

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

EDWARD ARNOLD,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2D11-5295
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

Opinion filed June 29, 2012.

Petition Alleging Ineffective Assistance of  
Appellate Counsel. Hillsborough County;  
Emmett Lamar Battles, Judge.

Edward M. Arnold, pro se.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Anne Sheer Weiner,  
Assistant Attorney General, for  
Respondent.

NORTHCUTT, Judge.

We previously affirmed Edward Arnold's conviction for attempted second-degree murder. Arnold v. State, 46 So. 3d 52 (Fla. 2d DCA 2010) (table decision).

Thereafter, Arnold filed a petition pursuant to Florida Rule of Appellate Procedure 9.141(d), alleging that his appellate counsel was ineffective. He contends that counsel

was deficient in failing to argue that his jury was given a fundamentally erroneous instruction on attempted manslaughter by act. We agree.

Arnold was charged with attempted first-degree premeditated murder and was convicted of the category one lesser-included offense of attempted second-degree murder.<sup>1</sup> Attempted manslaughter by act, commonly referred to as attempted voluntary manslaughter, also is a category one lesser-included offense of attempted first-degree premeditated murder. Betts v. State, 36 Fla. L. Weekly D2675, D2676 (Fla. 2d DCA Dec. 7, 2011); Fla. Std. Jury Instr. (Crim.) 6.2. At Arnold's trial, the jury was given the standard instruction on attempted manslaughter by act.

The notice of appeal in Arnold's case was filed after the First District decided Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009), approved, 39 So. 3d 252 (Fla. 2010), in which it held that the then-standard manslaughter by act instruction was fundamentally erroneous because it improperly contained an additional element of intent to kill.<sup>2</sup> The day after the notice was filed, the supreme court accepted the Montgomery decision for review. State v. Montgomery, 11 So. 3d 943 (Fla. 2009). Before Arnold's initial brief was filed, the First District issued Lamb v. State, 18 So. 3d 734, 735 (Fla. 1st DCA 2009), extending Montgomery to hold that it was fundamental error to give the standard instruction on attempted manslaughter by act. This court subsequently came to that view. Mueller v. State, 36 Fla. L. Weekly D2063 (Fla. 2d

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<sup>1</sup>The jury also found that Arnold discharged a firearm causing great bodily harm.

<sup>2</sup>The manslaughter by act instruction given to the jury at Arnold's trial continues to be the standard instruction. See Fla. Std. Jury Instr. (Crim.) 6.6. However, a proposed amended instruction awaiting supreme court approval would remove the intent to kill element. Banek v. State, 75 So. 3d 762, 764 n.1 (Fla. 2d DCA 2011).

DCA Sept. 16, 2011); Houston v. State, 36 Fla. L. Weekly D1772 (Fla. 2d DCA Aug. 12, 2011); Gonzalez v. State, 40 So. 3d 60 (Fla. 2d DCA 2010).

Under materially identical circumstances, we held that appellate counsel in Betts was ineffective for failing to argue that the standard attempted manslaughter by act instruction was fundamentally erroneous. 36 Fla. L. Weekly at D2676. Guided by that decision, we reach the same conclusion in Arnold's case.

Because a new appeal would be redundant in this case, we reverse Arnold's conviction for attempted second-degree murder, vacate the sentence, and remand for a new trial. See Betts, 36 Fla. L. Weekly at D2676. As we did in Betts, we certify that our decision is in conflict with Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), review granted, 64 So. 3d 1262 (Fla. 2011).

Petition granted; conflict certified.

WALLACE and MORRIS, JJ., Concur.