IN THE SUPREME COURT OF FLORIDA

STANLEY McCLOUD,

Petitioner,

v. CASE NO. SC14-1150

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

To provide a more complete picture of the evidence at trial, Respondent submits the following additions to Petitioner's Statement of Facts:

During his interview with police, the Defendant was asked why he went to get the gun before shooting his wife; he replied that she "put me on child support." (Vol. 14, Supp. Rec. at p. 21). The Defendant later contended that he was just going to scare the victim, that he did not know he still had the hammer cocked on the gun, and that he did not intend to touch the trigger. (Id. at p. 22-24). He admitted sitting on the floor, with the gun, for 15 minutes while the victim kept talking and would not shut up. (Id. at p. 13, 19). His young son and daughter were asleep in the bed at the time. (Id. at p. 13-14).

The Defendant told the police that while they were sitting outside barbequing earlier that day, the victim told him she was involved with another man during the time they were separated. (Id. at p. 10). The Defendant left and sat in his truck for a while, then bought more beer for the victim and came back inside, but the victim kept on talking and he "just couldn't take it no more" so he shot her. (Id. at p. 10-11).

The victim's 20 year old son testified that he was on the opposite side of the house, in his own room, when the victim was shot. (T. 376). He heard a thud, like something had fallen, and as he went to check on it he heard his little brother screaming.

(T. 376). He went to the victim's room and smelled smoke. (T. 377). His brother and sister were there, but the Defendant was not. (T. 377). He had heard no yelling or fighting that night. (T. 379-80).

The FDLE expert testified that the gun was at the top of the normal range for trigger pull -- the force needed to fire the gun. (T. 431-34). He further noted that there was no propellent on the child's shirt, so either the shooter was more than four feet away or there was something between the boy and the gun. (T. 437-38). The particulate lead found on the shirt was consistent with the passage of a bullet. (T. 438-39). Someone who went in to the room very soon after the gun was fired would smell burned gunpowder. (T. 439).

SUMMARY OF ARGUMENT

Error in the instruction on the intent requirement for manslaughter by act is fundamental only where the error made a difference at trial – that is, where the manslaughter offense is only one step removed from the conviction, where the defendant's intent was actually an issue at trial, and where the other instructions left the jury with no viable choice of a lesser offense other than second degree murder if it concluded that the defendant had no intent to kill.

In the instant case, the Defendant was convicted of an offense two steps removed from manslaughter, rendering any error in that instruction harmless. Further, the evidence at trial and the instructions given left open viable alternatives for a lesser conviction of culpable negligence manslaughter or third degree murder – especially where the special heat of passion instruction specifically clarified that manslaughter was a valid lesser offense if the jury believed the Defendant's statement to police. Accordingly, the district court properly found the error in the manslaughter instruction was not fundamental, but instead at worst harmless, and the Defendant is not entitled to a new trial.

ARGUMENT

THE JURY INSTRUCTIONS WERE NOT FUNDAMENTALLY ERRONEOUS UNDER THE CIRCUMSTANCES OF THIS CASE.

The Defendant seeks a new trial based on error in the manslaughter by act instruction. In State v. Montgomery, 39 So. 3d 252 (Fla. 2010), this Court concluded that an instruction on manslaughter requiring the State to prove the defendant "intentionally caused the death" of the victim was erroneous. Under this instruction, the Court held, "a reasonable jury would believe that in order to convict [the defendant] of manslaughter by act, it had to find that he intended to kill [the victim]," which is not actually required under Florida law. Id. at 257. Because manslaughter by act was a lesser offense only one step removed from the second degree murder conviction, a new trial was required.

This erroneous instruction was given here. (T. 707). However, the district court of appeal found that this error did not necessitate a new trial under the circumstances of this case. McCloud v. State, 139 So. 3d 474 (Fla. 5th DCA 2014). That ruling is correct and should be approved by this Court.

Fundamental Error

As a general rule, an objection must be raised at trial to preserve an issue for appeal. This requirement "is based on practical necessity and basic fairness in the operation of the judicial system." City of Orlando v. Birmingham, 539 So. 2d 1133, 1134 (Fla. 1989). Without an objection, the trial judge has no

opportunity to rule upon a point of law and to correct any error at an early stage of the proceedings. Id. at 1134-35. See also Crumbley v. State, 876 So. 2d 599, 601 (Fla. 5th DCA 2004) (contemporaneous objection rule prevents litigant from allowing an error to go unchallenged so it may be used as a tactical advantage later).

This Court has stated repeatedly that jury instructions are subject to this contemporaneous objection rule. See, e.g., Archer v. State, 673 So. 2d 17, 20 (Fla.), cert. denied, 519 U.S. 876 (1996). To demonstrate fundamental error in the context of a jury instruction, then, the error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Garzon v. State, 980 So. 2d 1038, 1042 (Fla. 2008).

Such a determination cannot be made in a vacuum or as a categorical matter. Rather, the effect of the error – whether it reached down into the validity of the trial itself – must be evaluated in the context of the trial, considering the nature and credibility of the factual issues, the defenses and argument presented to the jury, and the nature of the error itself. See Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) ("[i]f the error was not harmful, it would not meet our requirement for being fundamental").

This individualized determination only makes sense – if the alleged error had been preserved below, a harmless error review would be appropriate. Certainly no *lesser* standard should be used for reversal where there is *no objection* below. Indeed, even where the error relates to an *element of the crime*, if that element is not in dispute at the trial itself, the error is not fundamental. Battle v. State, 911 So. 2d 85, 88-89 (Fla. 2005), cert. denied, 546 U.S. 1111 (2006); State v. Delva, 575 So. 2d 643, 645 (Fla. 1991).

Accordingly, while the Defendant argues that the lower court erred in considering the actual effect of the instructional error on the trial itself, this argument has no merit. This Court has never held that Montgomery error is per se reversible in all cases, nor should it do so now.

Haygood

The Defendant contends that the lower court's opinion misapplies this Court's decision in Haygood v. State, 109 So. 3d 735 (Fla. 2013), by undertaking a harmless error analysis. This argument has no merit, as this Court expressly recognized in Haygood that a harmless error analysis is appropriate when the erroneous instruction is two or more steps removed from the crime for which the defendant was convicted. *Id.* at 741 n.4. This was exactly the conclusion of the court below, and that conclusion should be approved.

In the original proceedings on direct appeal, the State asked the court to follow the numerous cases that had concluded that Montgomery error was harmless where, as here, the jury was given the opportunity to convict the defendant of a lesser offense under a different theory – manslaughter by culpable negligence. The Fifth District Court of Appeal agreed with the State, citing this caselaw in affirming the Defendant's conviction. McCloud v. State, 53 So. 3d 1206 (Fla. 5th DCA 2011), quashed, 137 So. 3d 1021 (Fla. 2014).

This Court subsequently clarified the application of Montgomery in these situations. In Haygood, the Court held that giving the erroneous manslaughter by act instruction can be fundamental error even if the instruction on manslaughter by culpable negligence is given, *but not in all cases*. Rather, the error is fundamental only when it made a realistic difference at trial.

First, the error in the instruction must involve a disputed element of the crime – that is, intent must be an issue at trial. Haygood, 109 So. 3d at 742. Cf. Ebron v. State, 134 So. 3d 481, 483 (Fla. 1st DCA 2013) (Montgomery error not fundamental where record reflected that "intent to kill" was not disputed by either the State or the defense; instead, defense argued that defendant was not the shooter); Griffin v. State, 128 So. 3d 88, 90 (Fla. 2d DCA 2013) (Montgomery error not fundamental where sole defense was mistaken identity), rev. granted, 143 So. 3d 918 (Fla. 2014) (SC13-

2450). Here, intent was clearly an issue at the trial below, and the State does not contend otherwise.

This does not end the inquiry, however, as in Haygood this Court went further in delineating the circumstances where a new trial is required. Specifically, reversal is required only in those cases "where the evidence *supports* manslaughter by act but *does not support* culpable negligence," and the defendant is convicted of second-degree murder. Haygood, 109 So. 3d at 737 (emphasis added). In other words, the error requires a new trial when the error made a difference – effectively eliminating from consideration the only *viable* lesser offense and compelling a verdict for a greater crime.

In cases where culpable negligence is not supported by any evidence, the error in the manslaughter by act instruction harms the defendant by compelling a verdict of second-degree murder if the jury concludes that the defendant had no intent to kill.

If the jury believes that the defendant's act was intentional but he did not possess the intent to kill, but culpable negligence obviously does not apply under the facts presented at trial, neither form of manslaughter actually provides a viable lesser offense. Accordingly, the jury is left with no choice but to convict of second degree murder. Haygood, 109 So. 3d at 742 (defendant's admission that he intended to strike and choke victim essentially eliminated manslaughter by culpable negligence as a viable lesser offense, and error in instruction on manslaughter by

act left second-degree murder as "the only offense realistically available to the jury under the evidence presented in this case and the instructions given"). See also Daniels v. State, 121 So. 3d 409, 419 (Fla. 2013) ("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*.") (emphasis added).

In short, then, this Court found in Haygood that Montgomery error was fundamentally erroneous in those situations where manslaughter by act was the only viable lesser offense based on the instructions given and the evidence at trial. Cf. Hill v. State, 124 So. 3d 296, 301 (Fla. 2d DCA 2013) (Montgomery error required new trial where ""the only homicide offense not requiring a finding of intent to kill remaining for the jury's consideration was attempted second-degree murder."). That is not the case here.

First, unlike Haygood, in the instant case the evidence did support a finding of culpable negligence. The Defendant claimed in his statement to police that he only intended to scare the victim, and that he did not intend to touch the trigger and did not realize he still had the hammer cocked on the gun. (Vol. 14, Supp. Rec. at p. 21-24). If the jury believed this statement, a conviction of the lesser offense of culpable negligence was completely

appropriate. As the defense argued in closing, the verdict should be either not guilty or manslaughter. (T. 686-87). In fact, the Defendant entered a plea to culpable negligence charges involving the children, based on the same single shot he fired that killed his wife. (R. 164-69).

Second, even if the jury found that the Defendant went beyond being only culpably negligent but had no intent to kill, it still had the option to convict the Defendant of a lesser offense that did not require proof of intent to kill. Specifically, the jury was given an instruction on the lesser offense of third degree felony murder, which specifically provided that the State did not have to prove that the Defendant had an intent to kill. (T. 705-06). Unlike the jury in Haygood, then, this jury had the option to convict of a lesser homicide crime even if it concluded that the Defendant had no intent to kill.

Finally, the jury in this case was given a specific instruction on heat of passion,[1] which provided as follows:

> Heat of passion is a valid theory of defense to the ... depraved mind element of second degree murder. Passion

[1]The Defendant asserts that this is a classic case of heat of passion, thereby evidencing the importance of a correct instruction on manslaughter. The State submits that mulling over a shooting for 15 minutes is far from a classic example of heat of passion. Compare Paz v. State, 777 So. 2d 983, 984 (Fla. 3d DCA 2000) (finding heat of passion where defendant killed victim "immediately upon realizing that the victim had sexually assaulted his wife") with Palmore v. State, 838 So. 2d 1222, 1224-26 (Fla. 1st DCA 2003) (affirming second degree murder conviction where defendant, aware of the victim's relationship with another man, stabbed the victim several times after seeing her naked with that man).

> is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror.
>
> Pursuant to Florida law, **if you believe defendant's passion resulted in a state of mind where depravity, which characterized murder in the second degree is absent, you may return a verdict of manslaughter.**

(T. 705) (emphasis added). In other words, this jury was *specifically told* that a manslaughter verdict would be appropriate if it concluded that the Defendant did not have even "depraved mind" intent, but was acting instead in the heat of passion, as he claimed.

Under these circumstances, this Court's decision in Haygood does not require a new trial, and the lower court's decision affirming the Defendant's conviction for second-degree murder should be approved.

Two Steps Removed

That the Montgomery error was subject to a harmless error analysis is true not just under Haygood, but under other long-standing precedent as well. This Court has repeatedly and consistently held that error in a jury instruction on a lesser offense is presumed harmless where the instructional error or omission relates to an offense that is more than one step removed from the crime for which the defendant was found guilty. As this Court explained:

> the significance of the two-steps-removed requirement is more than merely a matter of number or degree. A jury

> must be given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. 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. However, when the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis.

Pena v. State, 901 So. 2d 781, 787 (Fla. 2005). See also Pope v. State, 679 So. 2d 710, 714-15 (Fla. 1996), cert. denied, 519 U.S. 1123 (1997); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992); State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978).

In Berube v. State, 149 So. 3d 1165, 1168-73 (Fla. 2d DCA 2014), the district court expressed concern with applying this two step rule in this context. Notably, the court was not troubled by applying this rule to find harmless error where manslaughter is at least two steps removed from the conviction (for example, where the defendant is convicted of first degree murder). Instead, the court was concerned that applying the Pena line of cases will necessarily result in a finding of per se reversible error any time manslaughter is one step removed from the conviction, no matter the facts. 149 So. 3d at 1173.

As discussed above, this Court's opinion in Haygood makes clear that an evaluation of the effect of Montgomery error must include a practical consideration of the actual trial. The State submits, then, that a two step analysis is simply an *additional* means of finding a Montgomery error to be harmless in cases where

the manslaughter offense is remote from the conviction and, as a practical matter, could not have reached down into the validity of the trial itself. Where manslaughter is one step removed from the conviction, an evaluation of the actual issues at trial, and other instructions given, is the proper focus of a harmless error analysis, as discussed above.

The Defendant further contends that this long-standing law is not applicable here because this Court has made clear that Montgomery error is not about the possibility of a jury pardon. This argument has no merit. Whether the instructional error is analyzed as a lost opportunity for the jury to exercise its pardon power or a lost opportunity for the jury to properly evaluate all possible charges, the end result is the same: at some point the lesser offense becomes so far removed from the crime for which the defendant was convicted that deeming the error harmful (and fundamentally harmful, at that) is absurd.

A jury is instructed to convict the defendant of the greatest offense established beyond a reasonable doubt, not to start with the lowest level offense and work its way up: "If you return a verdict of guilty, it should be for *the highest offense which has been proven beyond a reasonable doubt*." (T. 714) (emphasis added).

In light of such instructions, this Court has properly recognized that an instructional error in an offense more than one step removed does not reach down into the validity of the trial itself, and the lower court properly applied that precedent.

This Court has expressly stated that manslaughter is three steps removed from first degree murder, where the jury could have returned verdicts for second degree or third degree murder. Echols v. State, 484 So. 2d 568, 574 (Fla. 1985). It necessarily follows that manslaughter is two steps removed from second degree murder, where the jury could have returned a verdict for third degree murder, as was the case here.

While the Defendant laments this system as inappropriately elevating the happenstance order of offenses on the verdict form, this certainly makes more sense than analyzing the "steps" based on the statutory degree of the offenses. A jury has no idea what the degree of offense is, or what that means. The jury in the instant case, for example, was never told that second degree murder is a first degree felony while third degree murder and manslaughter are second degree felonies. Instead, the jury was told to return a verdict for the *highest* offense proven beyond a reasonable doubt. (T. 714). As far as the jury was concerned, the offenses were instructed upon, and placed on the verdict form, from highest to lowest.

Indeed, when explaining the verdict form in the instant case, the court eliminated any possible doubt regarding how to evaluate the lesser offenses, specifically instructing in relevant part as follows:

> If you do not check A [guilty of first degree murder] or B [guilty of second degree murder] you may check C, the

> defendant is guilty of murder in the third degree, a lesser included offense. . . .
>
> If you do not check A, B, or C, you may check D, the defendant is guilty of manslaughter, a lesser included offense.

(T. 715-716).

Unless the jury completely disregarded these instructions, there is no question that manslaughter (option "D") was two steps removed from second degree murder (option "B"). The case law discussed above is based on a practical evaluation of what the jury actually considered, not the legalistic formula proposed by the Defendant.

Finally, the Defendant's reliance on this Court's decision in Herrington v. State, 538 So. 2d 850 (Fla. 1989), and cases cited therein, is misplaced. First, the relevant portion of that case merely stands for the proposition that third degree murder is one step removed from second degree murder, and accordingly the complete failure to instruct on that lesser offense cannot be harmless. Id. at 851. The State agrees with this holding – and the lower court's opinion in no way conflicts with this rule. Had the error in the instant case involved the instruction on third degree murder, or had no instruction on third degree murder been given at all, this case would be helpful to the Defendant here.

Further, this line of cases evaluates error in the complete failure to instruct on a lesser offense. Id. The harm (or lack thereof) from such an error cannot be considered based on the

practical effect on the jury in light of the instructions on lesser offenses, but instead has to be considered based on the legal analysis of the degree of the offense. See also Dicicco v. State, 496 So. 2d 864, 865 (Fla. 2d DCA 1986) (failure to instruct on the next immediate lesser included offense (one step removed) constitutes per se reversible error even if instruction on offense lesser than that, but with same sentence, is given).

Harmless Error

Based on the facts of this case and the instructions given, the lower court properly concluded that the error in the manslaughter instruction did not reach down into the validity of the trial itself, but was instead harmless.

The Defendant argues that even if this Court does not accept his argument that he is entitled to a new trial, it should at the very least remand and direct the lower court to set out more reasoning behind its decision. Without such a remand, the Defendant contends, this Court has no way of knowing if the district court's analysis was correct.

Such a holding by this Court would create a dangerous precedent. Essentially, the Defendant is asking this Court to *presume* that the Fifth District Court of Appeal did not know what it was doing, based solely on the fact that the Defendant does not agree with its conclusion. The district court was not required to set out its reasoning in sufficient detail to satisfy the Defendant; it could very well have simply affirmed his conviction

without any written opinion at all. Instead, the court expressly stated that it had undertaken a harmless error analysis and found that the Montgomery error was harmless. McCloud, 139 So. 3d at 474. Unlike the case relied on by the Defendant, there is simply no basis to conclude that the lower court's analysis was anything but correct. Cf. Ventura v. State, 29 So. 3d 1086, 1089 (Fla. 2010) (remanding for reconsideration where lower court "*expressed* an *incorrect* harmless error analysis") (emphasis added).

The evidence reflects that the Defendant took a .357 handgun from the closet and sat on the floor for fifteen minutes while the victim repeatedly talked about the fact that she had been with another man while they were separated – a fact the Defendant had learned earlier that day. He then fired a single shot into the victim's chest and immediately fled from the house.

The only issue at trial was the Defendant's intent at the time of the shooting – whether he acted with premeditation, as charged, with a depraved mind, as the jury found, or in the heat of passion, as he claimed. While the jury was incorrectly told that the crime of manslaughter by act required an intent to kill, its consideration of the evidence did not require it to choose a verdict of second degree murder if it decided that the Defendant lacked such an intent. Instead, it had other options that were completely supported by the evidence and the instructions given by the trial court.

The Montgomery error in the instant case was harmless, and the lower court's opinion should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to Nancy Ryan, counsel for Appellant, 444 Seabreeze Blvd., Ste. 210, Daytona Beach, Florida 32118, by email to appellate.efile@pd7.org and ryan.nancy@pd7.org, this 12th day of March, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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