

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

HERBERT TYRONE JOHNSON,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
_____)

Case No. 2D08-5630

Opinion filed May 14, 2010.

Appeal from the Circuit Court for Lee
County; Edward J. Volz, Jr., Judge.

James Marion Moorman, Public Defender,
and Richard Sanders, Assistant Public
Defender, Bartow, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Susan M. Shanahan,
Assistant Attorney General, Tampa, for
Appellee.

WHATLEY, Judge.

Herbert Johnson appeals his judgment and sentence for second-degree murder with a firearm, arguing that the trial court committed fundamental error when it gave the standard jury instruction on the necessarily lesser-included offense of manslaughter by act. We are required to reverse based on the Florida Supreme Court's

recent decision in State v. Montgomery, 35 Fla. L. Weekly S204, S204 (Fla. Apr. 8, 2010), in which the court held that the use of the standard jury instruction on manslaughter constituted fundamental error. The Montgomery court reasoned that the crime of manslaughter by act requires the State to prove that the defendant intended to commit an act which causes death, but the standard jury instruction on manslaughter by act incorrectly requires the State to prove that the defendant intended to kill the victim. Id. at S205. Because the erroneous instruction was given at Johnson's trial, he is entitled to a new trial.

Johnson also argues that the trial court was required to give a jury instruction on manslaughter by culpable negligence. Because he will have an opportunity at his retrial to request such an instruction if he wishes, we need not determine at this time whether the failure to give the instruction absent a request or objection at his first trial was fundamental error.

Accordingly, we reverse Johnson's judgment and sentence and remand this case for a new trial.

NORTHCUTT and KELLY, JJ., Concur.