

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

| | | |
|-------------------|---|-------------------|
| JERRY PHARISIEN, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case No. 2D10-959 |
| |) | |
| STATE OF FLORIDA, |) | |
| |) | |
| Appellee. |) | |
| _____ |) | |

Opinion filed November 16, 2011.

Appeal from the Circuit Court for Collier
County; Franklin G. Baker, Judge.

James Marion Moorman, Public Defender,
and James T. Miller, Special Assistant
Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Tonja Rene Vickers,
Assistant Attorney General, Tampa, for
Appellee.

KHOUZAM, Judge.

Jerry Pharisien appeals his convictions and sentences for second-degree murder with a firearm and attempted second-degree murder with a firearm. We write to address his argument that the jury instruction given on manslaughter by act was fundamentally erroneous because it indicated that a conviction for manslaughter

required proof that he intended to kill the victim. As we conclude that the manslaughter instruction that was given in Pharisien's case was not error, we affirm and certify conflict with the First District. We note that this court recently reached the same result in Daniels v. State, 36 Fla. L. Weekly D2178 (Fla. 2d DCA Oct. 5, 2011), which addressed the same issue. Pharisien also argues that the circuit court erred by denying his motion for judgment of acquittal. We affirm as to this issue without comment.

On July 13, 2007, there was a shooting at a night club that left one man dead and another injured. Pharisien was charged with second-degree murder with a firearm and attempted second-degree murder with a firearm. At trial, Pharisien's attorney requested that the court not instruct the jury as to any lesser included offenses because there was no testimony to support convictions on the lesser included offenses. The trial court agreed not to provide the lesser included offense of aggravated battery on the attempted second-degree murder charge. However, the court decided to provide the jury with the manslaughter by act instruction on the second-degree murder charge as follows:

The lesser crime indicated in the definition of Second-Degree Murder is Manslaughter. To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:

[The victim] is dead and, two, Jerry Pharisien intentionally caused the death of [the victim].

In order to convince that [sic] Manslaughter by an 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.

Pharisien's attorney did not object to this instruction. The jury found Pharisien guilty as charged.

In State v. Montgomery, 39 So. 3d 252 (Fla. 2010), the Florida Supreme Court held that the then-standard jury instruction on manslaughter by act constituted fundamental error because it required proof of intent to kill. That instruction read as follows:

To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:

1. (Victim) is dead.
2. a. *(Defendant) intentionally caused the death of (victim).*

....

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.

Id. at 256 (quoting Fla. Std. Jury Instr. (Crim.) 7.7 (2006)).

The instruction given in Pharisien's case is different than the instruction given in Montgomery because it includes language that further explains the intent element of manslaughter. As the Montgomery court noted, the standard instruction was amended in 2008 to clarify that the required intent for a manslaughter conviction is intent to commit an act that caused the death of the victim as opposed to an intent to kill: "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.*" Id. at 257 (quoting In re Std. Jury Instrs. in Crim. Cases—Report No. 2007-10, 997 So. 2d 403, 403 (Fla. 2008)).

The First District held in Riesel v. State that this amended instruction did not eliminate the intent-to-kill requirement. 48 So. 3d 885, 886 (Fla. 1st DCA 2010).

Accordingly, the First District concluded that the amended instruction was fundamentally erroneous for the same reason as the instruction addressed in Montgomery. Id. Relying on Riesel, the First District has reached the same conclusion in several additional cases. See, e.g., Noack v. State, 61 So. 3d 1208, 1208 (Fla. 1st DCA 2011); Pryor v. State, 48 So. 3d 159, 161-62 (Fla. 1st DCA 2010); Williams v. State, 50 So. 3d 1207, 1208 (Fla. 1st DCA 2010).

The Third District, on the other hand, held in Moore v. State that the amended instruction was not fundamentally erroneous because it sufficiently clarified the intent element. 57 So. 3d 240, 244 (Fla. 3d DCA 2011).¹ We agree. It is true that the amended instruction first provides that the jury must find that the defendant "intentionally caused the death of" the victim. As addressed in Montgomery, this phrase is problematic because it suggests that the defendant must have intended to kill the victim. But the amended instruction clarifies that it is only necessary for the jury to find "an intent to commit an act which caused death." Because the amended instruction given in Pharisien's case included this clarifying language, we conclude that no error occurred. Accordingly, we affirm. We also certify conflict with the First District's holding in Riesel and its progeny.

Affirmed; conflict certified.

¹We note that the Third District also based its determination that no fundamental error had occurred on the fact that the instruction for manslaughter by culpable negligence was given along with the instruction for manslaughter by act. Moore, 57 So. 3d at 245; see also Barros-Dias v. State, 41 So. 3d 370 (Fla. 2d DCA 2010). The instruction for manslaughter by culpable negligence was not given in Pharisien's case, so we cannot base our holding on the combined effect of the two instructions. But the Moore court's heavy reliance on the manslaughter-by-culpable-negligence instruction does not detract from its holding that the amended manslaughter-by-act instruction was not erroneous.

DAVIS and CRENSHAW, JJ., Concur.