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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

J.C.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D17-792
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

Opinion filed January 5, 2018

Appeal from the Circuit Court for Polk County; Mark J. Hofstad, Judge.

Howard L. Dimmig, II, Public Defender, and Tosha Cohen, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Elba Caridad Martin, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

In this delinquency proceeding, the trial court found that J.C. committed the delinquent act of culpable negligence exposing another to personal injury under section 784.05(1), Florida Statutes (2016), withheld adjudication, and placed J.C. on six months of juvenile probation. J.C. appeals, arguing that the evidence was not sufficient

to prove the alleged offense. Our precedent holds that the term "culpable negligence" as used in section 784.05(1) requires a conscious act a reasonable person would know is likely to result in death or great bodily harm. Because the State's evidence was legally insufficient to prove that, we reverse.

On a summer evening not long after Independence Day in 2016, D.M., a young man of around fourteen, was at his home with his twin brother and grandfather. He heard a knock at the door. He answered it to find J.C.—a friend of his who was then twelve—and another boy. J.C. was holding a small round object in one hand that D.M. recognized as a smoke bomb. J.C. lit the smoke bomb, left the front door area, and went to the road that faced the house. He then threw the smoke bomb toward the open front door. It hit the door and landed on a carpeted floor just inside the house. It was not sparking or flaming, but it was making a lot of smoke. D.M. threw the smoke bomb back out of the house.

Soon thereafter, D.M.'s great uncle, who lived with the twins and their grandfather, returned to a smoky house. The police were called. When they arrived, there was still a lot of smoke and a strong smell of sulfur. No one got hurt, however. Nor was anyone's property damaged. The smoke bomb was not recovered. At trial, D.M. testified that he and J.C. have remained friends notwithstanding the incident.

The State filed a petition for an adjudication of delinquency which alleged that J.C. violated section 784.05(1) when he threw the smoke bomb at the home. The statute provides that "[w]hoever, through culpable negligence, exposes another person to personal injury commits a misdemeanor of the second degree." Id. At the close of the evidence, the defense argued that the evidence was insufficient to show that J.C.'s

throwing a smoke bomb at the house constituted culpable negligence within the meaning of the statute. The trial court disagreed, and this appeal followed.

Our court addressed the evidence required to prove culpable negligence under section 784.05(1) in Azima v. State, 480 So. 2d 184 (Fla. 2d DCA 1985). There, a doctor was charged with violating the statute after placing an intrauterine device in a pregnant patient. Although the evidence showed that placing an IUD in a pregnant woman is very risky, the patient fortunately was not injured. Id. at 185-86. After a county court found the doctor guilty and a circuit court affirmed the resulting judgment, the doctor petitioned this court for a writ of certiorari, arguing that his conviction was unsupported by the evidence. Id. at 186.

We held that the evidence was insufficient to establish that the doctor was culpably negligent and granted the writ. Id. at 187. We referred to the supreme court's decision in State v. Greene, 348 So. 2d 3, 4 (Fla. 1977), to explain that culpable negligence requires conduct akin to the conduct required to impose punitive damages in a civil case, and we described the civil punitive damages standard. Azima, 480 So. 2d at 186. Then, quoting our decision in Tsavaris v. State, 414 So. 2d 1087, 1088 (Fla. 2d DCA 1982), we held that the element of culpable negligence under section 784.05(1) requires the State to prove that the defendant consciously undertook "an act which a reasonable person would know is likely to result in death or great bodily harm to another person, even though done without any intent to injure anyone but with utter disregard for the safety of another." Azima, 480 So. 2d at 186. The requirement that the act include a likelihood of death or great bodily harm was dispositive in Azima because although the State presented evidence that the insertion of an IUD in a pregnant woman could

cause death or great bodily harm, there was no evidence that it was likely to do so. Id. at 186-87. We held that "[i]t is the likelihood of death or great bodily harm . . . which justifies the imposition of criminal sanctions for culpable negligence." Id. at 187; see also Kish v. State, 145 So. 3d 225, 227-28 (Fla. 1st DCA 2014) (requiring that the State prove a likelihood of death or great bodily harm under section 784.05(1)).

Here, the State failed to present any evidence from which a factfinder could have inferred that a reasonable person would have known that J.C.'s throwing a smoke bomb at D.M.'s home was likely to cause death or great bodily harm. It did not put on any evidence that a smoke bomb is inherently likely to cause death or great bodily harm. Nor did it put on any evidence about the particular smoke bomb J.C. threw, the condition of the smoke bomb when it was thrown, or the likely effect of the smoke on the home or its occupants that would have suggested that death or serious bodily harm was the likely result. In the final analysis, the State's evidence showed only that J.C. threw a smoke bomb that was smoking, but not on fire, at the door of the house. Without more, that simply does not permit a finding of an intentional act a reasonable person would regard as likely to cause death or great bodily harm.

For that reason, the evidence was insufficient to support the finding that J.C.'s action of throwing the smoke bomb constituted culpable negligence. We therefore reverse the order of delinquency and its resultant withhold of adjudication and juvenile probation order.

Reversed.

LaROSE, C.J., and VILLANTI, J. Concur.
SALARIO, J., Concurs with opinion.

SALARIO, Judge, Concurring.

I entirely agree that the State failed to prove what Azima requires: a conscious act that a reasonable person would know is likely to cause death or great bodily harm. I have serious doubts about whether we got it right in Azima, however, and I think that opinion is ripe for reexamination in an appropriate case.

The "likelihood of death or great bodily harm" requirement that Azima, 480 So. 2d at 187, reads into the statutory element of culpable negligence seems decidedly at odds with the text of section 784.05(1). In essence, Azima creates a requirement that the defendant's negligent conduct expose another to death or great bodily harm in order to qualify as culpable negligence. Put differently, to say that section 784.05(1) requires that the defendant's conduct create a likelihood of death or great bodily harm is in effect to say that the defendant's conduct must have been of a type that exposes another person to that result.

That interpretation of section 784.05(1), however, does not look anything like the statute the legislature actually wrote. The statute itself criminalizes culpable negligence that "exposes another to personal injury." Id. By the statute's unambiguous terms, then, the exposure that the defendant's conduct must create is one of "personal injury" and not one of "death or great bodily harm." The distinction is significant.

Personal injury, of course, can refer to any injury to the person, whether something severe like the loss of a limb or something minor like a bruise. See *Personal Injury*, Black's Law Dictionary (Rev. 4th ed. 1968) (defining "personal injury" as "[a] hurt or damage done to a man's person, such as a cut or bruise, a broken limb, or the like,

as distinguished from an injury to his property or his reputation").[1] The concept of "death or great bodily harm," however, is much narrower. Death means death. And great bodily harm reaches only severe injuries to the person, not more moderate or slight injuries that would nonetheless be embraced by the term "personal injury." See Coronado v. State, 654 So. 2d 1267, 1270 (Fla. 2d DCA 1995) (interpreting the term "great bodily harm" in the aggravated battery statute and holding that "[g]reat bodily harm defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery" (quoting Owens v. State, 289 So. 2d 472, 474 (Fla. 2d DCA 1974))). By interpreting the term "culpable negligence" to reach only such conduct as is likely to cause death or great bodily harm, Azima excludes from the scope of section 784.05(1) other conduct that may be wanton or reckless but that exposes others only to less morbid types of harm that would naturally be embraced by the term "personal injury" but not by the concept of "great bodily harm." Azima's interpretation of the term "culpable negligence" as requiring a likelihood of death or great bodily harm thus reduces the scope of section 784.05(1) to something much smaller than its plain language provides. That, to my mind, is a problem. See State v. Riley, 698 So. 2d 374,

[1]The version of section 784.05(1) criminalizing culpable negligence without injury was adopted in 1974, although it appears as though a statute criminalizing culpable negligence that actually resulted in personal injury predated that. Compare § 784.05, Fla. Stat. (1975) (criminalizing certain acts of culpable negligence without regard to actual personal injury), with § 784.05, Fla. Stat. (1961) (requiring actual injury for the criminal act of culpable negligence). I have no reason to believe that the term "personal injury" had any different meaning when it was first used in these statutes than it did when section 784.05(1) was adopted.

376 (Fla. 2d DCA 1997) (holding that when statutory terms are unambiguous, "we may not rewrite them by judicial construction").

The legal support Azima offers for this result seems pretty flimsy, consisting only of a quotation from our decision in Tsavaris, 414 So. 2d 1088. Tsavaris, however, did not involve section 784.05(1). It was a manslaughter case, and the manslaughter statute criminalizes "[t]he killing of a human being by the act, procurement, or culpable negligence of another." § 782.07(1), Fla. Stat. (2016). Because the end result of manslaughter is the death of a human being, culpable negligence of the type involved in a manslaughter case by definition involves conduct likely to cause death or great bodily harm. But the statutory element of death under the manslaughter statute exists separately from the additional element of culpable negligence, which speaks to state of mind underlying the defendant's conduct. See Dominique v. State, 435 So. 2d 974, 974 (Fla. 3d DCA 1983).[2] It thus does not follow, as Azima apparently assumed, that the culpable negligence involved in a prosecution for a felony that requires the death of a person must be identical to the culpable negligence involved in a prosecution for a second-degree misdemeanor that requires only exposure to personal injury.

On the contrary, the jury instructions for the two offenses demonstrate the opposite. The definition of culpable negligence in the manslaughter instruction requires a jury to find that the defendant knew or should have known that his conduct was likely

[2]But see State v. Simone, 431 So. 2d 718, 722 (Fla. 3d DCA 1983) (determining that culpable negligence is not a lesser included offense of manslaughter and reasoning that "the Legislature intended the culpable negligence statute . . . to punish acts of the same character as those covered by the offense of manslaughter by culpable negligence . . . but which acts do not result in the death of the victim").

to cause death or great bodily injury, while the instruction for culpable negligence offenses under section 784.05 contains no such requirement.[3] Compare Fla. Std. Jury Instr. (Crim.) 7.7 (manslaughter), with Fla. Std. Jury Instr. (Crim.) 8.9 (culpable negligence); see also In re Standard Jury Instructions Criminal Cases, 477 So. 2d 985 (Fla. 1985) (expressly amending the definition of the term "culpable negligence" in the manslaughter instruction to reflect a difference from the instructional definition of the term under section 784.05, as reflected by both definitions' current forms). This case involved a bench trial, and the jury instructions thus did not come into play. But the difference in the way the two offenses are treated for purposes of instructing a jury goes to show that relying on a manslaughter case to hold that section 784.05(1) requires a likelihood of death or great bodily harm is comparing apples to oranges. Our opinion in Azima contains no indication that the differences between the two offenses were considered.[4]

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[3]Section 784.05 contains three offenses. Subsection (1), the provision at issue here, makes culpable negligence exposing another to personal injury a second-degree misdemeanor. Subsection (2) makes culpable negligence resulting in actual injury to another a first-degree misdemeanor. And subsection (3) makes any violation of subsection (1) involving leaving a loaded firearm within the reach or easy access of a minor a third-degree felony, if the minor uses the firearm to inflict injury or death on himself or another. The felony categorization of the firearm offense in subsection (3)—which requires use of a firearm resulting in injury or death—may serve as a contextual indicator, if one is needed, that the term "culpable negligence" as used in subsections (1) and (2) does not require a likelihood of death or great bodily harm.

[4]Relying on authorities interpreting statutes that involve death or great bodily harm as an element, the First District has also held that section 784.05(1) requires a likelihood of death or great bodily harm. See Kish, 145 So. 3d at 228; Carrin v. State, 875 So. 2d 719, 720-21 (Fla. 1st DCA 2004), quashed on other grounds, 978 So. 2d 115 (Fla. 2008).

Azima's decision to graft onto section 784.05(1) the requirement of the offense of manslaughter that the defendant's conduct be of a type likely to cause death or great bodily harm also seems at odds with what the supreme court has said about the statute. In Greene, 348 So. 2d 3, the court upheld section 784.05 against a constitutional vagueness challenge. It explained that "the degree of negligence required to sustain imprisonment should be at least as high as that required for the imposition of punitive damages in a civil action." Id. at 4 (quoting Russ v. State, 191 So. 296, 298 (1939)).[5] It described the punitive damages standard as requiring "a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons," or "that entire want of care which would raise the presumption of indifference to consequences," or "such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public," or "that reckless indifference to the rights of others, which is equivalent to an intentional violation of them." Id. (quoting Russ, 191 So. at 298). Greene then held that "reckless indifference or grossly careless disregard of the safety of others is necessary to prove 'culpable negligence.' " 348 So. 2d at 4. The supreme court did not say that that this requires a likelihood of death or great bodily harm.

One might argue that the supreme court has said that "the required level of negligence for punitive damages is equivalent to the conduct involved in criminal manslaughter," see Valladares v. Bank of Am. Corp., 197 So. 3d 1, 11 (Fla. 2016), and thus that the manslaughter requirement of conduct likely to cause death or great bodily harm is also a punitive damages requirement and, by logical extension, a requirement

[5]Russ was a manslaughter case, but it said nothing about a requirement of death or great bodily harm.

of section 784.05(1) as well. But there is no case—at least that I have been able to find—that says a likelihood of death or great bodily harm is required before a plaintiff can recover punitive damages. On the contrary, we award punitive damages in cases where the defendant's conduct creates no risk to life or limb at all. See, e.g., Bailey v. St. Louis, 196 So. 3d 375, 382 (Fla. 2d DCA 2016) (reversing the trial court's decision not to award punitive damages in a tort case based on economic injuries to a business where the trial court's liability findings established "wanton intentionality, exaggerated recklessness, or such an extreme degree of negligence as to parallel an intentional and reprehensible act" (quoting Am. Cyanamid Co. v. Roy, 498 So. 2d 859, 861 (Fla. 1986))). It thus seems unlikely that the supreme court's analogy to the state of mind required for criminal manslaughter in describing the state of mind required for punitive damages entails an understanding that punitive damages requires conduct creating a likelihood of death or great bodily harm. And this may be why Greene's reference to the punitive damages standard in describing the state of mind necessary to sustain a conviction under section 784.05 contains no mention that a likelihood of death or great bodily harm is essential either to the award of punitive damages or, by extension, to the proof of the offense of culpable negligence.

In the final analysis, proof of culpable negligence under section 784.05(1) seems to require only that which Greene says it requires—a state of mind evincing extreme recklessness, wantonness, indifference to consequences, or reckless indifference to the rights of others.[6] I do not doubt that conduct that meets this standard

[6]I note that since Greene was decided, the legislature has specified the state of mind required for an award of punitive damages in a civil case. See § 768.72(2), Fla. Stat. (2016). For purposes of my present argument that Azima's

correlates highly with conduct creating a likelihood of death or great bodily harm. But the statute requires only culpable negligence creating an exposure to personal injury, and requiring proof of a likelihood of death or great bodily harm imports into the statute a requirement it does not appear to contain. This interpretative problem deserves our attention because it potentially reaches beyond section 784.05(1) to other statutes that also require proof of culpable negligence and that do not by their terms require a likelihood of death or great bodily harm. See, e.g., § 784.05(2) (criminalizing culpable negligence that inflicts actual personal injury on another); Arnold v. State, 755 So. 2d 796, 798 (Fla. 2d DCA 2000) (quoting Azima's standard in interpreting section 827.03(3)(c), Florida Statutes (1997), which applies—then and in current form, § 827.03(2)(d), Fla. Stat. (2017)—when a person "willfully or by culpable negligence neglects a child without causing great bodily harm").

So I think we should reevaluate Azima in an appropriate case. I do hope, however, that the appropriate case involves facts a little more deserving of prosecution than what appears from our record to be little (if anything) more than a preteen boy's careless exuberance with a smoke bomb around the Fourth of July.

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death-or-great-bodily-harm requirement appears to be legally unfounded, any difference between that statute and the decisional law that preceded it is not material.