Nov. 6, 2013) (table decision citing Griffin). The Griffin opinion thus erodes this court's authority to classify fundamental error because the opinion provides the Second District with a vehicle to subjectively determine whether to grant Montgomery relief. This opinion will result in PCAs that are unreviewable, based on the Second District's subjective determination of whether the defendant adequately put his mental state at issue during the trial. In that way, the opinion of the Second District destroys the concept of per se reversible fundamental error established by this Court in Montgomery.

The Petitioner here is, in fact, just like a defendant who sat silent and advanced no defense because in order to find him guilty, the jury had to reject his mistaken identity defense and then it had to find that all the elements of the crime were proven by the State beyond a reasonable doubt. But the Second District seems to erroneously assume that the jury could find Mr. Griffin guilty simply by rejecting his mistaken identity defense.

The Second District fails to comprehend 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, does not provide evidence that supplies any

element of the offense. Mr. Griffin never "conceded" any element of the State's case when he put forth a mistaken identity defense. His intent was always in dispute because the State was required to prove every element of the charge beyond a reasonable doubt.

The Second District erroneously equates the mistaken identity defense with an affirmative defense like insanity, self-defense, or voluntary intoxication, for which a defendant must concede some aspect of the State's case in order to raise the defense. When taken to its logical conclusion, the Second District's decision will permit a trial judge to refuse to give lesser-included offense instructions whenever a defendant advances an alibi or identity defense because that defense will be considered a concession of all other elements except that of identity. This will inevitably result in a constitutional violation. Cf. People v. Johnson, 246937, 2004 WL 2314551 (Mich. Ct. App. Oct. 14, 2004) (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).

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. Bolin v. State, 8 So. 3d 428 (Fla. 2d DCA 2009). This Court in Montgomery cited Pena which in turn cites Abreau, and held that failure to provide an accurate

instruction for the lesser-included offense of manslaughter is fundamental error when a defendant is convicted of second-degree murder, which is one-step removed. The Griffin opinion qualifies the Montgomery holding based on the facts of the case and applies a different analysis akin to a harmless error analysis to deny the relief that Montgomery provides. The opinion of the Second District is thus in direct conflict with Montgomery, Wimberly, Pena, and Abreau.

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 opinion of the Second District is therefore also in direct conflict with the Fifth District in Willis.

CONCLUSION

Based on the foregoing reasons and authority, Petitioner Steve Lawrence Griffin respectfully requests this Court to grant jurisdiction to review the opinion of the Second District.

APPENDIX

Griffin v. State, 2D11-4728, 2013 WL 5225303 (Fla. 2d DCA Sept. 18, 2013).

Order denying rehearing.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVE LAWRENCE GRIFFIN, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D11-4728

Opinion filed September 18, 2013.

Appeal from the Circuit Court for Sarasota County; Rochelle Curley, Judge.

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.

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.

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, 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 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.

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, 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.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

December 2, 2013

CASE NO.: 2D11-4728
L.T. No. : 2011 CF 698

Steve Lawrence Griffin v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Steve Lawrence Griffin
Karen Kinney, A.P.D.
Dawn A. Tiffin, A.A.G.
Karen Rushing, Clerk

me

James Birkhold
Clerk

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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 19th day of December, 2013.

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).

Respectfully submitted,

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