

Kristopher SANDERS, Appellant,

v.

STATE of Florida, Appellee.

No. 2D10-983.

District Court of Appeal of Florida,
Second District.

Oct. 5, 2011.

Rehearing Denied Nov. 30, 2011.

Background: Defendant was convicted by jury in the Circuit Court, Hillsborough County, Emmett Lamar Battles, J., of second-degree murder with a firearm, and he appealed.

Holding: The District Court of Appeal, Kelly, J., held that trial court fundamentally erred when instructing the jury on the lesser-included offense of manslaughter by act.

Reversed and remanded.

Criminal Law ⇨1038.1(3.1)

Homicide ⇨1380

In prosecution of defendant for second-degree murder with a firearm, trial court fundamentally erred when instructing the jury on the lesser-included offense of manslaughter by act; trial court instructed that, in order to convict defendant of manslaughter, the State was required to prove that defendant “intentionally caused” the victim’s death, but at the time of defendant’s trial, the standard jury instruction on manslaughter by act had been amended to clarify that a conviction for manslaughter by act did not require an intent to kill, but only an intent to commit an act which caused the victim’s death, and jury was not instructed on manslaughter by culpable negligence.

1. In 2010 the supreme court amended the manslaughter by act instruction deleting the

James E. Felman and Katherine Earle Yanes of Kynes, Markman, & Felman, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

KELLY, Judge.

Kristopher Sanders appeals his conviction for second-degree murder with a firearm. We find merit only in his argument that the trial court fundamentally erred when instructing the jury on the lesser-included offense of manslaughter by act. *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), mandates reversal.

The State charged Sanders with second-degree murder following the shooting death of Tyrie Gunn. At the conclusion of trial, the court instructed the jury on second-degree murder and on manslaughter by act, a category one lesser-included offense of the murder charge. The court instructed that in order to convict Sanders of manslaughter, the State was required to prove that Sanders “intentionally caused” the victim’s death. There was no objection to this instruction despite the fact that at the time of Sanders’ trial, the standard jury instruction on manslaughter by act had been amended to clarify that a conviction for manslaughter by act did not require an intent to kill but “only an intent to commit an act which caused [the victim’s] death.” *See In re Standard Jury Instructions in Criminal Cases—Report No. 2007-10*, 997 So.2d 403, 403 (Fla. 2008).¹ The jury was not instructed on manslaughter by culpable negligence.

On appeal, Sanders, citing *Montgomery*, argues that the manslaughter by act in-

language requiring an intent to kill and requiring proof that the “(defendant’s) act(s)

struction was defective and that its use constituted fundamental error. We agree that *Montgomery* is controlling. Here, the trial court gave the same manslaughter jury instruction that was given in *Montgomery*. As in *Montgomery*, the jury was not instructed on manslaughter by culpable negligence. See *Barros-Dias v. State*, 41 So.3d 370 (Fla. 2d DCA 2010) (holding that giving the erroneous manslaughter by act instruction did not constitute fundamental error when the jury was also instructed on manslaughter by culpable negligence). We therefore reverse Sanders' second-degree murder conviction, vacate his sentence, and remand for a new trial. See *Stoddard v. State*, — So.3d —, 2011 WL 3760863 (Fla. 2d DCA 2011); *Carter v. State*, 53 So.3d 1248 (Fla. 2d DCA 2011); *Walker v. State*, 46 So.3d 160 (Fla. 2d DCA 2010).

Reversed and remanded.

WHATLEY and DAVIS, JJ., Concur.



Corey MILLEDGE, Petitioner,

v.

STATE of Florida, Respondent.

No. 1D11-4829.

District Court of Appeal of Florida,
First District.

Oct. 5, 2011.

Rehearing Denied Dec. 5, 2011.

Petition Alleging Ineffective Assistance of Appellate Counsel—Original Jurisdiction.

caused the death of (victim).” *In re Amendments to Standard Jury Instructions in Crimi-*

Corey Milledge, pro se, Petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, for Respondent.

PER CURIAM.

The petition alleging ineffective assistance of appellate counsel is denied on the merits.

PADOVANO, ROBERTS, and
MARSTILLER, JJ., concur.



Robert FOWLER, Petitioner,

v.

**Kenneth S. TUCKER, Secretary,
Florida Department of Cor-
rections, Respondent.**

No. 1D11-4996.

District Court of Appeal of Florida,
First District.

Oct. 10, 2011.

Rehearing Denied Dec. 6, 2011.

Petition for Writ of Habeas Corpus—
Original Jurisdiction.

Robert Fowler, pro se, Petitioner.

No appearance for Respondent.

nal Cases—Instruction 7.7, 41 So.3d 853, 854 (Fla.2010).