Chapter 4: *Actus Reus*

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

Chapter Overview:

Actus reus is a criminal act or omission which, when concurrently combined with criminal intent, constitutes a crime. In order for *actus reus* to exist it is critical that the act be a voluntary criminal act. If someone is forced to commit an act, or commits an act without their own knowledge or due to circumstances beyond their control, it is not voluntary and they may not be held accountable. The idea of a voluntary act also re-raises the issue of status offenses, by which an individual is charged with a crime related to their status in life as opposed to an action they have taken. While courts have continued to hold that people cannot be charged with a crime for mere status, omissions are one way that an individual can commit a crime without an overt act.

Actus reus can be satisfied by a criminal omission when it violates a law that requires an individual to act. In the United States, individuals do not have a duty to intervene when someone else is in danger. This is known as the American bystander rule and is different from the European rule that obligates intervention, called the Good Samaritan rule. There are exceptions to the American bystander rule, however. If one's child, spouse, or employee is in danger, then an individual has an obligation to provide assistance. This can include situations like the need to obtain medical treatment. Parents can be held responsible, for example, for the death of a child if it is clear that the child requires medical attention but the parents fail to procure such attention. A person also incurs a duty to act if that person causes another individual to be put in harm's way. If someone voluntarily acts to assist another, then they also incur a duty and can be held responsible for what happens to the individual they are assisting. A duty to act may also be required by a contractual agreement between parties.

Possession is considered to meet the requirement for *actus reus* because it involves an act of obtaining the contraband, as well as an omission in the perpetrator's failure to dispose of the contraband. There are several different categories of possession. Actual possession is the most straightforward, involving an actual physical possession of contraband, either being carried by the individual or within their immediate reach. Constructive possession does not involve a person physically carrying the contraband, but rather that the individual has control over the object by virtue of its location, such as in the private room of the perpetrator. Joint possession involves multiple individuals maintaining control over contraband. Knowing possession simply refers to the perpetrator's awareness of his or her possession of the contraband, while mere possession refers to a perpetrator being unaware of his or her possession. In the remainder of this chapter of the supplement you will read Florida cases that exemplify the importance of *actus reus*, as well as Florida statutes regarding acts of omission and possession.

I. A Voluntary Criminal Act:

Section Introduction: In order for the *actus reus* of most crimes to be satisfied, the defendant must have voluntarily committed a criminal act. In crimes where the *actus reus* does not include an overt physical action, it is more difficult to ascertain whether a voluntary criminal act was committed. In some cases the defendant will focus on this aspect of the crime to draw their guilt into question. When reading the following case, consider what act is required for the defendant to be found guilty of the crime.

Arnold v. State, 755 So.2d 796 (2000)

Procedural History: Defendant was convicted in the Circuit Court, Hillsborough County, Daniel L. Perry, J., of child neglect. Defendant appealed. The District Court of Appeal, Casanueva, J., held that: (1) evidence did not show that conditions in trailer put child at risk of serious physical or mental injury, and (2) evidence failed to show defendant acted willfully or with culpable negligence in creating situation or in permitting suspect conditions to exist.

Issue(s): Did the defendant act willfully or with culpable negligence in maintaining hazardous living conditions for his child?

Facts: The State's case consisted of only two witnesses: the defendant's child, Tiffany Arnold, and the investigating officer. Responding to an anonymous telephone call, Officer John Belk of the Tampa Police Department, accompanied by a back-up officer and a social worker from the Department of Health and Rehabilitative Services, was dispatched to Mr. Arnold's trailer located in the Historia Mobile Home Park shortly after 8 p.m. one evening. Upon being admitted to the trailer by Mrs. Arnold, Officer Belk found the home grimy, smelly, and repulsive. Garbage littered the floor, spoiled and decomposing food was strewn about, and feces were smeared on the living room floor and were piled in another room. As to the latter, a large puppy appeared to be the culprit. A plywood board with nails protruding outward had been left where someone could step on it. A steak knife, partially covered by a newspaper, also lay on the floor. In what appeared to be a child's room, the mattress had been so badly shredded that the coils had poked through the covering. The officer noticed a fuse box with exposed wiring and mold between the doors of the refrigerator. He heard cockroaches skittering and was bitten by fleas, although he did not see any flea bites on the child.

Officer Belk spoke with Tiffany, who told him that she microwaved her food. He did not inquire whether she had eaten any of the spoiled food. She was wearing a dress but no shoes and she looked as if she had gotten dirty while playing. Mr. Arnold, who arrived a short time later in an apparently intoxicated condition, told the officer that he was in the process of making repairs to the trailer. Mr. Arnold said that none of the exposed wiring was connected to electric current, and Officer Belk did admit seeing some power tools

and repair manuals lying on the trailer's floor. Some of the walls looked as if they had recently been plastered.

Tiffany testified that her parents would leave her with a babysitter when they both left; otherwise her parents took care of her. She testified that she had not been sick that day and that she had eaten the day the officer visited. She also explained that before the puppy had torn apart her mattress with his sharp teeth, she had slept in her bedroom. Since then, however, she slept on the couch in the living room.

Holding: Reversed and remanded with instructions.

Opinion: CASANUEVA, Judge.

David Arnold appeals his conviction for child neglect, a third degree felony in violation of section 827.03(3)(c), Florida Statutes (1997). Because the State did not prove a prima facie violation of the statute, the trial court erred in failing to grant Mr. Arnold's motion for judgment of acquittal at the conclusion of the State's case-in-chief. Accordingly, the conviction must be vacated.

Section 827.03(3)(a)1 defines "neglect of a child," as applied to this case, as "a caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain a child's physical and mental health, including, but not limited to food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child." As stated in subsection (3)(a)2, that failure or omission can be based on repeated conduct or, as in this case, "on a single incident or omission that ... could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death to a child." Subsection (3)(c) of the statute, with which Mr. Arnold was charged, does not require that the State prove that the child has actually suffered any "great bodily harm, permanent disability, or permanent disfigurement," only that the caregiver has placed her at risk. However, even if the defendant's conduct or omission has the potential to cause serious physical or mental injury or risk of death to the child, that "neglect" becomes criminal only when the State proves that the caregiver has acted "willfully or by culpable negligence."

By its language, the legislature has demanded that the State prove more than mere negligence to criminalize child neglect. And the legislature has required that the defendant's acts or omissions create a "reasonably expected" potential for the child to suffer, at a minimum, serious injury. In establishing these elements for the crime of third degree felony child neglect, the legislature has responded to a series of decisions from the Florida Supreme Court declaring unconstitutional prior versions of this statute. The primary infirmity of the 1975 version of the statute was that it criminalized simple negligence and punished those with no intent to do wrong. [See § 827.05, Fla. Stat. (1975); *State v. Winters*, 346 So.2d 991 (Fla.1977)] The 1991 version of section 827.05 had added language addressing the financial ability of the caregiver and the degree of impairment or risk to the child, but those elements did not overcome the lack of scienter. [See *State v. Mincey*, 672 So.2d 524 (Fla.1996); *State v. Ayers*, 665 So.2d 296 (Fla. 2d

DCA 1995)] The latest version of the statute, under which Mr. Arnold was convicted, has attempted to remedy that shortcoming by adding the "willfully or by culpable negligence" language and has further attempted to define what actions or omissions constitute "neglect."

We have made this short digression into the background of this statute not because any party has challenged its constitutionality but to emphasize how difficult it has been for the legislature to define this crime. The fact that the legislature has been struggling to do so for the past several decades manifests a strong public policy in favor of providing criminal sanctions for those caregivers who neglect children, a policy we have not ignored in deciding this appeal. At the same time, however, the legal precedents have acknowledged that only the most egregious conduct, done either willfully or with criminal culpability, should be criminalized.

This court has defined culpable negligence as "consciously doing 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 v. State*, 480 So.2d 184, 186 (Fla. 2d DCA 1985) (citing *Tsavaris v. State*, 414 So.2d 1087, 1088 (Fla. 2d DCA 1982))] The degree of culpable negligence necessary to sustain a conviction was set forth in *State v. Greene*, [348 So.2d 3 (Fla.1977)]:

> This Court is committed to the rule 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. The burden of proof authorizing a recovery of exemplary or punitive damages by a plaintiff for negligence must show a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects; 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. [348 So.2d at 4 (quoting *Russ v. State*, 140 Fla. 217, 191 So. 296, 298 (1939)]

Such acts are known by the public to be criminally outlawed. [Id.] "Willfully," by contrast, is a term more susceptible of comprehension by the ordinary reasonable person. In the context of criminal violations, "willfully" implies that a defendant has acted voluntarily and consciously, not accidentally. [See *Black's Law Dictionary* 1773 (4th ed. 1968)] With these elements and definitions in mind, we have determined as a matter of law that the trial court should have granted the defense motion for judgment of acquittal.

Photographs taken of the trailer on the date in question demonstrated how unclean the trailer was. At one point the Assistant State Attorney argued to the trial court that they were "the whole case." Although pictures might have spoken a thousand words, they could not and did not satisfy the State's burden of proving that the elements of the statute had been met.

The first deficiency in the State's case was its failure to bring forth evidence to establish that the conditions in the trailer put the child at risk of serious physical or mental injury. Although expert testimony is not required on this issue, the evidence should nevertheless have demonstrated that Mr. Arnold's act or omission created a potential risk of serious - not minimal - harm to the child. None of the evidence met that legal standard. Tiffany was nine when her father was arrested. She was competent to avoid hazards or situations that otherwise might seriously injure a very young child or even put the child at risk of death. Without evidence that the knife was sharp enough to cut or was in a dangerous position, that the nails in the plywood could not be avoided, that electrical current ran through the exposed wiring, that the unsanitary conditions could cause Tiffany to become seriously ill or even to die, or that Tiffany went unclothed, unsupervised, or unfed, that element of the statute has not been proven. In fact, some of the evidence specifically contradicted those conclusions.

Assuming, however, that the proof was sufficient to meet the statutory definition of "neglect," the State was also required to prove Mr. Arnold acted willfully or with culpable negligence in creating the situation or in permitting the suspect conditions to exist. The State presented no direct or circumstantial proof of Mr. Arnold's actual knowledge. Mr. Arnold was not present when the officers arrived, and there was no evidence showing how long he had been away. Nothing established how long the home had been unclean. Such information was critical for a trier of fact to properly infer that Mr. Arnold's acts or omissions were knowing and intentional, or done with such wanton or careless indifference to Tiffany's well-being as to be practically intentional.

It is apparent that child neglect is a difficult (but we think not impossible) crime to prove. Without strict attention to the legal sufficiency of the evidence in any given case, however, our courts risk making this a strict liability crime. Fortunately, when children live in conditions similar to these, which are unclean but not significantly dangerous, or when their parents or caregivers are negligent but not criminally so, our child welfare system can provide services to help those children and the adults responsible for them. As set out in section 39.001(1)(a), Florida Statutes (1999), the expressed goal of chapter 39 ("Proceedings Relating to Children") and of the courts enforcing that comprehensive statutory scheme, is to "provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development."

Reversed and remanded with instructions for the trial court to grant the motion for judgment of acquittal and to discharge Mr. Arnold.

II. Status Offenses:

Section Introduction: As the commission of a crime requires an act be committed, it is unlawful to criminally charge someone based merely upon their status in life. Some defendants claim that the charges against them are designed to criminalize their status as,

for example, a drug addict, a homeless person, or a certain personality type. In the following Florida case a defendant claims that he has been the target of such unlawful prosecution.

***Benedict v. State*, 774 So.2d 940 (2001)**

Procedural History: Probation officer filed affidavit of violation alleging that probationer had not told her true identity of lessee of apartment where he was living. The Circuit Court, Pinellas County, Mark I. Shames, J., revoked probation, and probationer appealed. The District Court of Appeal, Patterson, C.J., held that revoking probation for failing to be completely truthful with probation officer as to lessee's identity was unduly harsh.

Issue(s): Should a probationer that is "homeless" have his probation revoked for not revealing the specific conditions about the home where he is staying?

Facts: While on probation, Benedict lived with his boss, Richard Jenkins, for about a year until Jenkins' daughter's marital difficulties caused her and her children to move to Jenkins' house. The terms of Benedict's probation did not prohibit him from coming in contact with children. Benedict was only prohibited from any contact with the victim in the case. Nonetheless, his sex-offender treatment program group recommended that he move out of Jenkins' house. Thereafter, Benedict arranged to temporarily stay at the apartment of a friend, Angela Pierson, while she and her children lived elsewhere. He told his probation officer where he was living, but claimed that the apartment belonged to Pierson's boyfriend, John.

Pierson appeared with her children at the apartment occasionally without Benedict's prior knowledge. The apartment manager notified the probation office that Benedict was living in Pierson's apartment and that she had seen children at the apartment. Benedict's probation officer filed an affidavit of violation alleging that Benedict had not told her that Pierson was the actual lessee of the apartment. Benedict was alleged to have violated probation condition 10, which provides: "You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation/ Community Control Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you."

Holding: Reversed.

Opinion: PATTERSON, Chief Judge.

Michael Benedict appeals from the order revoking his probation and the sentence imposed upon him for lewd act upon a child. He argues that his violation of probation was not willful and substantial. We agree and reverse.

At the revocation of probation hearing, Benedict admitted that he was not completely truthful with his probation officer as to the lessee of the apartment. The trial court revoked Benedict's probation on that basis. Although a trial court has broad discretion to determine whether a term of probation has been violated, [see *Harris v. State*, 610 So.2d 36 (Fla. 2d DCA 1992)], we hold that the trial court abused its discretion in this case. The court's revocation was an unduly harsh result considering Benedict's sincere attempts to comply with the terms of his probation. When a probationer has made reasonable efforts to comply with the terms of probation, his failure to do so will not be held to be willful. [See *Thorpe v. State*, 642 So.2d 629 (Fla. 1st DCA 1994)] Benedict's conduct has not shown that he is unfit for probation. [See *Washington v. State*, 579 So.2d 400 (Fla. 5th DCA 1991)] To the contrary, the record shows that Benedict worked religiously at his sex-offender treatment program and brought the problem with his living situation to the group's attention. He found himself homeless and made a reasonable attempt to find a place to live temporarily where there were no children. Although he was not completely candid as to the identity of the apartment's lessee, he did tell his probation officer where he was living. For these reasons, we hold that the violation was not substantial and reverse.

III. Omissions:

Section Introduction: While the *actus reus* of most crimes involves a specific action, some crimes can be committed through the omission of proper action. The following Florida statutes define some such crimes of omission, and they are followed by a Florida case that also addresses the issue.

Florida Statute, section 843.04 - Refusing to assist prison officers in arresting escaped convicts

> (1) All prison officers and correctional officers shall immediately arrest any convict, held under the provisions of law, who may have escaped. Any such officer or guard may call upon the sheriff or other officer of the state, or of any county or municipal corporation, or any citizen, to make search and arrest such convict.
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> (2) Any officer or citizen refusing to assist shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Florida Statute, section 843.06 - Neglect or refusal to aid peace officers

> Whoever, being required in the name of the state by any officer of the Florida Highway Patrol, police officer, beverage enforcement agent, or watchman, neglects or refuses to assist him or her in the execution of his or her office in a criminal case, or in the preservation of the peace, or the apprehending or securing of any person for a breach of the peace, or in case of the rescue or escape of a person arrested upon civil process, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Florida Statute, section 843.15 - Failure of defendant on bail to appear

(1) Whoever, having been released pursuant to chapter 903, willfully fails to appear before any court or judicial officer as required shall incur a forfeiture of any security which was given or pledged for her or his release and, in addition, shall:

(a) If she or he was released in connection with a charge of felony or while awaiting sentence or pending review by certiorari after conviction of any offense, be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, or;

(b) If she or he was released in connection with a charge of misdemeanor, be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Nothing in this section shall interfere with or prevent the exercise by any court of its power to punish for contempt.

Florida Statute, section 877.15 - Failure to control or report dangerous fire

Any person who knows, or has reasonable grounds to believe, that a fire is endangering the life or property of another, and who fails to take reasonable measures to put out or control the fire when the person can do so without substantial risk to himself or herself, or who fails to give a prompt fire alarm, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, if:

(1) The person knows that he or she is under an official, contractual, or other legal duty to control or combat the fire; or

(2) The fire was started lawfully by the person or with his or her assent and was started on property in his or her custody or control.

***Nicholson* v. *State*, 600 So.2d 1101 (1992)**

Procedural History: Defendant was convicted in the Circuit Court, Santa Rosa County, George Lowrey, J., of first-degree felony-murder and aggravated child abuse, and defendant appealed. The District Court of Appeal, 579 So.2d 816, affirmed. On review, the Supreme Court, Kogan, J., held that: (1) aggravated child abuse statute includes not only willful acts of commission, but also willful acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to a child, and (2) evidence was sufficient to support defendant's conviction.

Issue(s): Is “omission” by failing to feed a child sufficient to support a conviction of aggravated child abuse?

Facts: On February 8, 1988, four-year-old Kimberly McZinc died of starvation. Kimberly's mother, Darlene Jackson, pled nolo contendere to charges of third-degree murder and simple child abuse.

After Kimberly's birth, Darlene experienced a renewed interest in religion and became "born again." Darlene's view of life on earth began to center on the continuous struggle between the forces of God and Satan. Because of several unusual coincidences, Darlene began to think that her daughter was possessed by evil spirits and she began to dwell on concepts such as Satan and oppression by demons. Darlene, who lived in New York City, began communicating by phone with the petitioner, Mary Nicholson. Nicholson interpreted dreams and gave prophecies to Darlene over the phone.

In July 1987, Darlene took Kimberly to Nicholson's home in Pace, Florida. Darlene kept a diary that chronicled her participation in religious activities with Nicholson. The diary reflected that Nicholson provided specific directions to Darlene in disciplining Kimberly that were based on Nicholson's "prophecies from God." According to the prophecies, Kimberly was oppressed by the evil spirit of gluttony. The prophecies contained directions about Kimberly's feeding and exercise habits. According to Darlene's account, she was commanded to make Kimberly run, and to strike her with a switch if she resisted. Nicholson instructed Darlene that she must separate herself from Kimberly and allow her to care for Kimberly on a daily basis. Nicholson assumed full control of Kimberly's diet, and Kimberly's weight began to drop. A September diary entry records that Kimberly was denied food for several days and suggests that Kimberly was forced to drink urine and bath water.

A Laundromat worker testified that she had observed Kimberly during the summer and fall of 1987. During Nicholson's visits to the Laundromat, Kimberly sat quietly and never played or ate snacks with Nicholson's children. Kimberly became thinner and weaker during this period, but when the worker told Nicholson that something was wrong with Kimberly, she replied that there was always something wrong with Kimberly. On one occasion, the Laundromat worker offered Kimberly food; however, Nicholson would not allow her to eat stating that the child had a stomach virus.

In January 1988, Darlene asked Nicholson about Kimberly's weight loss. Nicholson told Darlene that her questions angered God and strengthened the evil spirits. On the Friday before Kimberly's death, Nicholson whipped Kimberly for being disobedient. Darlene protested the severity of the beating but, nonetheless, Darlene listened to Nicholson's instruction and later beat Kimberly herself.

On the day before Kimberly's death, Darlene noticed that Kimberly was sluggish; however, Nicholson insisted that Kimberly was only faking. Petitioner and Darlene stayed with Kimberly throughout the evening. They prayed at Kimberly's bedside and anointed her. At approximately 7:30 a.m., Darlene determined that something was wrong with Kimberly and called an ambulance. Kimberly, however, had been dead for several hours.

At the time of death, four-year-old Kimberly McZinc had virtually no body fat, had wasted muscles, and a small liver. An autopsy revealed that the child had severe bruises on her back, legs, abdomen, and arms, and that her liver had been partially consumed by her body. The medical examiner testified that Kimberly had died in extreme pain. Nicholson was charged with and convicted of first-degree felony murder and aggravated child abuse under section 827.03, Florida Statutes (1987).

At trial, Nicholson sought a judgment of acquittal, claiming that the evidence failed to establish that Kimberly died as a result of willful torture or malicious punishment as charged in the indictment. The motion was denied. On appeal, Nicholson challenged the trial court's refusal to enter a judgment of acquittal and further maintained that the trial court committed fundamental error by instructing the jury that aggravated child abuse by willful torture under section 827.03(1)(b) includes acts of omission or neglect.

Holding: Affirmed.

Opinion: KOGAN, Justice.

We have for review *Nicholson v. State*, [579 So.2d 816 (Fla. 1st DCA 1991)], because of conflict with *Jakubczak v. State*, [425 So.2d 187 (Fla. 3d DCA 1983)], and *State v. Harris*, [537 So.2d 1128 (Fla. 2d DCA 1989)]. We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and approve the decision below.

Both of Nicholson's claims are based on the contention that only acts of commission done with specific intent are actionable under section 827.03. [FN1] [See *Jakubczak v. State*, 425 So.2d at 189 ("legislature intended to punish under section 827.03 only acts of commission done with specific intent"); *State v. Harris*, 537 So.2d at 1129 (same)] Nicholson therefore argues that omission by failing to feed a child is insufficient to support a conviction of aggravated child abuse.

Section 827.03, Florida Statutes (1987), provides in pertinent part:

> (1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
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> (a) Commits aggravated battery on a child;
> (b) Willfully tortures a child;
> (c) Maliciously punishes a child; or
> (d) Willfully and unlawfully cages a child.
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> (2) A person who commits aggravated child abuse is guilty of a felony of the second degree....

The First District Court of Appeal rejected this contention, stating that it had no difficulty in concluding that "willful torture" may consist of acts of commission or omission. [579 So.2d at 819] The district court acknowledged *Jakubczak* and *Harris* in which the Third and Second District Courts of Appeal held that the legislature intended to punish only

acts of commission done with specific intent under section 827.03, and that the failure to take a child for medical treatment was not an act of "commission." [Id.] However, it rejected that interpretation of the statute, instead, holding that section 827.03 "contemplates acts of commission or omission." [Id.] We agree with this construction.

As recognized by the court below, "Florida's child abuse statute, clearly defines 'torture' [to include] an act of omission." [Id.] When a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears. [*Vocelle v. Knight Bros. Paper Co.*, 118 So.2d 664, 667 (Fla. 1st DCA 1960)] There is no contrary intent apparent in chapter 827. The word "torture" is used only once in chapter 827, that being in section 827.03(1)(b). Therefore, if the definition contained in section 827.01(3), Florida Statutes (1987), is to be given effect, it must be read into the phrase "willful torture" as used in section 827.03(1)(b). [See *Villery v. Florida Parole & Probation Comm'n*, 396 So.2d 1107, 1111 (Fla.1980) (where possible, court must give full effect to all statutory provisions and construe related provisions in harmony with one another)]

Applying the definition of torture supplied by the legislature results in a reading of section 827.03(1)(b) that includes not only willful acts of commission, but also willful acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to a child. We find no ambiguity in this construction. One can willfully omit or neglect to do something that results in unnecessary or unjustifiable pain and suffering just as one can willfully commit an act that produces the same result.

Thus, a willful "omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused" constitutes aggravated child abuse under section 827.03(1). The fact that section 827.03(1) expressly refers to "one or more acts committed" in defining aggravated child abuse does not preclude this construction because it is clear that in the criminal context an omission or failure to act may constitute an act. [*Black's Law Dictionary* 25 (6th ed.1990)]

It is true that section 827.04, Florida Statutes (1987), specifically addresses the deprivation of food. Section 827.04 provides in pertinent part:

> (1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree....
>
> (2) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree....

We agree with the district court that the case sub judice involved an aggravated form of food deprivation carried out systematically [accompanied with a regimen of forced exercise and beatings] with intent to willfully torture and maliciously punish the child. Under these aggravated circumstances, the State was entitled to prosecute under Section 827.03, Florida Statutes. [579 So.2d at 819]

We disapprove the decisions in *Jakubczak* and *Harris* to the extent they are in conflict with this opinion. However, we note that those cases are factually distinguishable. Both *Jakubczak* and *Harris* involved the negligent failure to seek prompt and timely medical attention for an injured child. We agree that such negligent omissions are not encompassed by section 827.03 not because they are omissions, but because they are committed without the requisite specific intent. Accordingly, the *Jakubczak* and *Harris* decisions are disapproved insofar as they hold that only acts of commission constitute aggravated child abuse under section 827.03.

In this case, Nicholson was in complete control of Kimberly's diet and, on several occasions, she emphatically denied the child food offered by third persons. The regime resulting in Kimberly's death clearly was systematic, continuing over a four-month period during which time the child's deterioration was brought to Nicholson's attention. These facts alone support a finding of willful intent. Accordingly, we approve the decision below.

Critical Thinking Question(s): Did the inactions (omissions) or failure to act amount to the requisite *actus reus* for the crime? Seeing as the defendant was not the mother of the child, why did the Court find that she had a responsibility to act (e.g., feed the child)? Should the natural mother be held culpable for allowing the child to live, and die, under those conditions?

IV. Possession:

Section Introduction: Possession is another crime that does not require the perpetrator to carry out a specific physical action. Under these Florida statutes a defendant may be charged with a crime for having in his or her possession certain items that have been deemed illegal. This section also includes a Florida criminal case regarding the charge of such a crime.

Florida Statute, section 893.147 - Use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Florida Statute, section 1893.149 - Unlawful possession of listed chemical

(1) It is unlawful for any person to knowingly or intentionally:

(a) Possess a listed chemical with the intent to unlawfully manufacture a controlled substance;

(b) Possess or distribute a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to unlawfully manufacture a controlled substance.

(2) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) This section does not apply to a public employee or private contractor authorized to clean up or dispose of hazardous waste or toxic substances resulting from the prohibited activities listed in s. 893.13(1)(g).

(4) Any damages arising out of the unlawful possession of, storage of, or tampering with a listed chemical, as defined in s. 893.033, shall be the sole responsibility of the person or persons unlawfully possessing, storing, or tampering with the listed chemical. In no case shall liability for damages arising out of the unlawful possession of, storage of, or tampering with a listed chemical extend to the lawful owner, installer, maintainer, designer, manufacturer, possessor, or seller of the listed chemical, unless such damages arise out of the acts or omissions of the owner, installer, maintainer, designer, manufacturer, possessor, or seller which constitute negligent misconduct or failure to abide by the laws regarding the possession or storage of a listed chemical.

Florida Statute, section 859.058 - Prohibition against clove cigarettes

No person shall sell, use, possess, give away, or otherwise dispose of cigarettes or similar products designed or intended for smoking, made in whole or in part from, or containing, cloves, clove oil, or eugenol, or any derivative thereof.

***Subuh v. State*, 732 So.2d 40 (1999)**

Procedural History: Defendant was convicted in the Circuit Court, Pinellas County, R. Timothy Peters, J., on drug paraphernalia charge. Defendant appealed. The District Court of Appeal, Salcines, J., held that state failed to establish that defendant knew glass pipe that he sold was to be used for illicit purpose and was drug paraphernalia.

Issue(s): Were the defendant's actions sufficient to maintain a conviction for sale of paraphernalia?

Facts: Subuh was charged with the delivery of drug paraphernalia, or the manufacture or possession of drug paraphernalia with the intent to deliver in violation of chapter 893.147(2)(b), Florida Statutes (1997). On March 10, 1998, a jury trial commenced. Detective Joanne Lindsey testified that she had conducted an undercover investigation of the South Georgia Meat Market in St. Petersburg, Florida, on May 9, 1997, as a result of information received about prior sales of glass pipes from the store. The detective stated that it was common for people who smoked crack cocaine to use glass pipes.

Detective Lindsey explained about the methods by which crack cocaine was sold and used, stating that small pieces of crack cocaine which resembled rocks were sold on the street. Usually the drug user would put the crack cocaine into a glass pipe or a soft drink can. When a glass pipe was used, a small piece of Brillo (a steel wool product) would be placed in the glass pipe to prevent the rock of cocaine from being sucked into the mouth. The rock of cocaine was then lit and, as it burned, the smoke would be inhaled producing an instant high. The detective stated that pipes could be made from metal, wood, acrylic, stone, plastic, or ceramic as well as glass.

Detective Lindsey testified that she located an undercover special employee to act as an operative, outfitted her with a listening device, and instructed her to go into the store. The operative testified that she went into the store, dressed like a middle-class housewife, and asked a man behind the meat counter, later identified as Subuh, if they had any more glass pipes. Subuh replied, "Up there," pointing to the front counter. The undercover operative responded, "I don't want everyone to know what I'm in here for." Subuh then spoke to a person at the front counter in Arabic. A translator testified that the words uttered on the tape in Arabic were "Aiteha zoujaja," which translated into English as "[g]ive her the glass."

The operative proceeded to the front counter. The employee at the counter took a small brown paper bag from the top of the counter, reached under the counter with his other hand, and placed a glass pipe in the bag. The operative noted that other items such as cigarettes, lighters, pipe tobacco, and lottery tickets were also behind the counter in the area in which the glass pipe was located. As the operative-buyer was paying for the pipe, she stated to the person behind the counter, "[y]our pipes are cheaper than the ones everywhere else." The person behind the counter shrugged his shoulders and the buyer walked out. The operative returned to Detective Lindsey with the brown bag which contained the glass pipe and, subsequently, they were admitted as trial exhibits.

At trial the operative identified a photo of Subuh as "the man that I asked for the crack pipe - or the glass pipe." The defense moved for a mistrial, which was denied. The trial court, nonetheless, instructed the jury to disregard the reference to the "crack" pipe. Subuh testified that he was a part-time employee of the store and did not recall the specific transaction, but after hearing the pertinent tape recording, stated that he had not known what the buyer meant when she asked "[d]o you have glass pipes?" He stated that

he told her where "she can find glass" and directed her to the person behind the cash register, Sahib Etayyeem. Subuh, an immigrant from Jordan who had been in the United States less than four years, said he always talked to Mr. Etayyeem in their native language, Arabic. Subuh testified that there was nothing during the transaction in question which indicated, to him, any involvement with drugs or drug paraphernalia.

At the close of the State's case, Subuh had moved for a judgment of acquittal, which was denied. He renewed his motion at the close of all the evidence and it was again denied. The jury returned a guilty verdict. On that same date, the trial court entered a judgment against Subuh, sentenced him to two years' probation, and imposed court costs.

Holding: Reversed and remanded with directions.

Opinion: SALCINES, Judge.

Jamal Mahmoud Subuh timely appeals the judgment and sentence rendered following a jury's verdict of guilt on a drug paraphernalia charge. Subuh contends that the State failed to prove an essential element of the offense for which he was convicted and, consequently, the trial court should have granted a motion for judgment of acquittal. We agree and reverse.

In order to obtain a conviction against Subuh, the State was required to prove three elements beyond a reasonable doubt. It had to prove that (1) Subuh delivered, possessed with intent to deliver, or manufactured with intent to deliver, drug paraphernalia; and (2) Subuh had knowledge of the presence of the drug paraphernalia; and (3) Subuh knew or reasonably should have known that the drug paraphernalia would be used to ingest, inhale or otherwise introduce crack cocaine into the human body. [See Fla. Std. Jury Instr. (Crim.) 323]

The statute, which specifically defines drug paraphernalia, lists glass pipes, with or without screens, as drug paraphernalia. [See § 893.145(12)(a), Fla. Stat. (1997)] The delivery of a glass pipe, or the manufacture or possession with the intent to deliver such an item, however, is not per se illegal. Rather, the State is required to demonstrate that the defendant knew or reasonably should have known that the paraphernalia was to be used for an illicit purpose. Interpreting section 893.147, Florida Statutes (1984), which is essentially the same as the version of the subject statute, the Fifth District opined:

> The statute does not require that a person unequivocally know that the paraphernalia will be used for an illicit purpose; rather, the state must only show that the defendant knew or reasonably should have known that the drug paraphernalia would be used for such purposes. It is important to note that the intent at issue in the statute is that of the seller/defendant, not that of the buyer.

[Baldwin v. State, 498 So.2d 1385, 1386 (Fla. 5th DCA 1986); See also Fla. Std. Jury Instr. (Crim.) at 242]

A non-exclusive list of considerations for a court or jury to evaluate in determining whether an object is drug paraphernalia is set forth in section 893.146, Florida Statutes (1997). Section 893.146, Florida Statutes (1997) - Determination of paraphernalia, provides:

> In determining whether an object is drug paraphernalia, a court or other authority or jury shall consider, in addition to all other logically relevant factors, the following:
>
> (1) Statements by an owner or by anyone in control of the object concerning its use.
> (2) The proximity of the object, in time and space, to a direct violation of this act.
> (3) The proximity of the object to controlled substances.
> (4) The existence of any residue of controlled substances on the object.
> (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
> (6) Instructions, oral or written, provided with the object concerning its use.
> (7) Descriptive materials accompanying the object which explain or depict its use.
> (8) Any advertising concerning its use.
> (9) The manner in which the object is displayed for sale.
> (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer in tobacco products.
> (11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.
> (12) The existence and scope of legitimate uses for the object in the community.
> (13) Expert testimony concerning its use.

The evidence adduced in regard to whether Subuh knew or reasonably should have known that the glass pipe was paraphernalia was lacking.

The State argued that an inference that Subuh knew or reasonably should have known that the glass pipe would be used for an illicit purpose could be drawn from the operative's statement that she did not want everyone in the store to know what she was purchasing and Subuh's request to another employee behind the counter in Arabic to "give her the glass." The State's contention hinged on the fact that Subuh spoke in Arabic rather than English. There was no testimony, however, that Mr. Etayyeem, to whom the direction was uttered, spoke anything other than Arabic, or that the parties to the conversation usually conversed in English yet spoke in Arabic in this isolated instance.

Indeed, when the undercover operative spoke in English to Mr. Etayyeem, all he did was shrug his shoulders. The use of the foreign language was neither shown to be an effort to conceal the transaction in this case nor did it suggest some other sinister motive.

Detective Lindsey's testimony that glass pipes were commonly used to ingest crack cocaine, likewise, did not support an inference that Subuh knew or reasonably should have known that this object would be used in such a manner. The most that such testimony established was that such an object might, could be, or commonly was used for such a purpose. There was no testimony that the glass pipe in question had some peculiar design from which it could be recognized as having a use only to ingest illegal substances. [Cf. *Dubose v. State*, 560 So.2d 323 (Fla. 1st DCA 1990)]

In fact, the "pipe" was a simple glass tube, four inches long and three-eighths inches in diameter with openings on both ends. It was very similar to the "glass tube" or "pipette" commonly found in any chemistry laboratory or glass "straw" formerly used in hospitals for patients to drink liquids, except this one was shorter. It was not shaped in some special fashion that might have denominated it as a pipe for smoking. Although we are hard pressed to think of a probable lawful use for this tube when purchased from this location, there are many lawful uses for glass tubing.

The First District, in *Dubose v. State*, [560 So.2d 323 (Fla. 1st DCA 1990)], analyzed whether cigarette rolling papers constituted illegal drug paraphernalia as defined in section 893.145, Florida Statutes (1987), where the defendant was convicted of possession of drug paraphernalia. The First District determined that the State did not dispel the defendant's reasonable hypothesis of innocence that he intended to sell the cigarette rolling papers rather than use the papers himself. In so doing, the First District applied a standard requiring the State to prove that, in the absence of evidence disclosing that the defendant actually used or intended to use the papers for an illicit purpose, the State had to show that the "only" intended use of the papers involved the illicit use. We note that such an interpretation might be inapplicable in some circumstances. For example, reviewing the constitutionality of an Illinois village ordinance which prohibited the sale of paraphernalia "designed or marketed" for use with illegal drugs, the Supreme Court held that the village ordinance could constitutionally encompass an object "principally" used with illegal drugs. [See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); See also *City of Whitehall v. Ferguson*, 14 Ohio App.3d 434, 471 N.E.2d 838 (Ohio App. 10 Dist.1984)]

Mr. Subuh was employed as a part-time butcher at this store. He was not the owner. There was no evidence that he played any role in stocking the shelves of this store. A customer asked him where a product could be located and he provided accurate information on one occasion. The State presented no evidence that Mr. Subuh had worked in the store even one day before this incident or that he had any reason to know about the character of the neighborhood. The State presented evidence of only one sale of one glass pipe. There may be a case in which the sale of a simple glass tube is

evidence that helps to establish the offense of delivery of paraphernalia, but the State failed to prove its case against Mr. Subuh.

The trial court's denial of the motion for judgment of acquittal was erroneous. This case is reversed and remanded, and the trial court is directed to immediately discharge Subuh. Reversed and remanded with directions.

Critical Thinking Question(s):

- Should objects that can be used for legal as well as illegal purposes even be the subject of criminal indictments?
- How would a statute outlawing paraphernalia held up in light of the void for overbreath doctrine?
- Can you think of other objects besides cigarette papers and pipes that have both legal and illegal uses?