

>> All rise.

The Supreme Court of Florida is
now in session.

>> We now come to the third case
on today's docket, Haygood
versus the state of Florida.

>> May it please the court.

My name is Maureen Surber and
I'm here on behalf of
Mr. Haygood.

Mr. Haygood was charged with and
convicted of second-degree
murder in a jury trial and this
case is similar to Montgomery
because in the Mr. Haygood trial
the jury was instructed, given
the erroneous manslaughter
instruction which meant, he told
the jury that manslaughter by
act would have an intent to kill
when this court has decided
there is no intent to kill by
act.

There is no intent to kill and
no intent to kill by culpable

negligence.

The problem with the 2nd DCA in this particular case I think with reservation, and based on their past and recent precedent, decided that Mr. Haygood did not have fundamental error existing because the jury was also read the manslaughter negligence instructions but I think that was an error and the error is, well, with second-degree murder, the jury was given these choices.

Second-degree murder would be intent to commit an act plus a depraved mind and then they were given the erroneous instructions with intent to kill and then a manslaughter by act.

Excuse me, manslaughter by culpable negligence, no intent to act, so the jury found that Mr. Haygood did not have any intent to --

>> It would be one thing --

Excuse me.

>> Just take a deep breath.

>> Yeah, I speak quickly.

>> It will all work.

>> The problem is if the jury

found that Mr. Haygood had an

attempt to commit an act, which

would have been the proper

instruction of secondary murder

and intent to commit an act plus

a depraved mind, it should read

and an intent to commit an act

which caused the death of the

victim and then the manslaughter

by culpable of negligence has no

intent to act and the victim

died.

>> Your basic argument then is

that because the next

instruction was erroneous, then

what?

>> Well then the jury is left

with two options.

Second degree murder which has

the intent to act plus depraved
mind or manslaughter by culpable
negligence, no intent to act so
the problem is the facts in this
case that Mr. Haygood did intend
to act and did commit an act so
the jury is precluded to pick
either one of the manslaughter
instructions.

>> They were left with no
options finding the included
defense basically.

>> Right.

[INAUDIBLE]

>> He wasn't charged with that.

>> The state recognized if it
was going to be anything it was
based on an intent to cause
harm.

He admitted that, resulting in
death, so between -- and there
was no question there was an
intent to do harm between
second-degree and manslaughter
by act would be, how would the

jury has been making that
decision?

>> Well, the jury, since they
were given the incorrect
decisions -- the incorrect
instruction they could not take
manslaughter by act because that
is showing no intent.

There is no evidence to show
intent to kill plus the
fundamental, there was an error.

If they were to take
manslaughter and some of the
DCA's have said, Oh well there
is still an option out there
because the culpable negligence
instruction was read to them,
the jury could have just picked
that but it really isn't a
viable pick because you would
have to have no intent to harm.

Well, you would have to have no
intent for conscious intent to
harm, which he did have the
conscious intent to harm and he

would have to be no intent to act and he did intend to act so they were precluded from taking a manslaughter by culpable negligence option.

>> Help me understand what distinguishes second-degree murder from manslaughter by act?

Assuming they had been given the correct instruction, what would they have been looking at to decide whether it's second-degree murder or falls in the category of manslaughter by act?

>> To define second-degree murder they need to find he intended to commit an act class and imminently dangerous act with a depraved mind so mental culpability, that's the problem.

>> That is what we are asking.

>> No, no, hold on, hold on.

You said that they did pick that.

>> Which one?

Second-degree murder?

>> Eminently dangerous and
depraved mind, they picked that.

>> They did.

>> The evidence did support
that.

>> The next one down is intent
to commit an act which caused
the death of the victim.

That would be the proper thing.

>> So if the depraved mind was
absent, then they would be able
to convict him of manslaughter
by act?

That really is in every version
of this situation.

There was no negligence.

>> No.

>> That was not a viable
alternative.

It is fundamental and I mean I
don't know how something can be
both fundamental and harmless so
I know a lot of the DCA's have

said that.

>> The jury may have been
convicting of second-degree
murder by process of
elimination.

The depraved mind, manslaughter,
obviously that was not available
and they basically said I
intended to --

[INAUDIBLE]

But manslaughter by act as
instructed in the case
eliminated that possibility
because it required an intent to
kill so had they been properly
instruct did --

>> They could have picked
manslaughter by action.

>> We said in a case in 2002,
Reed versus state that if any
erroneous instruction for the
jury must consider to convict
that its fundamental error and
hear the erroneous instruction
was that the jury was told that

he had to have an intent to
kill.

So it seems to me that it falls
under that category of
fundamental error.

>> It does and because I mean,
there wasn't really any
evidence, there was no evidence
of culpable negligence so what
were they to do?

If they found the intent to harm
without a depraved mind, what
could they depict?

Was that close to second-degree
murder, intent to harm or intent
to act or culpable negligence
with no intent to act?

Of course it's closer to
second-degree murder.

That's the same problem
exercised in Montgomery.

>> And there were no other
lesser included offenses with
the instructions given?

>> I don't believe so.

>> And this is manslaughter by act is the next lesser included offense to second-degree murder?

>> Yes.

>> The defense did request an instruction on culpable negligence.

>> Yes, the trial judge --

>> Did the record show why that was the case?

>> I suspect it was, even though you can ask for --

[INAUDIBLE]

>> Even if all the evidence didn't totally support it but the trial community did not rely on culpable negligence.

She continually -- her theory was yes he did that, yes he intended to cause bodily harm but no he did not have a depraved mind, so --

>> Her theory was it wasn't second-degree murder.

>> Correct, correct.

And --

>> The only thing, I'm trying to see why Montgomery does not answer things like the appellate court doesn't think so, but it's that the issue we are looking at is the presence of a culpable negligence instruction with a misleading manslaughter by accident instruction to say this is fundamental error.

>> That's incorrect.

>> But do you conceive that is the circumstance where Justice Labarga read -- it would allow the courts to look at the facts of that case and say it could be harmless error?

>> If there was culpable negligence, evidence of culpable negligence?

>> Where they still had an erroneous choice.

>> I think it still a fundamental error.

>> If we don't adopt that rule
with a lot of cases pending
where do you slice and dice it?

>> I don't think it's the
correct thing.

I'm not sure why all the DCA's
have gone the way they have that
the only one set of five about
it and analyzed it is a
three-judge panel on Haygood.

>> I feel badly because that is
the court that adopted the
erroneous instruction and I am
still trying to figure out how
that all happened over the
years.

>> Well it has come a long ways
in the last three years.

>> Judge Labarga, thank you for
clarifying for us.

>> It just seems to me that the
instruction culpable by act as
corrected by Montgomery was a
better fit for your Defense.

>> Definitely.

>> I think it might've been a hard sell given the way he committed his crime but it would have been a better fit and would not have required a jury partner which is the reason why the court says as long as you instruct him and culpable negligence than the jury can always use it as a hook.

>> I can't understand the logic of that thinking.

>> But basically your argument it seems to me, to be with culpable negligence you really would get a jury hardened because he really did the act. However, with manslaughter by act, a jury could reasonably find that if he did not have depravity.

>> And culpable negligence this is consciously following a course of conduct the defendant should have known as likely to

cause death or great bodily

harm.

How is that really different
than the manslaughter by act?

>> Well it is an intent to act
really.

Everything -- everything has
some sort of act but that but
whether it's an intent for an
unlawful act is another thing.

>> Either manslaughter or
culpable negligence in both,
there is a conscience doing an
act of some type, right?

>> Everything has an act.

>> How are they different?

>> How are they different?

One has intent to harm and an
intent to do an unlawful act
would be the manslaughter by act
but involuntary manslaughter,
manslaughter by culpable
negligence and you don't have to
have that.

It's kind of like --

>> You could be playing around.

If somebody is playing around in
a way --

>> But in the circumstances
wouldn't the facts in this case
fit with culpable negligence?

>> No, no because he had an
intent.

For a few reasons really.

Not to throw him under the bus
but he had an intent to commit
harm and that is one thing.

He also --

>> But he said he had no intent
to cause death or great bodily
harm.

>> It's just an intent to do the
act and he also -- I am between
thoughts.

He didn't have a conscious
intent to harm and also it kind
of leads to multiple acts.

It was the headbutting and then
choking for 10 seconds and then
he tripped her and unbeknownst

to him that is when she hit her
head but she gets back up.

They walk over, they sit down,
she leans on him and the fact
that there are multiple
incidents kind of doesn't
support negligence.

It's more an act, intent to act.

Does that answer your question?

I'm going to save the rest of my
time for rebuttal.

>> Good morning Your Honors, may
it please the court.

Cerese Taylor on behalf of the
State of Florida.

Your Honor, this is not
Montgomery.

To answer your question, Judge
Pariente.

>> Judge Labarga, when you talk
about the problem in Montgomery,
the problem was a lack of an
option.

The jury was directed in the
verdict.

There was no ABC.

It was the charge or charge or
the acquittal and that is not
present when you have unlawful
culpable negligence to
manslaughter.

He has option for the jury to
impose a lesser charge based on
the review of the evidence.

This is not the part that the
people are concerned about
because this is not an acquittal
when you have a smoking gun.

What this is is the jury's
conscience.

It is obligation and a social
conscience to look at the facts,
make determinations as to what
the facts are and to apply those
facts to the option, the verdict
option that the jury --

>> In this case, even
manslaughter by act, we know
that is --

[INAUDIBLE]

>> Yes, Your Honor.

>> I don't believe there was any evidence that there was an intent to kill.

>> That's right.

Definitely not.

>> So if you look at culpable negligence was there any real option to the jury if under culpable negligence, you don't have to have any intent to commit the act?

So that is my thought here is, is there any real option when they only lesser included that was given that was given accurately was the culpable negligence?

>> The answer is yes, absolutely an option and I will explain what I mean.

We are talking about the difference between these crimes.

You are talking about really a difference of mental degree.

There is no intent to commit
this murder.

He is really remorseful and what
we are talking about is what was
in your mind?

Are you depraved or are you
reckless?

I think it's important that
culpable negligence, the problem
with it, and in my humble
opinion is, if it has negligence
and that it is defective -- but
when you look at what the jury
is instructed, culpable
negligence, that's when he put
it side-by-side and you have
committed an act.

Manslaughter by culpable
negligence instruction is
comparatively longer because
it's developed, what is culpable
negligence?

It is not in my estimation a
failure act is underlying it and
what that act is is an act whose

recklessness is to such a degree
that we in the law allocate it
elevate it to a purposeful act.
Really when you look at the
manslaughter, the statute, the
variance of the same crime, it's
that little subpart which are
really procurement by act,
culpable negligence are all
weight of committing a lesser
offense where someone is dead
and where that person is not
acting either with depravity or
premeditated intention.

>> And I have to look at how the
legislature has defined it.

I thought that there is some
crime where it was stated as
aggravated assaults, you would
commit assault in certain ways
but that these are manslaughter
by act versus culpable
negligence are two crimes with
two distinct elements.

Am I incorrect about that?

>> My view of that is it's not that way.

When you look at the statute it is really kind of one line and it gives you the options of different ways you can accomplish manslaughter.

When you look at the verdict form it doesn't asked the jury to select and slaughter.

It's an opportunity to impose a lesser and it doesn't asked the jury to parse between the various ways they can be accomplished.

It just says manslaughter.

>> Again, explain to me whether the element -- the elements are the same.

Are they the same, the elements of manslaughter and culpable negligence?

>> No, the way they are described in jury instructions is manslaughter is just an act.

>> But the problem was again in Montgomery the way we ended up defining it sounded like he had no intent to kill the person.

>> And that is really why we take in this conversation manslaughter by act out of the conversation.

We are talking about culpable negligence and second-degree murder and that is the distinction.

>> Well, we take it out of the act.

>> Because of Montgomery.

>> Because the instruction was erroneous, but if you look at manslaughter by act, the only difference as I see it and you can correct me is that the manslaughter by act, the difference from first-degree murder is that we don't have a depraved mind but other than that manslaughter by act seems

to be a crime of second degree
murder.

>> It's not the same as second
degree because second degree is
a depraved mind.

>> You have manslaughter by act.

>> Which is why they necessarily
include a lesser and I think
when you have this discussion
you can't escape the fact that
the trial courts are obligated
in homicide cases to impose all
the necessary included lessers
and they don't have a choice in
that.

And then they have the
opportunity, I'm sorry Your
Honor.

>> You can finish.

>> An opportunity to impose --
This is not unique because of
that.

You are always going to have to
take -- a trial judge is
required to give instruction on

a crime whose facts may or may not exactly fit the charge of the offense.

>> But isn't the problem here really, we talk about the -- that has issues itself.

But let's forget about the pardon now.

If you look at that, before I get to my question, my main question, isn't it the case that if you set out to hurt somebody, you are not going to end up committing manslaughter by culpable negligence.

>> Well I don't know that is true but when I think about manslaughter in a perfect world properly instructed, properly charged.

My example is I hit somebody.

I intended to act and I intended to hurt you.

I wanted to break your nose but

I did not want to kill you and

really that is why these

lesser --

>> But my question was not about

manslaughter by act but by

culpable negligence.

If you set out to hurt

somebody --

So isn't the real problem here

is we have the circumstances.

To me it looks clearly like a

second degree murder given the

pattern of things here, but that

arguably the circumstances here,

some jury conceivably could say

that this is manslaughter by

act.

That if they don't think there

is a depraved mind, for whatever

reason, they would decide, it's

given that choice between

manslaughter by act and properly

instructed, and second-degree

murder.

They would decide that it is

manslaughter by act rather than

second-degree murder.

Whether they are going to understand it can't be culpable negligence so it's not about pardoning but about a jury, the jury trying to faithfully carry out their responsibility to figure out what this crime is.

They need to be properly instructed in order to do that.

>> But that's the very reason in this case.

I see all the points you are saying.

It's a way that Montgomery became protected, because it did not provide this opportunity.

The idea has been uniform in the application and the question goes beyond what the DCA has now.

The DCA's have all found culpable negligence.

The opportunity for position of a lesser verdict.

>> But in doing that based on this idea that somehow we are talking about pardoning power as opposed to the fact that it's a real question, was the jury presented with a viable alternative that, where they would understand the facts?

We are talking here -- sometimes I think we are up here in front of the public and they are saying, what are they talking about?

Instructions in the law are critical to whether the jury comes up with a proper conviction.

[INAUDIBLE]

>> Please let me finish.

The question of whether he gets second degree or manslaughter is a big deal.

>> Yes.

>> Okay so, and that's why wouldn't the state just want to

make sure that juries are properly instructed?

We have Montgomery going forward

and on these pipeline cases, if

they had been instructed

improperly, go back and if it's

so clear like you maybe say this

one is -- they will get

re-convicted but I mean this guy

has a sentence of what?

What's his sentence?

Life in prison?

>> I don't recall, Your Honor.

>> We have ultimate punishment

here.

We are not talking about whether

they get to slap some there is.

You are doing an excellent job

of advocating on behalf of the

state but in terms of really

looking at it and taking this

case which says they were not

going to find intent to kill so

the erroneous instruction could

mislead them.

They were finding he had an intent to harm so there is culpable negligence and that leaves them with one choice, which is second degree and that is how I am looking at this case at the very least.

>> The difference between the Montgomery instruction and this instruction is that this was an unlawful instruction because it misled the jury on what the legal elements were that the state was required to prove.

That is the problem with Montgomery.

It didn't leave any options except to really depart us.

Second-degree was a departure to think Montgomery instruction on manslaughter was an intentional act of killing.

>> Would you agree in this case that the culpable negligence was

not available to the jury?

>> I absolutely disagree with

that and I will tell you why.

Because what we are talking

about here, the question is --

what we are talking about is

comparing Montgomery method by

act, second degree and culpable

negligence manslaughter is

degrees of mental intention and

you can argue in this case,

Mr. Haygood -- he tripped her.

He elbowed her.

This is like a temper tantrum.

These are the actions --

>> He intended to hurt her.

>>> Sure he intended to hurt her

but he did not intend to kill

her.

When you elbow somebody and trip

somebody and then they hit their

head, now you are getting into

where you have to lay at the

feet of the jury and say what

you think in this society when

you elbow somebody?

Is it a depraved mind?

>> But is that act

second-degree?

I am not sure.

The discussion here is not really whether he was rightfully convicted of second-degree murder.

The discussion is whether the jury was given an option.

But if culpable negligence does not include the element of wanting to hurt someone, then how is that a viable option when you have just said that it's clear in this case that he intended to hurt her?

>> In our estimation it is a viable option.

You have to have intentional action.

You have to do something on purpose.

And you have to have

recklessness, whose degree is
such that we are going to make
it equivalent to intentional and
I would remind you to look at
the jury instructions.

It makes it equivalent.

It's not just negligence.

It is criminal negligence.

>> It's still negligence,
whether it's elevated like
punitive damages.

It still means that you didn't
intend something.

>> I'm sorry, I am just excited.

I apologize, Your Honor.

>> Negligence is still that you
are not intending something.

You are failing to act with
reasonable care and then it's
elevated so that we go back to,
you say your argument is that it
is a viable option in the way I
understood the second district
opinion is whether its
fundamental error or whether,

giving culpable negligence makes
it somehow harmless error and an
in harmless error, which is hard
to really be objective.

I guess in harmless error the
state as the beneficiary of the
air has to prove beyond a
reasonable doubt that he didn't
contribute to the jury verdict
and several of us are here just
kind of going, well Gee, you
know, if you take out the two
lessers and culpable negligence
as meaning no intent and then
otherwise you have an intent to
kill by process of elimination
you go back up to second-degree.

But what you say is no, no the
jury might have felt culpable
negligence would still be
viable.

That's just speculating on it
and what you would have to do to
find it was harmless beyond a
reasonable doubt, who us how

under no set of circumstances
the jury could have been misled
by having that erroneous
instruction.

So now you can --

>> Thank you.

I think what is key in these
cases is that the court is
guided by the instrumentation of
fundamental error and there is
no objection.

What we are talking about is
whether this is error that
reaches down into the verdict.

That is the level of error we
are talking about.

This court does not throw around
fundamental error every day.

It's a serious consideration to
a serious crime.

With regard to the instruction,
the question of whether this is
a lawful instruction I don't
think anyone would disagree.

The culpable negligence

instruction was a lawful
instruction and that is what
makes it a viable alternative.

The defendant is entitled to
lesser included offenses,
including lessers and some
permissive lessers that
accurately directs the jury as
to the law.

And it is always going to be the
case that, in every case, there
are lessers whose facts the jury
has an opportunity to take the
fact, re-determine them and
apply them.

>> But this is still my problem
with this is.

You have got your second-degree
murder and the conscientious
juror knows that killing someone
is --

But then they are told that if
you are not satisfied with that,
that those elements are
applicable, in this case what

they were told is you can find him guilty of manslaughter by act, which includes you know, the killing and the intended killing, okay?

And on the other side you are given the manslaughter by culpable negligence where he is told that you did act but you didn't intend to hurt.

We know he intended to hurt her so that's out of the way.

They looked at the other one and they say well, a manslaughter by act, he has to have the intent to kill her but we don't have any evidence that he did that, so that's out.

So you really don't have a viable option because that one viable option, the instruction was erroneous for it.

If they had been told that he could be convicted of manslaughter by act, so the

killing and you -- you intend to do the act but not to kill, then they would have had a viable act, wouldn't they?

That is how it appears to break down in my mind.

>> Fair enough.

>> I certainly want to explain myself in a way that will make opposition very clear.

>> I guess if you could explain to me how manslaughter by culpable negligence was truly a viable act.

>> Okay.

Mr. Haygood, closing argument.

You didn't put on any --

His closing argument said, I was not acting in depravity.

I was acting in recklessness and that is the focus of the way in which the case is best presented if you want to obtain this lesser manslaughter result because I think reasonable minds

could agree that tripping
somebody and elbowing somebody
is not imposing reasonable death
so for him to make the case that
these actions are not depraved.

They are not ill will, spite and
hatred.

The jury did find that it was
because you could make that
argument too.

He punched her, he choked her,
he elbowed her.

>> He was furious with her and
wanted to hurt her.

>> Definitely he was hurt about
the affair.

>> I'm looking at the majority
of opinion in this case as well
as dissent and what they are
saying is it's possible to
speculate what the jury would
have found had it been properly
instructed that manslaughter by
action is not required for an
intent to kill and then we go

back and say fundamental error must be harmful or classified as fundamental, I simply fail to see the logic by which a fundamental error of this kind becomes harmless merely because the jury received an alternative instruction that has little or no application for the evidence presented at trial and I think that seems to be what several of us keep on saying, is that we -- had something not remained fundamental because there is another instruction that is not as applicable that they are given and their only alternative than is to use an instruction that really doesn't fit with the evidence and that's the problem.

>> But when you are looking at whether the instruction fits with the evidence in all due respect I think what a reasonable jury is looking at is

a short verdict form,
second-degree and manslaughter
and acquittal.

If they're looking at
manslaughter I believe they have
already made a determination
that maybe second-degree doesn't
exactly fit.

We have the set of facts in
which a these things most
closely resemble it?

That is always the jury's
function in any homicide case.

This is the opportunity for the
jury to apply these sets of
facts to a lesser charge and not
be forced to acquittal and not
be forced to depart.

That is what distinguishes these
cases.

>> You seem to be saying that
it's without regard to the
instructional law that the judge
provides.

You are discussing it in a very

factual type approach as though they are not going to follow exactly what the judge tells them.

>> Then I misspoke, Your Honor.

I certainly mean to say they are going to be following the law but what they are instructed to do is to determine what they think the facts are and to figure out which among these lawful instructions most closely resembles these facts.

In this lesser -- whose actions could be interpreted, and this is a case where it was a question of where he had involvement.

It wasn't like there were some mysterious other person like in the Balentine case.

There was direct involvement and what the defendant would do would try to get cast a state of mind in a certain way that makes

his crime -- but doesn't have to bear life in prison for something that a jury could have found reckless disregard for her welfare but not depravity.

>> The problem here is the jury was not properly instructed on the alternative that at least plausibly could fit, which would be manslaughter by act and he would concede that that's the most plausible alternative that fit these factual circumstances to second-degree murder.

It's certainly much more plausible than the other manslaughter.

>> Yes, I would not concede that because to me it's not.

>> Isn't it the case that the state actually objected to the culpable and ultimately they let it go but they objected to that.

There was a reason for that.

>> I think there are two

reasons.

>> I don't have time to talk
about that because you have --

>> I would ask that the court
answer --

[INAUDIBLE]

Thank you for your time Your
Honors.

>> Briefly, the closing argument
and in Mr. Haygood's case, his
trial counsel never argued,
never mentioned the word
negligence.

She didn't even mention the word
culpable.

The state spent a little bit of
time specifically instructing
and telling the jury, arguing to
the jury that of course you
cannot take manslaughter by
culpable negligence because to
have manslaughter by culpable
negligence you have to have no
conscious intent to harm and of
course he said Mr. Haygood had a

conscious intent to harm.

>> Did they say anything about manslaughter by act, why they couldn't do that?

>> The state, yes, because he kept harping he had a depraved mind so this is a situation of a depraved mind and Haygood's trial counsel was no -- yes he did it.

>> Why did the state say he couldn't be convicted of manslaughter by act?

>> Because he had a depraved mind and it was more second-degree murder because of the --

>> I guess the question really is, did they argue that the state, in its closing arguments, argue manslaughter by act with the elements that were erroneous to instructions?

They said, you can't use manslaughter by act because?

>> Because he had an intent to kill?

No, he did not.

>> This is a situation where the jury was definitely improperly instructed.

It's not a JOA trying to get a new trial to get the give the jury the fact-finder an actual opportunity to see, is the second-degree murder with depraved mind or is this manslaughter by act or is this nothing, acquittal?

For that reason I respectfully request that this court answer the certified question in the affirmative and quash the decision of the 2nd DCA.

>> A lot of other decisions would be disapproving, is that correct?

>> Yes, Your Honor.

>> We thank you both for your arguments.