

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2010

DESMOND T. KENNER,

Appellant,

v.

Case No. 5D09-90 & 5D09-166

STATE OF FLORIDA,

Appellee.

Opinion filed November 12, 2010

Appeal from the Circuit Court
for Orange County,
Marc L. Lubet, Judge.

James S. Purdy, Public Defender, and
Noel A. Pelella, Assistant Public Defender,
Daytona Beach, for Appellant.

Desmond T. Kenner, Lake Butler,
Pro se.

Bill McCollum, Attorney General,
Tallahassee, and Douglas T. Squire,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Appellant challenges his conviction for second-degree murder on several grounds, only one of which merits discussion. Appellant contends that the jury instruction for the lesser-included offense of manslaughter by act was fundamentally flawed, requiring a new trial. We agree and reverse.

Appellant was charged and tried for second-degree murder. In addition to instructing the jury on the second-degree murder charge, the trial judge also instructed the jury, without objection, using the then-standard instruction for manslaughter by act, a category one lesser-included offense of the murder charge. Subsequent to the trial, our supreme court held that the use of this instruction constitutes fundamental error. *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010). Although the State concedes that a new trial is required if *Montgomery* is applicable, it attempts to distinguish it based on *Joyner v. State*, 41 So. 3d 306 (Fla. 1st DCA 2010), which distinguished *Montgomery* on two grounds, neither of which are applicable here. Here, the jury was not instructed on manslaughter by culpable negligence because defense counsel did not believe that the facts supported the instruction. Nor did counsel invite the error here in the manner identified by the court in *Joyner*. Accordingly, *Montgomery* compels a new trial.

REVERSED AND REMANDED.

PALMER, TORPY and COHEN, JJ., concur.