IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2011

DAVID HARRICHARAN,

Appellant,

v. CASE NO. 5D10-102

STATE OF FLORIDA,

Appellee.

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Opinion filed February 25, 2011

3.850 Appeal from the Circuit Court for Seminole County,
Debra S. Nelson, Judge.

Richard C. Klugh, of Richard C. Klugh, PLLC, and Mark Seiden, of Law Offices of Mark Seiden, P.A., Miami, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

David Harricharan appeals an order denying his postconviction motion after an evidentiary hearing. We affirm as to all issues and write only to address Harricharan's argument that the case should be remanded so that he can amend his postconviction motion to include a claim of fundamental error based upon *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) (holding that the standard manslaughter by act jury instruction's second element -- that the defendant "intentionally caused the death of (victim)" --

erroneously required the jury to find proof that the defendant intended to kill the victim in order to find him guilty of that crime).

With respect to this claim, we conclude that *Montgomery* does not apply to cases such as Harricharan's, which were final before *Montgomery* was decided. *See, e.g., Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002) (finding fundamental error in giving of standard jury instruction for aggravated child abuse, but applying holding only to "cases pending on direct review or not yet final."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) ("[W]e hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final . . . . To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.") (citations omitted); *see also, Rozelle v. State*, 29 So. 3d 1141 (Fla. 1st DCA 2009) (holding that First District's decision in *Montgomery v. State*, 35 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which was approved in the Supreme Court's *Montgomery* opinion, did not apply retroactively to cases that were final before the decision was issued).

AFFIRMED.

GRIFFIN, SAWAYA, and LAWSON, JJ., concur.