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IN THE SUPREME COURT OF FLORIDA

STEVE LAWRENCE 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

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

ISSUE

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

The Second District's opinion and the State's argument share the misconception that a necessary lesser-included offense, one step removed, is not always relevant and material to what the jury must consider in a criminal case. This misconception underlies that court's erroneous conclusion that mens rea was not a material issue in Griffin's trial.

Mr. Griffin's not guilty plea put in dispute every element of the charge. See Fla. R. Crim. P. 3.170(e) ("A plea of not guilty is a denial of every material allegation in the indictment or information on which the defendant is to be tried."); In re Winship, 397 U.S. 358, 364 (1970)).

A defendant may elect to waive instructions on the necessary lesser offense to advance an "all-or-nothing" defense.[1] See Harris v. State, 438 So. 2d 787, 797 (Fla. 1983); Jones v. State, 484 So. 2d 577 (Fla. 1986). However, unless that occurs, the necessary lesser is relevant and material to the jury's deliberations.

[1] In Gallo v. State, 491 So. 2d 541, 543 (Fla. 1986), this court held that in order for the waiver of lesser included offense instructions to be effective, the state had to consent to the waiver.

Here, Griffin did not waive the lesser or concede any element of the charge when he testified that he was not the perpetrator. Griffin's testimony cannot be construed as an affirmative defense (in the nature of confession and avoidance) that admits an essential element. Because the State had to prove mens rea, the manslaughter instruction was relevant and material to what the jury had to consider in order to convict him.

When a defendant disputes the identity element of the charged offense, the defense attorney can make the alternative arguments that the defendant was not the perpetrator, but if you find that he was, the evidence is insufficient to prove his intent. These alternative arguments no doubt can confuse a jury, even suggesting that the defense attorney does not believe his client's protestation of innocence. Cf., Demurjian v. State, 727 So. 2d 324, 327 (Fla. 4th DCA 1999) ("[I]n order for counsel to argue in closing for the consideration of lesser offenses, he would have had to contradict his client, who in his confession adamantly maintained that it was a killing in self-defense."). For this reason, the defense attorney may not refer to the lesser included offenses in closing argument. Nevertheless, the defense certainly hopes that if the verdict is guilty, it will be for the lesser offense.

A prosecutor knows that when the defense raises misidentification or alibi, the lessers are still possibilities for the jury, which is why the prosecutor addresses the lessers even when the defense attorney does not. That is what occurred at

the trial in Hill v. State, 124 So. 3d 296, 301 (Fla. 2d DCA 2013), where the defense argued that Mr. Hill had been misidentified as the shooter and the prosecutor put Mr. Hill's intent at the time of the shooting at issue by discussing the lesser in the closing argument. This is also what occurred in this case when the prosecutor referred to the lesser in his closing.

When Griffin testified that he was not the perpetrator, he did not concede that the shooting was done with a depraved mind. Even if the jury disbelieved Griffin's testimony, it still had to determine whether all the elements of second-degree murder were proved, including that the defendant's act was done from ill will, hatred, spite, or an evil intent. Because the jury heard testimony that Griffin and Mills were friends (T369, 375, 612), it might have concluded that the evidence was insufficient to infer the malice required for second-degree murder.[2] Had the jury been given the necessary tools, meaning the accurate manslaughter instruction, it may have found Griffin guilty of manslaughter under the theory that the evidence was insufficient to show that

[2] Light v. State, 841 So. 2d 623, 626 (Fla. 2d DCA 2003), discusses the element that distinguishes second-degree murder from manslaughter. Reversing a second-degree murder conviction due to insufficient evidence that the defendant acted with a depraved mind, the court explained that "extremely reckless behavior itself is insufficient from which to infer any malice. Moreover, . . . an impulsive overreaction to an attack or injury is itself insufficient to prove ill will, hatred, spite, or evil intent." Id. at 626; see also Poole v. State, 30 So. 3d 696, 699 (Fla. 2d DCA 2010) (reducing second-degree murder to manslaughter where evidence showed an impulsive overreaction; defendant said he stabbed victim because he knew victim "was fixing to get me").

Griffin acted with a depraved mind. The flawed manslaughter instruction removed the lesser as an option by providing the extra intent to kill element. The jury may have concluded that second-degree murder was the only viable option it had to choose from because that offense did not require it to find intent to cause the death.

An accurate instruction for the manslaughter necessary lesser is an essential tool that the jury must be given to render the trial fair. Interpreting Florida Rule of Criminal Procedure 3.510(b), this Court stated:

> A "necessarily lesser included offense" is, as the name implies, a lesser offense that is always included in the major offense. The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given.

State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986). When the trial judge gave an erroneous instruction on the necessary lesser in this case, the court short-circuited the process by which the jury could reach a correct verdict. "It is up to the jury to hear the evidence, find the facts, and apply the law to reach a proper and fair verdict. That process was short-circuited in this case by the faulty instruction." Haygood v. State, 109 So. 3d 735, 743 (Fla. 2013).

The state takes issue with the phrase "per se reversible" error in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and attempts to distinguish State v. Abreau, 363 So. 2d 1063 (Fla. 1978). In so doing, the State overlooks the history and

significance of Abreau. In Lomax v. State, 345 So. 2d 719, 720 (Fla. 1977), this court addressed an issue that was "by no means one of first impression," explaining that "[w]e have been asked repeatedly to determine whether a trial court erred in refusing to instruct on a particular lesser-included offense, and if so whether that error was harmless or prejudicial." This Court in Lomax explained that the Second District embraced a harmless error theory, whereby overwhelming evidence that the defendant committed the crime charged would justify an affirmance when a trial court refused to instruct on a required lesser-included offense. Id. at 721. This Court rejected the Second District's harmless error analysis because it permitted the trial court to invade the province of the jury:

> The major flaw underlying this rationale, however, is that it revives the very problem ostensibly remedied in Hand [v. State, 199 So. 2d 100 (Fla. 1967)]; that is, the trial court is permitted to invade the province of the jury by making a unilateral determination that a lesser-included offense instruction is unnecessary because there is overwhelming evidence to convict the defendant on the crime charged. In such a situation, whether the judge's failure to instruct properly is deemed harmless error or not error at all is immaterial. In both cases the effect is the same-the trial judge successfully takes an important evidentiary matter from the proper province of the jury.
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> * * * *
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> The principle enunciated in [State v.] Terry[, 336 So. 2d 65 (Fla. 1976)] is equally applicable here. Therefore, we affirm that decision and hold that when failure to instruct on a lesser-included offense constitutes error, the harmless error doctrine will not be invoked. Any such failure constitutes prejudicial error and is thus per se reversible.

> Any prior appellate decisions conflicting with the principle announced herein are overruled.

Lomax, 345 So. 2d at 720, 721. In Abreau, this Court reaffirmed the holding of Lomax, but clarified that the broad language applied only to lesser included offenses that were one-step removed.

> [T]o the extent that the broad language employed in Lomax intimates that the harmless error doctrine cannot be invoked whenever there has been a failure to instruct on Any lesser-included offense, it is disapproved. Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, . . . reviewing courts may properly find such error to be harmless.

Abreau, 363 So. 2d 1063, 1064.

"[T]he per se reversible error rule is concerned with the right to a fair trial." Johnson v. State, 53 So. 3d 1003, 1006 (Fla. 2010). "This Court has . . . applied the per se reversible error rule to those cases where the appellate court is unable to conduct a harmless error analysis because it would have to engage in pure speculation in order to attempt to determine the potential effect of the error on the jury." Id. at 1007.

> Another circumstance in which this Court has held that an error is per se reversible because the reviewing court cannot conduct a harmless error analysis is when a jury is not instructed on a lesser-included offense one step removed from the charged offense. In such a situation, the reviewing court cannot determine the effect of the error on the jury because the court cannot know whether the jury would have convicted the defendant of the next lesser included offense if the jury had been given the option. As explained by this Court: "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 v. State, 901 So. 2d 781, 787 (Fla. 2005) (citing State v. Abreau, 363 So. 2d 1063 (Fla. 1978)). To conduct a harmless error analysis in that situation would be to engage in pure speculation.

Johnson, 53 So. 3d at 1008 (emphasis added).

Montgomery error falls into the category of per se reversible error discussed in Johnson. The Montgomery opinion relies upon a well-established legal framework to find that giving the erroneous standard manslaughter instruction was fundamental error. The Second District discarded the Montgomery holding and the framework upon which it is based when it affirmed Griffin's case.

The Second District's analysis must be rejected because the logic on which it is based will inevitably lead to a Hobson's choice that will force a defendant to give up his defense or forego a lesser-included instruction. See United States v. Trujillo, 390 F.3d 1267, 1269 (10th Cir. 2004) (holding that trial court erred when it conditioned granting defendant's request for a lesser-included instruction with his abandoning what the court characterized as mutually exclusive defenses).

The Second District's decision, in effect, shifts the burden to Griffin to negate the intent element in order for that element to be considered a material issue. The U.S. Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), overturned a statutory scheme that effected this type of burden-shifting because it violated Winship. The State of Maine homicide laws placed the burden on the defendant to establish that he acted in the heat of passion on sudden provocation in order to reduce murder to

manslaughter. The U.S. Supreme Court rejected the argument that proof of the element distinguishing murder and manslaughter could be shifted to the defendant once the state proved he was the perpetrator.

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Mullaney v. Wilbur, 421 U.S. at 698.

Similarly, in the present case, the distinction between second-degree murder and manslaughter is highly significant. The jury was deprived of an instruction by which it could draw an accurate distinction between those two offenses; an error that inured to the benefit of the State. The question of whether that error should be remedied must not rest on whether the defendant put on a particular defense or whether his attorney mentioned the lesser-included offenses during closing argument.

On occasion, this Court has found that error in jury instructions for the offense of conviction did not require a reversal because the error did not pertain to a disputed element. But the "rare" case when an element of a crime is not in dispute occurs only when an element is truly conceded, i.e., when proof of

an element is apparent at trial. See Pena v. State, 901 So. 2d 781, 784 (Fla. 2005). For instance, where an offense requires proof that a defendant is over the age of 18 and the jury viewed the 37-year old defendant sitting at counsel table throughout the trial, the appellate court could say that an instruction omitting the defendant's age as an element is not fundamental error because his age was not in dispute and the defendant's age was obvious to the jury. See Glover v. State, 863 So. 2d 236 (Fla. 2003).

This is a different line of cases than the line of cases governing the necessity of instructing on category one lessers. The line of cases addressing error that eviscerates a necessary lesser that is one step removed does not provide for a harmless error analysis.

This Court has never suggested that a district court could affirm a second-degree murder conviction after finding that Montgomery error occurred. To read this Court's Montgomery line of cases that way is to venture far afield from their holdings. In Daniels v. State, 121 So. 3d 409 (Fla. 2013), extending the Montgomery analysis to cases involving the 2008 jury instruction, this Court stated:

> In reaching the verdict that it did—second-degree murder—the jury necessarily concluded that Daniels had no intent to kill. Because of the continuing requirement in part of the 2008 instruction that the jury find intent to kill in order to convict for manslaughter by act, the jury was left with second-degree murder as the only other non-intentional alternative. Thus, because fundamental error occurred in this case, a new trial is required.

121 So. 3d at 419. In Haygood v. State, 109 So. 3d 735 (Fla.

2013), holding that a culpable negligence manslaughter instruction did not cure Montgomery error, this Court stated:

> The error in the manslaughter jury instruction prevented the jury from being able to choose the true verdict in this case—a verdict based on the jury's application of its fair assessment of the facts concerning Haygood's intent to the proper elements of the offense as set forth in the manslaughter statute.

109 So. 3d at 743. Those two cases both upheld Montgomery and extended it.

A district court is required to follow this Court's decisions. When that does not occur, litigants face uncertainty and arbitrary results ensue. See Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level."). The Second District has improperly interpreted language in Daniels and Haygood as giving it license to affirm in spite of the error this Court designated as fundamental in Montgomery.

Although error designated as fundamental cannot be subject to a harmless error analysis, the Second District's method for deciding whether to remedy Montgomery error is comparable to a harmless error analysis. But instead of placing the burden on the State as the beneficiary of the error, the district court places the burden on the defendant to show that he (or the prosecutor) argued something about his intent or the lesser-included charges during the trial. Under the analysis, in order to make the lesser

a material issue, a defense attorney must argue to the jury that "the defendant was not the perpetrator, but if you find that he was, you should look at whether the state proved intent." Whether such alternative arguments were made to the jury should not be the difference that separates Montgomery cases that get remedied from those that do not.

In a recently issued order from the Second District, in a case on remand from this Court for reconsideration in light of Daniels, the district court explicitly recognized that intent can considered by the jury even when the defense presented is misidentification. See Order entered in Berube v. State, Case No. 2D09-4385 (Fla. 2d DCA April 29, 2014) (directing supplemental briefing on the issue of whether Mr. Berube's intent was disputed at trial) (attached as Appendix A). In the order, the court states:

> Mr. Berube's theory of defense at the trial that is the subject of this appeal was that he did not commit the murder and, instead, it was committed by someone else. Thus, on the one hand, it appears that Mr. Berube's intent was not a material element that was disputed at trial. On the other hand, however, the jury's return of a guilty verdict on second-degree murder rather than first-degree murder, on which it was also instructed, suggests that the jury's decision might have turned on an issue of intent.

Id. at 2. The order illustrates the difficulty faced by the Second District in implementing its Griffin decision. The court recognizes that even though Berube's defense was based on the theory that the defendant was not the perpetrator, the jury must have considered the issue of intent since it returned a verdict

for the lesser. This order implicitly recognizes that the appellate court cannot know whether the jury would have convicted of the next lesser included offense if the jury had been given that option.

The only way that the state can justify the Second District's decision to affirm this case is to question whether this Court meant what it said in Montgomery. The Montgomery decision conforms to well-established precedent; there is no need to revisit it here. This Court should quash the opinion under review because the Second District failed to follow this Court's correct and binding Montgomery decision and remand with instructions to the district court to reverse for a new trial.

CONCLUSION

Petitioner Steve Griffin respectfully requests this Court to quash the opinion of the Second District and direct that Griffin be given a new trial in accordance with Montgomery.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Dawn Tiffin, Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 28 day of May, 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).

Respectfully submitted,

/s/ Karen M. Kinney

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APPENDIX TO REPLY BRIEF OF PETITIONER

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

April 29, 2014

CASE NO.: 2D09-4385
L.T. No. : CRC 04-00350 CFANO

Leo Richard Berube	v.	State Of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

In Berube v. State, 84 So. 3d 436 (Fla. 2d DCA 2012), this court rejected Leo Richard Berube's challenge to his second-degree murder conviction. Certifying conflict on the issue concerning the jury instruction that had been given on the lesser included offense of manslaughter, this court concluded that the jury instruction did not constitute fundamental error for the reasons set forth in Daniels v. State, 72 So. 3d 227, 230 (Fla. 2d DCA 2011) (determining that the version of the manslaughter instruction given at the defendant's trial did not require the jury to find that the defendant intended to kill the victim, as had the prior version of the instruction found to be erroneous). Berube, 84 So. 3d at 436. This court's decision in Daniels was subsequently quashed by the Florida Supreme Court. Daniels v. State, 121 So. 3d 409 (Fla. 2013). The supreme court then quashed this court's decision in Berube and remanded it to this court for reconsideration upon application of its decision in Daniels. Berube v. State, No. SC12–672 (Feb. 27, 2014) (2014 WL 814920).

Mr. Berube's appeal is now before this court for reconsideration in light of the supreme court's decision in Daniels. In that case, the supreme court explained, in part:

> [A] defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial. Accordingly, where the trial court fails to correctly instruct on an element of the crime over which there is dispute, and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any of its lesser included offenses, fundamental error occurs.

Daniels, 121 So. 3d at 418 (Emphasis added.)

App. 1

Mr. Berube's theory of defense at the trial that is the subject of this appeal was that he did not commit the murder and, instead, it was committed by someone else. Thus, on the one hand, it appears that Mr. Berube's intent was not a material element that was disputed at trial. On the other hand, however, the jury's return of a guilty verdict on second-degree murder rather than first-degree murder, on which it was also instructed, suggests that the jury's decision might have turned on an issue of intent.

Accordingly, the parties are directed to file supplemental briefs, not to exceed fifteen pages, addressing whether the erroneous jury instruction on manslaughter that was given in this case resulted in fundamental error. See also Griffin v. State, 128 So. 3d 88 (Fla. 2d DCA 2013) (finding no fundamental error arose from jury charge that employed the erroneous 2006 version of the standard manslaughter by act instruction even though the jury returned a guilty verdict to second-degree murder as charged, which was only one step removed from manslaughter, because the element of intent was not disputed), review granted, No. SC13-2450 (Fla. Feb. 17, 2014) (2014 WL 700611). The supplemental initial brief shall be served within 20 days, and the supplemental answer brief shall be served within 20 days of service of the supplemental initial brief.

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

Served:

Susan D. Dunlevy, A.A.G. Cynthia J. Dodge, A.P.D. Leo Richard Berube
Ken Burke, Clerk

ec

James Birkhold
Clerk

DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA