

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case Number: SC10-1244

CHAD DOUGLAS RUSHING,

Respondent.

_____/

JURISDICTIONAL BRIEF OF RESPONDENT

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The First District ordered a new trial on Respondent's attempted second-degree murder conviction because the jury instruction on the lesser included offense of attempted manslaughter by act contained a fundamentally erroneous intent element. The First District's decision is consistent with its decision in Montgomery v. State, which this Court approved in State v. Montgomery. Petitioner's brief does not cite or discuss this Court's decision in Montgomery.

Petitioner argues that Rushing conflicts with the Second District's decision in Hall and the Fifth District's decision in Barton. However, any such conflict has been resolved by this Court's decision in Montgomery, and Petitioner has not argued otherwise. Further, Rushing is consistent with this Court's prior cases discussing the elements of attempted manslaughter by act.

Petitioner argues that Rushing conflicts with this Court's decision in Ray v. State on the question of fundamental error. The finding of fundamental error in Respondent's case does not conflict with Ray, and this Court's exercise of jurisdiction for this reason is unnecessary.

ARGUMENT

PETITIONER HAS NOT STATED A COMPELLING BASIS
FOR THIS COURT'S EXERCISE OF JURISDICTION.

Standard of Review: The determination of jurisdiction is a legal question. Jacobsen v. Ross Stores, 882 So. 2d 431 (Fla. 1st DCA 2004). Legal questions are determined *de novo*. Engle v. Liggett Group Inc., 945 So. 2d 1246, 1259 (Fla. 2006).

Argument: In Issue I, Petitioner requests this Court to review Rushing v. State, ___ So. 3d ___, 2010 WL 2471903 (Fla. 1st DCA July 21, 2010), based upon purported conflict with the Second and Fifth Districts' decisions in Hall v. State, 951 So. 2d 91 (Fla. 2nd DCA 2007) (en banc), and Barton v. State, 507 So. 2d 638 (Fla. 5th DCA 1987), reversed on other grounds, State v. Barton, 523 So. 2d 152 (Fla. 1988) (Jurisdictional Brief Of Petitioner at 3-7). Respondent contends that any such conflict has been resolved by this Court's decision in State v. Montgomery, ___ So. 3d ___, 2010 WL 1372701 (Fla. Apr. 8, 2010), and that Petitioner's reasons are not compelling.

Petitioner's brief does not once mention this Court's decision in Montgomery, where the Court held that the crime of manslaughter by act does not require proof of intent to kill. State v. Montgomery, ___ So. 3d ___, 2010 WL 1372701 (Fla. Apr. 8, 2010). A jury instruction stating that the defendant "intentionally caused the death of" the victim requires proof of

an intent to kill and is thus erroneous. Id. When a jury receives this erroneous instruction and the defendant is convicted of second degree murder, the error is fundamental. Id. Petitioner presents no reasons that this holding should not apply to a conviction for attempted second degree murder when the jury instruction on attempted manslaughter by act erroneously required proof of an intent to kill.

The First District based its decision in Respondent's case on its decisions in Montgomery v. State, ___ So.3d ___, 2009 WL 350624 (Fla. 1st DCA Feb. 12, 2009), and Lamb v. State, 18 So. 3d 1141 (Fla. 1st DCA 2009). In its Montgomery decision, the First District discussed Taylor v. State, 444 So. 2d 931 (Fla. 1983), and the Second and Fifth District's interpretations of Taylor as holding that attempted manslaughter required proof of an intent to kill. Montgomery v. State, 2009 WL 350624 at *2-3. The court concluded that Taylor did not hold that attempted manslaughter required proof of an intent to kill but proof of "only an intent to commit an act that would have resulted in the death of the victim except that the defendant was prevented from killing the victim or failed to do so." Montgomery, 2009 WL 350624 at *3. In Lamb, the First District applied Montgomery to a jury instruction on attempted manslaughter by act which stated that the defendant "committed an act intended to cause the death of the victim." 18 So. 3d at 735. The court reversed Lamb's

conviction, holding, “attempted manslaughter by act requires only an intentional unlawful act.” This Court approved the First District’s holding in Montgomery, and Lamb is entirely consistent with this Court’s decision in Montgomery. Thus, that decision has resolved any purported conflict between Rushing and Hall and Barton.

The First District’s interpretation of Taylor’s holding is also consistent with this Court’s interpretation of that holding. See, e.g., Murray v. State, 491 So. 2d 1120, 1121 (Fla. 1986) (Taylor held that attempted manslaughter “logically exists ‘in situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter,’” quoting Taylor, 444 So. 2d at 934); Tillman v. State, 471 So. 2d 32, 33, 35 (Fla. 1985) (Taylor held that attempted manslaughter required proof of “a certain degree of criminal intent” or the “requisite criminal intent”); Brown v. State, 455 So. 2d 382 (Fla. 1984) (Taylor held, “[A] verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act,” quoting Taylor, 444 So. 2d at 934). It is unnecessary for this Court to exercise jurisdiction in Respondent’s case only to restate what the Court has already said several times and reaffirmed in Montgomery.

In Issue II, Petitioner requests the Court to exercise jurisdiction on the basis that the First District’s decision in

Respondent's case "expressly and directly conflicts" with Ray v. State, 403 So. 2d 956 (Fla. 1981), on a question regarding fundamental error. The finding of fundamental error in Respondent's case does not conflict with Ray, and this Court's exercise of jurisdiction for this reason is unnecessary.

In Ray, the Court held:

[I]t is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidence by argument to the jury or other affirmative action.

403 So. 2d at 961. Petitioner contends that Rushing conflicts with Ray because the First District "distinguished Ray by limiting Ray's application to cases in which a jury finds the defendant guilty of the erroneously instructed lesser offense" (Jurisdictional Brief of Petitioner at 8). However, this is exactly the situation which Ray addresses: "[I]t is not fundamental error to *convict* a defendant under an erroneous lesser included charge" 403 So. 2d at 961 (emphasis added). Rushing does not conflict with Ray on this basis.

More important, however, is Petitioner's reliance upon Armstrong v. State, 579 So. 2d 734 (Fla. 1991). According to Petitioner, Armstrong establishes that Ray applies "even when a jury finds the defendant guilty of the greater offense" (Jurisdictional Brief of Petitioner at 9). What Petitioner fails

to recognize is that Armstrong relies upon Ray's requirement that defense counsel take some "affirmative action" in order to establish a waiver of a fundamentally erroneous instruction on a lesser offense. In Armstrong, defense counsel requested an abbreviated excusable homicide instruction which conformed to the defense theory. Id. at 734-35. When the defendant challenged the instruction on appeal as fundamental error, the Court concluded the defendant had waived the issue by affirmatively requesting the abbreviated instruction. Id. at 735.

The Rushing majority discussed Ray in response to the dissent's position that Respondent waived the issue regarding the attempted manslaughter instruction because, according to the dissent,¹ defense counsel agreed to the use of the standard instruction and read the instruction during closing argument. 2010 WL 2471903 at *2. Facts recited in a dissenting opinion cannot provide a basis for this Court's conflict jurisdiction. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, in order to establish a waiver under Ray and Armstrong, "defense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete instruction." Beckham v. State, 884 So. 2d 969, 973 (Fla. 1st DCA

¹Although the facts relied upon by the dissent are not relevant to this Court's decision whether or not to accept jurisdiction, Respondent feels constrained to note without further discussion that the dissent's factual statements are incorrect.

2004); Black v. State, 695 So. 2d 459, 461 (Fla. 1st DCA 1997); Brown v. State, 909 So. 2d 975, 976 (Fla. 2nd DCA 2005); Roberts v. State, 694 So. 2d 825, 826 (Fla. 2nd DCA 1997). The facts in the majority opinion in Rushing state only, "The instruction on attempted voluntary manslaughter was read to the jury without objection from either party." 2010 WL 2471903 at *1. No facts in the majority opinion establish that defense counsel was aware the instruction was infirm. Rushing does not conflict with Ray.

CONCLUSION

The First District's opinion in Respondent's case does not conflict with Hall, Barton or Ray. This Court should deny review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by U.S. Mail to **Ed Hill** and **Michael T. Kennett**, Assistant Attorneys General, Counsel for the State of Florida, The Capitol PL01, Tallahassee, Florida 32399-1050, and to **Mr. Chad Rushing**, DOC# 690006, NWFRC Main Unit, 4455 Sam Mitchell Drive, Chipley, FL 32428-3597, on this 21st day of July, 2010.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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