

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

November 6, 2009

ANGEL MANUEL NIEVES,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D08-3809

BY ORDER OF THE COURT:

Appellant's motion for rehearing is granted. The prior opinion dated September 16, 2009, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRK HOLD, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANGEL MANUEL NIEVES,)
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 Appellant,)
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 v.)
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 STATE OF FLORIDA,)
)
 Appellee.)
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Case No. 2D08-3809

Opinion filed November 6, 2009.

Appeal from the Circuit Court for Lee
County; Thomas S. Reese, Judge.

Lee Hollander of Law Offices of Hollander
and Hanuka, Naples, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Ha Thu Dao, Assistant
Attorney General, Tampa, for Appellee.

KHOUZAM, Judge.

Angel Manuel Nieves appeals his judgment and sentence for second-degree murder. Nieves contends that the trial court committed fundamental error when it instructed the jury on the lesser-included offense of manslaughter by act because the standard instruction in effect at the time of and given at his trial improperly imposed the

additional element of "intent to kill" to that offense.¹ In support of his contention, Nieves relies on Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), review granted, 11 So. 3d 943 (Fla. 2009), in which the First District determined that the trial court fundamentally erred in giving the standard instruction on manslaughter by act in effect at the time of Montgomery's trial, which was virtually identical to the instruction given at Nieves' trial. This court, however, recently held that the instruction was not fundamentally erroneous. See Zeigler v. State, Case No. 2D07-5300, 2009 WL 3232684, at *7 (Fla. 2d DCA Oct. 9, 2009). Furthermore, unlike Montgomery and Zeigler, the jury in Nieves' case was also instructed on the lesser-included offense of manslaughter by culpable negligence.

Accordingly, we affirm Nieves' conviction and sentence, and as we did in Zeigler, we certify conflict with Montgomery.

Judgment and sentence affirmed; conflict certified.

WALLACE and MORRIS, JJ., Concur.

¹The instruction given in Nieves' case is no longer the standard instruction for manslaughter by act. The instruction, which was modified by the supreme court in December 2008, now reads: "In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death, only an intent to commit an act which caused death." In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10, 997 So. 2d 403, 403 (Fla. 2008).