Supreme Court of Florida

No. SC11-294

JEREMY HAYGOOD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[February 14, 2013]

LABARGA, J.

This case is before the Court for review of the decision of the Second District Court of Appeal in Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 2011), in which the Second District certified a question to this Court to be of great public importance. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. We rephrase the certified question as follows:

> IF A JURY RETURNS A VERDICT FINDING A DEFENDANT GUILTY OF SECOND-DEGREE MURDER, DOES A TRIAL COURT COMMIT FUNDAMENTAL ERROR BY GIVING AN ERRONEOUS MANSLAUGHTER BY ACT INSTRUCTION WHEN IT ALSO GIVES AN INSTRUCTION ON MANSLAUGHTER BY CULPABLE NEGLIGENCE AND THE EVIDENCE SUPPORTS ONLY A THEORY OF MANSLAUGHTER BY ACT?

Id. at 1038. For the reasons explained below, we answer the certified question in the affirmative. We hold that giving the erroneous manslaughter by act instruction, which we found to be fundamental error in State v. Montgomery, 39 So. 3d 252 (Fla. 2010),[1] is also fundamental error even if the instruction on manslaughter by culpable negligence is given where the evidence supports manslaughter by act but does not support culpable negligence and the defendant is convicted of second-degree murder.

FACTS AND PROCEDURAL HISTORY

Jeremy Haygood was tried in September 2009 on the charge of second-degree murder for the November 2008 death of his girlfriend, Jeanine Tuckey, in Pinellas County, Florida. The State presented evidence that Haygood became angry with Tuckey and, at various times during the argument, head-butted her, kicked her legs out from under her, choked her, and elbowed her in the chest. When Tuckey became unresponsive, Haygood ran indoors and told her mother to call for an ambulance, and he attempted to perform CPR until the ambulance arrived. The beating, during which she hit her head, resulted in swelling in her

1. We held in Montgomery that the standard jury instruction on manslaughter by act was erroneous because it imposed an element of intent to kill not contained in the manslaughter statute, section 782.07, Florida Statutes (2006). See Montgomery, 39 So. 3d at 258. We concluded that giving the erroneous instruction was fundamental error where Montgomery was convicted of second-degree murder, which was only one step removed from manslaughter and which also does not require any intent to kill. Id.

brain that damaged her brain and brain stem. Tuckey fell into a permanent coma from which the neurologist advised she would never recover. She died after being removed from life support the day after her injuries.

After Haygood was advised of his rights, he told police that he had consumed about nine beers in a five-hour period that afternoon and evening before Tuckey was injured and was "[n]ot sober but . . . wasn't drunk." Haygood first told police he only elbowed Tuckey twice in the chest "in a blind rage" over her infidelity. Haygood said that he hit her a couple of times "to prove a point, get her attention," but not to seriously hurt her. He later admitted to the much more extensive beating. Haygood expressed remorse in the police interview and said, "It was an accident . . . . [W]hat I did was on purpose, but I didn't mean to kill her."

The jury was instructed without objection as to second-degree murder and the lesser included offense of manslaughter. The manslaughter instruction included the instructions on manslaughter by act and manslaughter by culpable negligence. Haygood was subsequently found guilty of second-degree murder. He appealed to the Second District Court of Appeal, alleging that fundamental error occurred when the jury was given the then-standard jury instruction on manslaughter by act, which this Court held to be fundamental error in

Montgomery, 39 So. 3d at 258. We turn first to discuss the manslaughter by act instruction given in this case.

The Instruction Given in this Case

The jury was instructed in Haygood's trial in pertinent part as follows:

> THE COURT: Therefore, if you decide that the main accusation [of second-degree murder] has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime. The lesser included crime . . . is manslaughter.
>
> To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt. Number one, Jeanine Tuckey is dead. Number two, Jeremy Haygood intentionally caused the death of Jeanine Tuckey, or the death of Jeanine Tuckey was caused by culpable negligence of Jeremy Haygood. However, the defendant cannot be found guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms.

(Emphasis added). In closing argument, the prosecutor argued that there are two ways to prove manslaughter and, under the first way, the State must prove that Haygood intentionally caused Tuckey's death, although, the prosecutor explained: "Now, that doesn't mean that he - - that he meant to kill her. That just means that he meant to do what he did and she ended up dying." The prosecutor also argued to the jury that manslaughter by culpable negligence was not proven. Haygood was subsequently convicted of second-degree murder and appealed to the Second District Court of Appeal, where he argued that the trial court fundamentally erred

in giving the erroneous manslaughter by act instruction that required the jury to find that he intentionally caused Tuckey's death.

On appeal, the district court held that "[a]lthough Mr. Haygood's argument [of fundamental error] is arguably supported by supreme court precedent, we adhere to the precedent of this district as established in Barros-Dias v. State, 41 So. 3d 370 (Fla. 2d DCA 2010), and Nieves v. State, 22 So. 3d 691 (Fla. 2d DCA 2009), and we accordingly affirm Mr. Haygood's judgment of conviction." Haygood, 54 So. 3d at 1036. The district court recognized that this Court held in Montgomery that the then-standard jury instruction on manslaughter by act was erroneous because, although the offense of manslaughter by act does not require proof of intent to kill, the standard jury instruction informed the jury that to convict for manslaughter by act, the jury must find that the defendant "intentionally caused the death of [the victim]." Haygood, 54 So. 3d at 1036. Nevertheless, the Second District relied on Nieves where it had found significant the fact that "unlike Montgomery . . . the jury in Nieves' case was also instructed on the lesser-included offense of manslaughter by culpable negligence." Haygood, 54 So. 3d at 1037 (quoting Nieves, 22 So. 3d at 692).

After acknowledging that Montgomery held it was fundamental error to give this jury instruction in cases where the defendant was convicted of second-degree murder, which is one step removed from manslaughter, the Second District held

that the erroneous instruction was not fundamental error in this case because the jury was also instructed on manslaughter by culpable negligence. Haygood, 54 So. 3d at 1037. Even so, the district court expressed doubt about whether that distinction was warranted. The district court stated:

> In this case, Mr. Haygood was charged with and convicted of fatally beating his girlfriend. Arguably, the evidence presented at trial is inconsistent with a theory of manslaughter by culpable negligence. Additionally, as for manslaughter by act, the instruction as given was flawed. Thus, if the jury believed Mr. Haygood's act was an intentional one but not that he possessed the intent to kill, then neither form of manslaughter provided a viable lesser offense of which the jury could find Mr. Haygood guilty. Although the evidence unquestionably supports the jury's verdict finding Mr. Haygood committed second-degree murder, it is impossible to speculate what the jury would have found had it been properly instructed that manslaughter by act does not require the intent to kill. In this regard, giving the flawed manslaughter by act instruction appears to run afoul of principles which the supreme court has articulated in [Pena v. State, 901 So. 2d 781, 787 (Fla. 2005)], and Montgomery, 39 So. 3d at 257-59.
>
> In sum, adhering to the decisional law of this district, we affirm Mr. Haygood's judgment of conviction.

Haygood, 54 So. 3d at 1037. The Second District then certified a question of great public importance to this Court asking if, in a case where the evidence does not support a theory of culpable negligence, giving the flawed manslaughter by act instruction is fundamental error where the manslaughter by culpable negligence instruction is also given. Id. at 1038. Judge Altenbernd noted in his special concurrence in part and dissent in part, "I simply fail to see the logic by which a fundamental error of this kind becomes harmless merely because a jury receives an

alternative instruction that has little or no application to the evidence presented at trial." Id. (Alternbernd, J., specially concurring in part and dissenting in part).

ANALYSIS

The certified question presented by the district court is solely a legal question. Thus, this Court's review is de novo. See Kirton v. Fields, 997 So. 2d 349, 352 (Fla. 2008); see also D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003) (stating that the standard of review for pure questions of law is de novo). Because the legal effect of this Court's decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), is at the heart of the certified question in this case, that decision will be discussed first. We recognized in Montgomery that the then-existing standard jury instruction on manslaughter by act required the jury to find that the defendant "intentionally caused the death" of the victim. See Fla. Std. Jury Instr. (Crim.) 7.7 (2006). We also recognized that section 782.07, Florida Statutes, did not require the jury to make such a finding. That statute provides as follows:

> **782.07. Manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; aggravated manslaughter of an officer, a firefighter, an emergency medical technician, or a paramedic.—**
>
> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 782.07(1), Fla. Stat. (2012).[2] In discussing the requirements of this statute, we stated in Montgomery:

> We observe that the statute does not impose a requirement that the defendant intend to kill the victim. Instead, it plainly provides that where one commits an act that results in death, and such an act is not lawfully justified or excusable, it is manslaughter.
>
> Although in some cases of manslaughter by act it may be inferred from the facts that the defendant intended to kill the victim, to impose such a requirement on a finding of manslaughter by act would blur the distinction between first-degree murder and manslaughter. Moreover, it would impose a more stringent finding of intent upon manslaughter than upon second-degree murder, which, like manslaughter, does not require proof that the defendant intended to kill the victim. Thus, we conclude that under Florida law, the crime of manslaughter by act does not require proof that the defendant intended to kill the victim.

Montgomery, 39 So. 3d at 256. As noted above, the manslaughter by act instruction given in this case erroneously imposed an additional element of proof—that the defendant intentionally killed the victim. As we held in Reed v. State, 837 So. 2d 366 (Fla. 2002), if an erroneous instruction is given as to a disputed element of the offense, and the instruction is pertinent or material to what the jury must consider in order to convict, it is fundamental error; and "fundamental error is not subject to harmless error review." Id. at 369-70.

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2. The statute remains in the same form as it was when we decided State v. Montgomery.

In Montgomery, we similarly focused on the fact that the manslaughter by act instruction was " 'pertinent or material to what the jury must consider in order to convict,' " and emphasized that the defendant is "entitled to an accurate instruction on the lesser included offense of manslaughter." See Montgomery, 39 So. 3d at 258 (quoting State v. Delva, 575 So. 2d 643, 645 (Fla. 1991)). We concluded that giving this erroneous jury instruction—requiring the jury to find the killing was intentional in order to convict for manslaughter by act—constituted fundamental error where Montgomery was convicted of second-degree murder, an offense not more than one step removed from manslaughter and which, like manslaughter, also does not require any intent to kill. Id. at 259. We also note that in Montgomery's case, the jury was told:

> 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.

Montgomery, 39 So. 3d at 256 (quoting Fla. Std. Jury Instr. (Crim.) 7.7 (2006)). However, we concluded that "this language was insufficient to erode the import of the second element: that the jury must find that the defendant intended to cause the death of the victim." Montgomery, 39 So. 3d at 257.

After issuance of the Montgomery decision, we amended the manslaughter jury instruction consistent with our decision in Montgomery to provide that for the crime of manslaughter by act the State must prove the following:

1. (Victim) is dead.

Give 2a, 2b, or 2c depending upon allegations and proof.

2. a. (Defendant~~'s~~) intentionally committed an act ~~(s)~~ or acts that caused the death of (victim).

b. (Defendant) intentionally procured an act that caused the death of (victim).

c. The death of (victim) was caused by the culpable negligence of (defendant).

In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7, 75 So. 3d 210, 211 (Fla. 2011).[3] We turn now to the certified question in this case: If a jury returns a verdict finding a defendant guilty of second-degree murder, does a trial court commit fundamental error by giving an erroneous manslaughter by act instruction when it also gives an instruction on manslaughter by culpable negligence and the evidence supports only a theory of manslaughter by act?

We have long held that fundamental error occurs in a jury instruction where the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict. See Delva, 575 So. 2d at 644-45. We reiterated in Reed that it is fundamental error to give a standard jury instruction that contains an erroneous statement as to an element of the crime which is disputed. Reed, 837 So. 2d at 369. Moreover, we cautioned that

3. Shortly after Montgomery was issued in 2010, the Court issued an interim instruction. See In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7, 41 So. 3d 853 (Fla. 2010). The final revisions to the instruction were accomplished in 2011. See In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7, 75 So. 3d 210 (Fla. 2011).

"whether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental." Id. In addition, we reiterated that "fundamental error is not subject to harmless error review." Id. at 369-70.

These are the same principles on which we focused when we decided Montgomery. We made clear that "Montgomery was entitled to an accurate instruction on the lesser included offense of manslaughter." Montgomery, 39 So. 3d at 258. We stated, "Thus, we conclude that fundamental error occurred in this case, where Montgomery was indicted and tried for first-degree murder and ultimately convicted of second-degree murder after the jury was erroneously instructed on the lesser included offense of manslaughter." Id. Based on our decision in Montgomery, and the principles underlying that decision, we conclude that giving the manslaughter by culpable negligence instruction does not cure the fundamental error in giving the erroneous manslaughter by act instruction where the defendant is convicted of second-degree murder and the evidence supports a finding of manslaughter by act, but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant.

This Case

In the instant case, we conclude that giving the erroneous manslaughter by act instruction constituted fundamental error. Haygood was convicted of second-

degree murder, which is not more than one step removed from the lesser offense of manslaughter.[4] The evidence in this case supported a finding that Haygood intentionally committed an act or acts, and that the act or acts resulted in the victim's death. The evidence also supported a finding that he had no intent to kill the victim. Significantly, there was no evidence to support a finding that Tuckey's death resulted from culpable negligence. Haygood's unambiguous admission that he intended to strike, head butt, choke, and trip Tuckey essentially eliminated the alternate means of committing manslaughter—manslaughter by culpable negligence—as a viable lesser offense. Thus, second-degree murder was the only offense realistically available to the jury under the evidence presented in this case and the instructions given—instructions that required the jury to find intent to kill in order to convict Haygood for manslaughter by act.[5]

Haygood was entitled to have his jury properly instructed on the elements of the charged offense and the lesser included offenses. See Montgomery, 39 So. 3d

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4. We held in Pena v. State that "when the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." Pena, 901 So. 2d 781, 787 (Fla. 2005).

5. The instruction for second-degree murder requires proof, inter alia, that the victim is dead, the death was caused by the criminal act of the defendant, and there was an unlawful killing of the victim by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life. See Fla. Std. Jury Instr. (Crim) 7.4 (2011). There is no requirement of intent to kill.

at 258. The elements of the offense were disputed and the instructions were pertinent and material to what the jury must consider in order to convict Haygood of any of the offenses. We further conclude that the culpable negligence instruction did not render the erroneous manslaughter by act instruction to be impertinent or immaterial to what the jury must consider in order to convict. Thus, the erroneous manslaughter by act instruction was fundamental error in this case.

The dissent contends that the jury pardon doctrine was the basis of the majority's decision in both Montgomery and this case; and it further suggests that the finding of fundamental error in both cases is completely divorced from the question of whether any evidence would have supported a conviction of the lesser included offense of manslaughter. See dissenting op. at 5-6. This is incorrect. This decision is not based on the jury pardon doctrine and is not hinged on the right of the jury to issue a jury pardon despite the evidence. This decision is firmly founded on the longstanding principle that a defendant is entitled to have the jury correctly instructed on the crime charged and the lesser included offenses. As we have explained, where the erroneous instruction pertains to an element that is material to the jury's deliberation and is in dispute, fundamental error occurs, as our precedent indicates, if that offense is one step removed from the crime for which the defendant is convicted. In this case, the erroneously instructed element

was placed in dispute by the evidence; thus there was a basis on which the jury could find that the lesser included offense was proven.

The dissent also suggests that a manslaughter conviction is proper only where there is proof of sudden heat of passion aroused by provocation. See dissenting op. at 2-3. Because the dissent concludes the evidence in this case did not show heat of passion, the dissent would find that the evidence only supports a conviction for second-degree murder and not manslaughter. However, although many manslaughter cases have involved heat of passion, nothing in the manslaughter statute requires proof of sudden heat of passion or provocation. The manslaughter statute defines manslaughter simply as the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification, and in which the killing shall not be excusable homicide or murder. See § 782.07(1), Fla. Stat. (2008). Moreover, it is the province of the jury to find the facts supported by the evidence and, based on proper instruction, apply those facts to the statutory elements required for conviction. The error in the manslaughter jury instruction prevented the jury from being able to choose the true verdict in this case—a verdict based on the jury's application of its fair assessment of the facts concerning Haygood's intent to the proper elements of the offense as set forth in the manslaughter statute.

The dissent appears to be based on the assumption that the only justification for instructing the jury on manslaughter would be to provide an opportunity for a jury pardon. However, this puts the cart before the horse. The reason for properly instructing the jury on manslaughter is to enable the jury to determine what degree of crime, if any, is proven. The dissent also concludes that the evidence in this case proved only second-degree murder and, thus, the jury could not possibly have found manslaughter without aid of the jury pardon. That conclusion is unjustified. It is up to the jury to hear the evidence, find the facts, and apply the law to reach a proper and fair verdict. That process was short-circuited in this case by the faulty instruction.

The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, the only non-intentional homicide offense remaining for the jury's consideration in this case was second-degree murder. The result of incorrectly instructing on a necessarily lesser included offense, or even jettisoning the requirement of instruction on necessarily lesser included offenses as the dissent suggests, is that

the jury is deprived of all the tools it needs to reach a proper verdict in the case before it.

CONCLUSION

For the reasons set forth above, we answer the certified question in the affirmative. We hold that giving the manslaughter by culpable negligence instruction does not cure the fundamental error in giving the erroneous manslaughter by act instruction where the defendant is convicted of an offense not more than one step removed from manslaughter and the evidence supports a finding of manslaughter by act, but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant. Accordingly, we quash the decision of the Fourth District in Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 2011), and remand with directions that Haygood's conviction for second-degree murder be reversed and a new trial granted.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.
PARIENTE, J., concurs with an opinion, in which LABARGA and PERRY, JJ., concur.
CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.

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

PARIENTE, J., concurring.

I fully concur in the majority's opinion but write separately to emphasize that this case is not, as the dissent argues, about the Court applying the jury pardon doctrine. Instead, as the majority aptly explains, this is a case where an erroneous jury instruction was given that deprived the jury of the ability to find the defendant guilty of manslaughter by act, an offense that is one step removed from second-degree murder and supported by the facts of this case. Far from "encourag[ing] irrational jury verdicts," as the dissent suggests, dissenting op. at 22, the majority decision upholds the integrity of the jury process by guaranteeing that the jury is properly instructed on the elements of the charged offense and the lesser included offenses when those elements are in dispute. This decision makes clear that it is the jury who decides, after accurate instructions on the law, what crimes are proven by the facts in evidence in a given case.

While the dissent appears to engage in its own weighing of the evidence in this case by stating that the facts place it clearly in the category of second-degree murder, dissenting op. at 23-26 & 26 n.8, our role as an appellate court is not to reweigh the evidence to arrive at our own determination of the best outcome. Rather, our role is to ensure, consistent with fundamental principles of constitutional law, that the jury is correctly instructed on the law so that it can

ultimately make the determination based on the facts placed into evidence about what crimes were committed.

In State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010), the same Court that decides the case today unanimously explained that the identical erroneous manslaughter by act instruction presented in this case constituted fundamental error. In Montgomery, the defendant was charged with first-degree murder, received an erroneous jury instruction on the lesser included offense of manslaughter by act, and was convicted of second-degree murder. This Court reversed and held that the erroneous jury instruction required a new trial. Id. at 260. There is simply no cogent rationale for explaining how, as happened in this case, properly instructing the jury on another lesser included offense—one not supported by the facts—cures the fundamental error identified in Montgomery.

Although the dissent argues that "[t]he uncontested facts here unequivocally set this case in the category of second-degree murder as distinct from manslaughter by act," dissenting op. at 24, the defendant is entitled to have the jury make such a determination in light of proper instructions on the lesser included offenses when the elements of those offenses are placed in dispute by the evidence. As Judge Altenbernd explained in his opinion below specially concurring in part and dissenting in part:

> This is a case in which the evidence unquestionably supports the jury's verdict finding that Mr. Haygood committed second-degree

> murder. At the same time, the evidence would also have permitted the jury to return a verdict of manslaughter by act if the jury had received the correct instruction. I am hard pressed to believe that any reasonable jury would have found that the evidence in this case supported a theory of manslaughter by culpable negligence.
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> In this context, I do not believe that the fundamental error identified in Montgomery is rendered harmless by the instruction on manslaughter by culpable negligence. It is useful to consider that a fundamental error must be harmful before it can be classified as fundamental. I simply fail to see the logic by which a fundamental error of this kind becomes harmless merely because a jury receives an alternative instruction that has little or no application to the evidence presented at trial.

Haygood v. State, 54 So. 3d 1035, 1038 (Fla. 2d DCA 2011) (Altenbernd, J., specially concurring in part and dissenting in part) (citation omitted).

In accordance with this line of reasoning, the majority explains, while there was evidence to support the jury's verdict of second-degree murder in this case, "[t]he evidence also supported a finding that [Haygood] had no intent to kill the victim." Majority op. at 12. Therefore, if the jury believed Haygood's assertions that he "didn't mean to kill" the victim, the jury's only option in light of the erroneous manslaughter by act instruction, which pertained to the material element of intent that was placed in dispute by Haygood's assertions, was to convict Haygood of second-degree murder. There is simply no way to know what verdict the jury would have returned had it been properly instructed that manslaughter by act does not require an intent to kill. The Second District explained this point as follows:

> Arguably, the evidence presented at trial is inconsistent with a theory of manslaughter by culpable negligence. Additionally, as for manslaughter by act, the instruction as given was flawed. Thus, if the jury believed Mr. Haygood's act was an intentional one but not that he possessed the intent to kill, then neither form of manslaughter provided a viable lesser offense of which the jury could find Mr. Haygood guilty. Although the evidence unquestionably supports the jury's verdict finding Mr. Haygood committed second-degree murder, it is impossible to speculate what the jury would have found had it been properly instructed that manslaughter by act does not require the intent to kill.

Haygood, 54 So. 3d at 1037 (emphasis added).

Contrary to the dissent's assertion that the majority opinion is "corrosive of the rule of law," dissenting op. at 22, the Court's holding today is in actuality essential to upholding it. By ensuring that the jury is provided with a complete and accurate accounting of the applicable law prior to rendering its verdict, we make certain that jury verdicts are obtained in full compliance with and appreciation for the applicable law.

Although the dissent suggests that our decision today is grounded in the jury pardon power and that we should "repudiate" this doctrine, dissenting op. at 22, our decision is actually based simply on an application of our prior unanimous holding in Montgomery to the circumstances of this case. While it is true that the Second District did reference the jury's pardon power as part of its reasoning, Judge Altenbernd observed the problem with this analysis in the following way:

> I am also not convinced that "pardon power" analysis is the best approach to this particular problem. I recognize that this panel lacks

> the power to reverse and remand for a new trial under existing precedent, but I believe the case law needs a tweaking to permit a new trial in this type of case in order to fully comply with the supreme court's holding in Montgomery.

Haygood, 54 So. 3d at 1038 (Altenbernd, J., specially concurring in part and dissenting in part).

The majority recognizes Judge Altenbernd's concerns and clarifies the reason that the giving of the erroneous manslaughter by act instruction constitutes fundamental error. It is not, as the dissent contends, an application of the pardon power, but rather the overriding requirement that every defendant receive the benefit of accurate jury instructions regarding the elements of a disputed offense if those instructions could have resulted in a lesser verdict.

As the majority notes, our cases have long held that a standard jury instruction that contains an erroneous statement as to an element of a disputed offense constitutes fundamental error regardless of "whether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument." Reed v. State, 837 So. 2d 366, 369 (Fla. 2002). Contrary to the dissent's own weighing of the evidence, the evidence here supported a finding of manslaughter by act. Accordingly, I concur in the majority's conclusion that the erroneous manslaughter by act instruction given in this case constitutes fundamental error under Montgomery.

LABARGA and PERRY, JJ., concur.

CANADY, J., dissenting.

The conclusion that fundamental error occurred in this case flows from Florida's jury pardon doctrine[6]—a doctrine that is at odds with both federal law and the law of the vast majority of the states.[7] Because I conclude that Florida's law regarding the jury pardon power is inconsistent with the pertinent rule of criminal procedure, embeds contradiction in the jury instruction process, encourages irrational jury verdicts, and is corrosive of the rule of law, I dissent. I would repudiate the jury pardon doctrine and approve the Second District Court of Appeal's determination that Haygood's conviction should be affirmed.

This case dramatically illustrates the perverse consequence of the jury pardon doctrine. A retrial is ordered to correct an error in instruction regarding a lesser included offense, when it is manifest beyond any doubt that no rational juror, acting on the basis of the facts and a correct understanding of the law, could

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6. See John F. Yetter, Truth in Jury Instructions: Reforming the Law of Lesser Included Offenses, 9 St. Thomas L. Rev. 603 (1997) (discussing Florida law on entitlement to "jury pardon" and providing an in depth history).

7. Iowa and Louisiana are the only other states that have similar jury pardon doctrines that ignore whether the evidence warrants the trial court instructing on a necessarily lesser included offense. See, e.g., State v. Jeffries, 430 N.W. 2d 728, 737 (Iowa 1988) (holding "that Iowa trial courts shall no longer be required to review the record to determine whether there is sufficient evidence to support a verdict for a lesser-included offense"); State v. Peterson, 290 So. 2d 307, 311 (La. 1974) ("In Louisiana, when there is evidence to prove the greater offense, it is the jury's province to determine the existence vel non of lesser culpability and exercise the statutory right to return the manslaughter verdict.").

determine the defendant to be guilty of the lesser offense and innocent of the charged offense. This result is reached because under Florida law—as articulated by this Court in the jury pardon doctrine—defendants have a fundamental right for the jury to be correctly instructed on one-step-removed necessarily lesser included offenses.

After first discussing why there was no evidentiary basis in this case for an instruction on manslaughter by act, this dissent then turns to a review of Florida's jury pardon doctrine—which provides the basis for requiring instructions with respect to necessarily lesser included offenses that lack an evidentiary basis and for the conclusion that the failure to provide correct instructions regarding such offenses constitutes fundamental error. This dissent then explains why the majority's determination that fundamental error occurred in this case is inconsistent with the general standard for determining fundamental error in jury instructions. This dissent concludes with an examination of the flaws in Florida's jury pardon doctrine and a brief summary of the federal case law rejecting the jury pardon doctrine.

Here, "Haygood's unambiguous admission that he intended to strike, head butt, choke, and trip" the victim—who was Haygood's girlfriend—while "in a blind rage" not only "eliminated" manslaughter by culpable negligence "as a viable lesser offense," but also eliminated manslaughter by act as a viable lesser offense.

Majority op. at 3, 12. After head-butting and choking the victim, Haygood pulled her legs out from under her. As a consequence, the victim fell and hit her head on the concrete. When she then sat up and leaned on Haygood, he elbowed her in the chest and she collapsed. Expert medical testimony established that the cause of the victim's death was neck trauma and blunt force trauma to the head. The uncontested facts here unequivocally set this case in the category of second-degree murder as distinct from manslaughter by act.

Haygood's conduct indisputably constituted acts "imminently dangerous to another and evincing a depraved mind regardless of human life." § 782.04(2), Fla. Stat. (2012). And there is no evidentiary basis for concluding that Haygood acted in a "sudden heat of passion, aroused by adequate provocation," which would effectively negate the depraved mind element of second-degree murder and thus provide legal "mitigation of the crime from murder to manslaughter." Febre v. State, 30 So. 2d 367, 369 (1947). For a homicide to be mitigated in that manner, there must be a "temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion." Id. (emphasis added). Such a sudden outburst or attack of passion can exist only where there is an immediate provocation, and "the slayer cannot take time and [deliberate] upon the wrong and act upon an impulse to avenge." Collins v. State, 102 So. 880, 882 (1925).

A defendant who has brooded on a prior wrong and has nursed his resentment and anger into a full-blown rage is not one who lacked a depraved mind because he was subject to "a sudden access of passion." Here, the evidence viewed in the light most favorable to Haygood establishes that he attacked the victim in the course of an argument concerning an act of infidelity by the victim two years earlier, of which Haygood had become aware several months earlier. During the argument, Haygood knocked the victim down multiple times. The victim got up each time, until the final time she was struck. Each time the victim got up, Haygood continued his attack. Haygood admitted to law enforcement that he intended to strike the victim but asserted that killing her was an accident. These circumstances are far removed from those "heat of passion" manslaughter cases in which one spouse has discovered the other spouse in an act of adultery. See Febre, 30 So. 2d at 369; Auchmuty v. State, 594 So. 2d 859, 859-60 (Fla. 4th DCA 1992); see also Palmore v. State, 838 So. 2d 1222, 1224 (Fla. 1st DCA 2003) (involving an unmarried couple who lived together and raised their child together).

No circumstance—neither a sudden heat of passion nor any other relevant circumstance—is present here that could provide any basis for a rational jury to return a verdict for manslaughter by act rather than for second-degree murder. The depraved mind element and all the other elements of second-degree murder manifestly were proven beyond a reasonable doubt at trial and could not have been

rejected by any rational juror. Accordingly, there was no evidentiary basis in this case for an instruction on manslaughter by act.[8]

But, of course, Florida's jury pardon doctrine renders the lack of an evidentiary basis for an instruction totally irrelevant. The connection between the jury pardon doctrine and the requirements regarding instructions on necessarily lesser included offenses is well established in Florida law. We expressly identified that connection in State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986): "The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'" (Citing State v. Baker, 456 So. 2d 419, 422 (Fla. 1984)).

Unfolding the full implications of the jury pardon doctrine, we have treated the failure to provide a correct instruction on a one-step-removed necessarily lesser included offense as per se reversible error and as fundamental error without regard to whether there is any evidentiary basis for an instruction on the lesser offense.

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8. The concurrence asserts that "the evidence here supported a finding of manslaughter by act" but provides no analysis to support that assertion. Concurring op. at 5. In the concurrence there is no discussion of the relevant facts and no discussion of the relevant law. Neither the concurring opinion nor the majority opinion provides an explanation of how the victim's death resulting from Haygood's sustained attack—an attack which indisputably was not brought on by a sudden provocation—could be considered by a rational jury to be manslaughter by act rather than second-degree murder.

See State v. Lucas, 645 So. 2d 425, 426-27 (Fla. 1994) (holding that "when a defendant has been convicted of either manslaughter or a greater offense not more than one step removed, . . . failure to explain justifiable and excusable homicide as part of the manslaughter instruction always" results in fundamental and per se reversible error, "regardless of whether the evidence could support a finding of either justifiable or excusable homicide"); State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978) (relying on need for jury to be given "a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime" to support holding that "failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible"); Lomax v. State, 345 So. 2d 719, 720-21 (Fla. 1977) (referring to "policy concept of 'jury pardon'" and holding that failure to instruct on a lesser-included offense constitutes per se reversible error regardless of whether the evidence to convict the defendant on the greater offense is overwhelming based on the jury pardon rationale) (disapproved in situations involving necessarily lesser included offenses that are multiple steps removed from the principal offense by Abreau, 363 So. 2d at 1064).

The analysis in State v. Montgomery, 39 So. 3d 252 (Fla. 2010)—which provides the basis for the majority's decision in this case—was predicated on the jury pardon power. In concluding that an incorrect instruction regarding an element of a one-step-removed necessarily lesser included offense resulted in

fundamental error, the Montgomery Court relied on this proposition: "A jury must be given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." 39 So. 3d at 259 (quoting Pena v. State, 901 So. 2d 781, 787 (Fla. 2005)).[9]

In effect, we have determined that defendants have a fundamental right to the availability of a jury pardon. This right we have recognized is more accurately described as the right to the availability of a partial jury nullification. The failure to empower the jury to accomplish such a partial jury nullification is treated as a structural defect that necessarily vitiates the defendant's right to a fair trial. Nothing in the Florida Constitution, the Florida Statutes, or the Florida Rules of Criminal Procedure supports our recognition of such a right of access to a partial jury nullification. Florida's jury pardon doctrine is a judicial creation that is radically flawed.

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9. After citing Montgomery and the "principles underlying that decision," the majority here states that its "decision is not based on the jury pardon doctrine and is not hinged on the right of the jury to issue a jury pardon despite the evidence." Majority op. at 13. Similarly, the concurrence asserts that "[t]his case is not . . . about the Court applying the jury pardon doctrine," but about giving an erroneous instruction regarding "an offense that is one step removed from second-degree murder," the offense for which the defendant was convicted. Concurring op. at 1. The suggestion that there is no connection between the jury pardon doctrine and the requirements of Florida law concerning instructions on lesser included offenses disregards what our case law has said repeatedly about the connection between the jury pardon doctrine and instructions regarding necessarily lesser included offenses.

The conclusion that there was fundamental error in this case is inconsistent with our general standard for determining fundamental error in jury instructions.

> [F]or jury instructions to constitute fundamental error, the error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Further, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict."

Taylor v. State, 62 So. 3d 1101, 1119 (Fla. 2011) (quoting Garzon v. State, 980 So. 2d 1038, 1042 (Fla. 2008)) (citations and some internal quotation marks omitted). In any case where the evidence supports the jury's verdict of guilt on the charged offense and no error was made in the instructions regarding that offense, it is hard to fathom how an error in an instruction regarding a lesser included offense would properly be considered an error without which "a verdict of guilt could not have been obtained." But the departure from our general doctrine of fundamental error is magnified where—as in the majority's decision here—an error in an instruction regarding a lesser included offense is declared fundamental even though there is no evidentiary basis for an instruction on that offense. The "validity of the trial itself" is said to be vitiated because the jury was not correctly instructed on an inapplicable lesser offense and instead was fully afforded the opportunity to act in an irrational and lawless manner. This is a far cry from the cases in which we have held that fundamental error occurred because a defendant was convicted of an offense and the jury was not properly instructed concerning the elements of that

offense. See Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953); Reed v. State, 837 So. 2d 366, 369 (Fla. 2002).

Contrary to the logic of the jury pardon doctrine, interference with an opportunity for the jury to carry out a partial jury nullification does not undermine the validity of the trial. No defendant has the right to a trial in which the judge facilitates the jury's acting in disregard of the law.

An extended discussion of the flaws in the Florida law regarding the jury pardon power is contained in Justice Shaw's dissent in Wimberly, 498 So. 2d at 932-935. Justice Shaw explained his view that the doctrine "sacrifices the truth-finding process on the altar of the 'jury pardon' by injecting unnecessary confusion into a criminal prosecution." Id. at 932. Justice Shaw observed that "[i]nstructing the jury on necessarily lesser included offenses serves only two legitimate purposes: to prevent a miscarriage of justice by enabling the jury to choose the true verdict and to dispose of all criminal charges from the episode in one prosecution." Id. at 933. Justice Shaw concluded that it was a deviation from those purposes to "allow the jury pardon to be used to arrive at a verdict contrary to the evidence and contrary to the oaths of the jurors." Id. Florida's jury pardon doctrine is thus inconsistent with "the responsibility of the courts to minimize potential jury capriciousness by providing instructions on matters of law which set

legal standards and channel jury deliberations toward rational verdicts." Id. at 934.[10]

The jury pardon doctrine encourages jurors to violate the oath they swear and to ignore the basic instructions they are given. Jurors in a criminal trial are required to swear or affirm that they "will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence." Fla. R. Crim. P. 3.360 (emphasis added). Jurors are instructed that if they "decide that the main accusation has not been proved beyond a reasonable doubt, [they] will next need to decide if the defendant is guilty of any lesser included crime." Fla. Std. Jury Instr. (Crim.) 3.4. The instruction given to jurors regarding the rules for deliberation contains this statement:

> You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

Fla. Std. Jury Instr. (Crim.) 3.10. The standard verdict form provided to jurors specifically addresses the responsibility of jurors with respect to lesser included

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10. Voicing similar criticism of Florida's jury pardon doctrine, Professor John Yetter has stated: "A regime of jury instruction law exists in Florida that requires trial judges to ignore the evidence and invites juries to return illogical verdicts. Such a system destroys any possibility of the fair and consistent application of the law from case to case. . . . It is also against the great weight of authority in other jurisdictions." Yetter, Truth in Jury Instructions: Reforming the Law of Lesser Included Offenses, supra note 6, at 610.

offenses. The verdict form states that the jurors "may find the defendant guilty as charged . . . or guilty of such lesser included crime as the evidence may justify or not guilty." Fla. Std. Jury Instr. (Crim.) 3.12. The verdict form also contains this unequivocal instruction: "If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt." Id. (emphasis added). The jury pardon doctrine cannot be reconciled with the juror's oath or any of these provisions of the standard jury instructions.

Nor can the doctrine be reconciled with the provision contained in Florida Rule of Criminal Procedure 3.510(b) that "[t]he judge shall not instruct on any lesser included offense as to which there is no evidence." The jury pardon power has been used to justify denying any application of this provision to necessarily lesser included offenses. See Wimberly, 498 So. 2d at 930. But there is no textual basis for concluding that the rule, which refers unequivocally to "any lesser included offense for which there is no evidence," only applies to permissive lesser included offenses. The only reasonable way to read this provision of rule 3.510(b) is as a requirement that there be an evidentiary basis for any lesser included offense—whether permissive or necessarily included—before the judge provides the jury with an instruction on that lesser offense. Such an evidentiary basis does not exist if—based on the evidence adduced at trial and the applicable law—no rational juror could acquit the defendant of the greater offense.

With respect to offenses against the United States, it is well established "that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973). Long ago, in Sparf v. United States, 156 U.S. 51 (1895), the Supreme Court rejected the argument that juries possess the power to return a verdict for a lesser included offense that is without an evidentiary basis.

In Sparf, the Supreme Court held that it "is not error" "[t]o instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser [offenses] that might, under some circumstances, be included in the one so charged," where there is "no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular [offense] charged." Id. at 103. The Court concluded that "Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial." Id. at 63. Where there was no evidentiary basis for the conclusion that the defendant was innocent of the charged offense but guilty of the lesser offense, "[a] verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict." Id. at 63-64. The Court condemned

such a verdict as an "exercise by the jury of the power to commute the punishment for an [offense] actually committed, and thus impose a punishment different from that prescribed by law." Id. The Court further observed that "[p]ublic and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves." Id. at 101.

In Roberts v. Louisiana, 428 U.S. 325, 334 (1976), the Supreme Court invalidated Louisiana's mandatory death sentence statute because under that statute "every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts." The Court concluded that the sentencing scheme "not only lacks standards to guide the jury in selecting among first-degree [murders], but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate." Id. at 335. The Court condemned the "element of capriciousness" that arose from "making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." Id.

Subsequently, in Beck v. Alabama, 447 U.S. 625, 627 (1980), the Supreme Court held unconstitutional a death sentence that was imposed "after a jury verdict

of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict[.]" In Hopper v. Evans, 456 U.S. 605, 611 (1982), consistent with its reasoning in Roberts, the Supreme Court held that "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." The Court concluded that because the evidence "affirmatively negated any claim that [the defendant] did not intend to kill the victim" during the robbery in which the homicide occurred, "[a]n instruction on the offense of unintentional killing during this robbery was therefore not warranted." Id. at 613.

Roberts, Beck, and Hopper addressed challenges to sentences of death and were—as Hopper, 456 U.S. at 611, explained—"concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided." But as Justice Shaw recognized in his dissenting opinion in Wimberly, 498 So. 2d at 934, there is no reason that the purpose of avoiding arbitrary and capricious results in jury verdicts should be limited to the context of death penalty cases.

The existence of the jury's unreviewable power to return a nullification verdict—that is, a verdict acquitting a defendant the jury knows to be guilty under the law—does not mean that courts should either encourage nullification verdicts

or facilitate partial nullification under the guise of the jury pardon power. Where a jury returns a nullification verdict or a partial nullification verdict, the verdict reflects the jury's "assumption of a power which they had no right to exercise, but to which they were disposed through lenity." Dunn v. United States, 284 U.S. 390, 393 (1932). A "defendant has no right to invite the jury to act lawlessly." United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996). Nor does a defendant have the right for the judge to invite the jury to act lawlessly. "Although jurors have the capacity to nullify, it is not the proper role of courts to encourage nullification." United States v. Polouizzi, 564 F.3d 142, 162-63 (2d Cir. 2009). And it is not the proper role of courts to provide instructions which facilitate verdicts convicting of lesser offenses for which there is no evidentiary basis. Such partial nullification verdicts—no less than traditional nullification verdicts—"encourage the substitution of individual standards for openly developed community rules," "are lawless . . . and constitute an exercise of erroneously seized power." United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

Accordingly, I would recede from our decisions that require the giving of instructions with respect to necessarily lesser included offenses where there is no evidentiary basis for acquitting the defendant of the charged offense and returning a conviction for the lesser offense. In this case, I would reject Haygood's claim of

fundamental error. The decision of the Second District Court of Appeal affirming Haygood's conviction should not be disturbed.

POLSTON, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 2D09-4769

(Pinellas County)

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