Chapter 10: Criminal Sexual Conduct, Assault and Battery, Kidnapping, and False Imprisonment

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:

This chapter examines three of the four categories of crimes against the person: sexual offenses, crimes against bodily integrity, and crimes against personal liberty and freedom. Under the common law, a rape trial was mainly focused on the resistance made by the victim and the victim's past sexual history. The standards of modern law, however, have been affected by various levels of reform. This includes the addition of rape shield laws to protect victims from the exposure of their past sexual behavior as evidence against them in court, as well as various combinations of other provisions which seek to overcome the barriers that have made rape convictions so difficult to obtain. Examples of these are expanded definitions of coercion and sexual intercourse, and a reframing of the marital exemption that made it impossible for husbands to be charged with raping their wives. With rape reform also came the introduction of new questions, such as rape trauma syndrome and distinguishing various degrees of rape.

Moving on to crimes against bodily integrity, the chapter examines assault and battery, noting the distinctness of the two crimes. While battery involves application of force upon another person, assault is simply an attempted or threatened battery. Both crimes are considered misdemeanors, but there are special categories of aggravated assault and aggravated battery that are considered felonies. Assault also includes special cases like stalking and cyberstalking.

Finally, offenses against a person's liberty and freedom are addressed, which include kidnapping and false imprisonment. The common law of kidnapping addressed the issue of forcing a person from his or her own country. Later kidnapping came to be concerned with transporting of an individual across state lines for some form of ransom. Today, kidnapping statutes vary greatly from state to state. In this chapter of the supplement you will learn about the specifics of Florida's kidnapping laws and how they are applied in state courts. You will also learn the unique elements of Florida's laws with regard to assault and battery and various forms of sexual offenses.

I. Common Law Rape

Section Introduction: Originally, rape was considered a violation of a man's property rights over his wife and daughters. At common law, rape trials mainly focused on the sexual history of the victim and on trying to ascertain exactly how much resistance the victim made against the assailant. If the victim was found to have not fought hard enough or to have a questionable sexual past, it became very difficult or impossible to

obtain a conviction. If, however, it could be shown that the defendant was indeed guilty of the crime of rape, the defendant was convicted of a felony crime that was punishable by death. In the following Florida case from 1960 you will see how courts dealt with the issue of rape prior to the reform of rape laws, which would not take begin to take place for another decade.

Askew v. State, 118 So.2d 219 (1960)

Procedural History: The Circuit Court, Alachua County, John A. H. Murphree, J., entered a judgment imposing the death sentence pursuant to a jury verdict finding defendant guilty without a recommendation of mercy. Defendant appealed. The Supreme Court, Hobson, J., held that requisite intent was presumed or inferred from the act itself and that evidence was sufficient to support the jury's rejection on defendant's defense of temporary insanity with loss of memory allegedly brought on by extreme use of alcohol.

Issue(s): The appellant contends that the trial court erred by failing to give two of his requested charges to the jury. The contention is based upon the appellant's theory that the appellant was so intoxicated that he could not form the intent necessary to commit the crime of rape and that such a specific intent is an essential element of this crime.

Facts: This is an appeal by Donald Ray Askew from a judgment imposing the death sentence pursuant to a jury verdict finding the appellant guilty of rape without a recommendation of mercy. The appellant was indicted for the rape of a female age ten and one-half. The record discloses that on the night of the alleged crime the appellant, together with several other adults, were social guests of the victim's mother at her home. After a 'round of drinks,' the group broke up. According to the testimony of the victim and her two brothers, the appellant returned to the house alone. With but slight variation, the victim and her brothers (ages 13 and 15 years) testified that the appellant, by threats of bodily harm, forced the boys to lie on a bedroom floor while he carnally attacked the victim. The victim testified the appellant forcibly attacked her even though she attempted to kick him and otherwise resist. Her testimony was supported by that of her brothers. The physician who interviewed the victim, within a few hours after the attack, testified that his examination revealed that the victim's private parts had been violently penetrated.

To the indictment, the appellant entered a plea of "not guilty by reason of temporary insanity and that the type of temporary insanity relied upon is loss of memory during the time the act charged took place, brought on by extreme use of alcohol." In his own defense, the appellant testified that during the afternoon and evening of the day in question he had consumed large quantities of beer and whiskey. It was his testimony that he became so intoxicated that he blacked out prior to going to the victim's house the first time, and that he has no recollection of subsequent events that may have transpired. The court-appointed psychiatrist testified that, based upon the appellant's history and the neurological, psychiatric and psychological examinations, it was his opinion that the appellant was neither medically psychotic nor legally insane. He did testify that the examinations disclosed some evidence of emotional instability and alcoholism.

Holding: Affirmed.

Opinion: HOBSON, Justice.

It is contended on this appeal that the trial court erred by sustaining the State's objection to three questions propounded by the defense counsel in his cross examination of the court-appointed psychiatrist. We have carefully examined these questions and are of the opinion that, when they are viewed in light of the particular facts of this case, the trial court was justified in sustaining the State's objection to the same. The appellant further contends that the trial court erred by failing to give two of his requested charges to the jury. The contention is based upon the appellant's theory that the appellant was so intoxicated that he could not form the intent necessary to commit the crime of rape and that such a specific intent is an essential element of this crime.

It is here relevant to reiterate that when an appellate court passes upon the propriety of the trial court's refusal to give requested charges, it is duty bound to consider the items refused in connection with all other charges bearing on the same subject. If when thus considered the law appears to have been fairly presented to the jury, assignments of error predicated upon the giving or refusing to give such charges must fail. [*Spanish v. State*, Fla.1950, 45 So.2d 753; *Peele v. State*, 1940, 155 Fla. 235, 20 So.2d 120]

The common law crime of rape is composed of three essential elements: carnal knowledge, force, and the commission of the act without the consent or against the will of the female victim. [75 C.J.S. Rape § 8, p. 471; 44 Am. Jur., Rape, § 2, p. 902] In the past, the type of rape we are here concerned with has been defined in Florida as the ravishment and carnal knowledge of a female of the age of ten years or more by force and against her will. [F.S. § 794.01, F.S.A] The elements of the crime are (1) penetration of the female private parts by the private male organ, and (2) force of such a nature as to put the victim in such fear that she is thereby compelled to submit to the act. [*Barker v. State*, 40 Fla. 178, 24 So. 69; *Russell v. State*, 71 Fla. 236, 71 So. 27.] [See also *State v. Bowden*, 1944, 154 Fla. 511, 18 So.2d 478, 480; *Jackson v. State*, Fla. App.1958, 107 So.2d 247]

With reference to the alleged failure of the court to charge on the subject of intent, counsel for appellant makes a novel and unique two-pronged argument. He, after citing authority for the proposition that rape was a crime malum in se at common law points out that this court held in *Talley v. State* [1948, 160 Fla. 593, 36 So.2d 201, 204] that:

> In many criminal offenses, intent is the essence of the crime, and where not established, the prosecution fails. In crimes malum in se, intent is presumed, but where it is not a matter of presumption, it must be proven as any other fact.

From this the petitioner illogically reasons that the State must show the appellant was capable of manifesting necessary criminal intent.

In support of his assertion that a specific intent must be proven by the prosecution in a rape case, the appellant has cited respectable authority to the effect that the gravamen of the offense of assault with intent to rape is intent to have unlawful intercourse with the intended victim with or without her consent. [*Manning v. State*, Fla.1957, 93 So.2d 716] The appellant argues that, since assault with intent to commit rape is a lesser included offense in the higher crime of rape, [*Barker v. State*, 1898, 40 Fla. 178, 24 So. 69], a conviction of the crime of rape requires proof of a specific intent. While we agree with appellant's statement that intent to accomplish the carnal act is the gravamen of the assault with intent to rape, we do not agree that such a specific intent is the essence of the crime of rape.

Although very little has been written in this state on the subject of intent in rape prosecutions, it is clear that while a general intent is involved in the crime, no specific intent is requisite other than that evidenced by the doing of the acts constituting the offense. [75 C.J.S. Rape §, p. 471] The law makes the act of rape the crime and infers a criminal intent from the act itself. [*Simmons v. State*, 1942, 151 Fla. 778, 10 So.2d 436]

Since the requisite intent is presumed or inferred from the act itself, voluntary intoxication is only a defense to the crime of rape when its use produces a mental condition of insanity. As this court indicated in *Cochran v. State*, [1913, 65 Fla. 91, 61 So. 187, 190. See also *Griffin v. State*, Fla.App.1957, 96 So.2d 424, and *Withers v. State*, Fla.1958, 104 So.2d 725]:

> The mental effects of a mere voluntary intoxication may not excuse the commission of an unlawful act or relieve its consequences; but if excessive and long-continued use of intoxicants produces a mental condition of insanity, permanent or intermittent, which insane condition exists when an unlawful act is committed, such insane mental condition may be of a nature that it would relieve the person so affected from the consequences of the act that would otherwise be criminal and punishable.

When the charges given, as well as those rejected, are viewed in the light of the foregoing, it becomes eminently clear that the case was fairly presented to the jury. Such being the case, the assignments of error, predicated upon the trial judge's failure to give two requested charges, fail.

As a final comment with reference to the appellant's defense of temporary insanity, our careful perusal of the testimony having any bearing upon appellant's alcoholic condition as well as his general mental condition at the time of, prior to, and subsequent to, the commission of the crime charged and for which he was convicted, has led us to the conclusion that there was more than sufficient evidence to support the jury's rejection of this defense.

The jury in this case, after hearing the evidence and receiving the charge of the court, retired to the jury room and thereafter returned with a verdict of guilty. Appellant's counsel immediately requested the jury be polled. After several jurors had affirmed the

jury's verdict, two of the jurors indicated that they only agreed to a verdict of guilty with recommendation of mercy. On this state of the facts, the trial judge ordered the poll discontinued and sent the jury back for further consideration of the case. Appellant now contends that the above delineated action of the trial court constitutes reversible error. We do not agree. Section 919.10, F.S.A., provides in pertinent part:

> Upon the motion of either the State or the defendant, or upon its own motion, the court shall cause the jurors to be asked severally if the verdict rendered is their verdict. If a juror dissents, the court must direct them sent back for further consideration; and if there be no dissent, the verdict shall be entered of record and the jurors discharged.

From our scrutiny of the record, it is apparent that the 'dissents' of jurors Mathews and Kennard gave rise to a situation in which the provisions of Section 919.10, F.S.A. were brought into play. The court did not err in referring the matter to the jury for reconsideration of its verdict.

Our careful consideration of the remaining questions presented by the appellant has failed to disclose any material or harmful error. Further, we have examined and considered the record in the light of the requirements of Section 924.32, Florida Statutes, F.S.A., [See also Florida Appellate Rules, rule 6.16, subd. b, 31 F.S.A.], reviewing the evidence to determine if the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence does not reveal that the ends of justice require a new trial.

<u>Critical Thinking Question(s):</u> While voluntary intoxication cannot serve as a defense to crimes of general intent, it may affect a person’s ability to form specific intent. Under what circumstances, if any, would such intoxication be sufficient to lessen one’s criminal culpability concerning sexual acts?

II. Modern Law Rape

<u>Section Introduction:</u> During the ’70’s and ‘80’s movement was made to reform rape laws and the treatment of rape cases in courts. Laws were passed to protect the rights of victims and to focus rape cases on the acts of the assailant. Rape shield laws prohibited a victim’s sexual history from being raised against them in trial. The common law requirements that a victim promptly report the crime and have corroborating evidence of the event were abandoned. In this section you can see how rape reform affected certain Florida statutes regarding sexual battery. Also read the following cases from 1999, 2001, and 2005, comparing to the case above, to see how these changes affected the way rape cases are tried.

Florida Statute, sec. 794.011 – Sexual battery

(1) As used in this chapter:

(a) "Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.
…

(h) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Florida Statute, sec. 794.022 – Rules of Evidence
(1) The testimony of the victim need not be corroborated in a prosecution under s. 794.011.

(2) Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

(3) Notwithstanding any other provision of law, reputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence in a prosecution under s. 794.011.

(4) When consent of the victim is a defense to prosecution under s. 794.011, evidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing, or voluntary; and the court shall instruct the jury accordingly.

(5) An offender's use of a prophylactic device, or a victim's request that an offender use a prophylactic device, is not, by itself, relevant to either the issue of whether or not the offense was committed or the issue of whether or not the victim consented.

***Richards v. State*, 738 So2d. 415 (App. 2 Dist., 1999)**

Procedural History: Defendant was convicted in the Circuit Court, Pasco County, Craig C. Villanti, J., of capital sexual battery, and he appealed. The District Court of Appeal, Altenbernd, Acting C.J., held that defendant was entitled to instruction that state was required to prove that some entry into victim's vagina took place, however slight.

Issue(s): Richards appeals his conviction for capital sexual battery based upon a charge that he digitally penetrated the vagina of a four-year-old girl. Richards claims that he was

entitled to an instruction clarifying the definition of vagina as it pertains to the element of penetration.

Facts: Mr. Richards was the boyfriend of the child's mother. In November 1991, he allegedly penetrated the girl's vagina with his finger on one occasion. This occurred while he was alone with the child watching television. Although the victim was interviewed at the time of the alleged offense, an information was not filed until February 1996. The State charged Mr. Richards with one count of capital sexual battery on a child less than twelve years of age in violation of section 794.011(2), Florida Statutes (1991). Oddly, the information contains language in addition to the statutory offense, alleging that he had committed the act "in a lewd, lascivious or indecent manner." [The offense of lewd and lascivious acts is not a necessarily included offense within the offense of capital sexual battery. [See *State v. Hightower*, 509 So.2d 1078 (Fla.1987)] The trial occurred in March 1997, and the jury returned a verdict of guilty as charged. Because of our resolution of this case, we do not need to determine whether the surplus language in this information transformed the offense of lewd and lascivious act into a lesser offense of the charged offense.

The evidence in this case, like that in many other sexual battery cases, involves little or no physical evidence of a crime, and critical testimony from a small child who does not understand the nuances of anatomy. When interviewed in 1991, she claimed that Mr. Richards touched her "monkey." This was a term that her mother had taught her to describe her general "female area." A physician who examined her in 1991 found no evidence of damage to her hymen, but found redness and a swollen area on the inner aspect of the child's labia majora. His investigation neither established nor ruled out digital penetration of the vagina. At the trial in 1997, the prosecutor and the State's examining physician used the phrase "vaginal area" during the State's case. The assistant state attorney asked whether the doctor had found evidence that the girl's "vaginal area" had been touched. The defense objected and attempted to require the doctor to testify using a distinction between the vagina and the vulva. By the end of the doctor's testimony, the distinction was quite muddled. Finally, the doctor testified:

> Okay. The medical definition usually refers to the opening of the canal itself and its extension back up to the cervix and the uterus. General terms, when the vagina or vaginal area is referred to, it's generally accepted, I believe, that it includes the labia majora, the labia minora, the clitoris, the urethra, the hymen, the tissues that surround and encompass the opening to the canal itself.

The defense objected to this testimony because it intermingled the relevant definition of vagina with other portions of the anatomy. The court overruled the objection and added that counsel could address the issue on re-cross.

At the conclusion of the case, the defense requested an instruction that provided an accurate definition of vagina and distinguished between the vulva and the vagina. This proposed written instruction was denied. Exacerbating this problem, during closing arguments, the State belittled the defense's efforts to draw a distinction between the

vagina and the vulva. When the defense attorney tried to explain to the jury that they must find that the defendant placed his finger inside the vagina and not merely the vaginal area, the prosecutor objected that this was a "misquote" of the law. The trial court did not rule on this objection but told the jury that it would instruct them on the law. In the State's rebuttal, the prosecutor argued:

> The defense wants you to rely on this medical definition. All these charts and these graphs, what do you think? Why do you think he wants you to rely on that? What's his defense, folks? [Objection made and overruled at this point.] Folks, think about what the defense is. Their defense is not even consistent with logic. If you heard him, he says, first you've got to not believe the victim.... Then he says, well, if he did it, if he did it, I want you to rely on this medical definition. I want you, folks, to ignore common sense of what a vagina is. And I want you to rely on this medical definition. Because it's going to make it harder to prove penetration....

The jury returned a verdict as charged, and Mr. Richards appealed his conviction and life sentence to this court.

<u>Holding:</u> Reversed and remanded for new trial.

<u>Opinion:</u> ALTENBERND, Acting Chief Judge.

Gregg Richards appeals his conviction for capital sexual battery based upon a charge that he digitally penetrated the vagina of a four-year-old girl. We reverse because under the particular circumstances of this case, Mr. Richards was entitled to an instruction clarifying the definition of vagina. Although this case is factually distinguishable, we disagree with the analysis in *State v. Pate*, 656 So.2d 1323 (Fla. 5th DCA 1995) and *Bowden v. State*, 642 So.2d 769 (Fla. 1st DCA 1994), which essentially equates the statutory term "vaginal" with "sexual organ." Under our current statute, sexual battery can occur when the defendant's mouth has "union" with the victim's "sexual organ," but the defendant's finger must actually "penetrate" the vagina. If the defendant's finger does not penetrate the vagina, but only touches the vulva, the crime would appear to be a lewd and lascivious act. [See § 800.04(1), Fla. Stat. (1991)] Given that the crime of lewd and lascivious is a second-degree felony that can result in a sentence no longer than fifteen years imprisonment, and capital sexual battery results in a sentence of lifetime incarceration, the jury should not be misled about the critical issue of anatomy.

As defined by statute, "[t]he term 'sexual battery' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." [§ 794.011(1)(h), Fla. Stat. (1991)] This antiseptic definition intermingles numerous prohibited acts, and it is often necessary to parse the definition to determine whether an offense has been committed. The confusion is exacerbated because the word "sexual organ" in the statute can mean either the victim's or the defendant's sexual organ, depending on the conduct alleged. Because it is often

difficult to understand exactly what types of conduct this statute proscribes, it is useful to divide this offense into four parts, and to translate its terms into more active language. [See *Dorch v. State*, 458 So.2d 357, 358 (Fla. 1st DCA 1984)] The statute prohibits:

> (1) "Oral, anal, or vaginal penetration by the sexual organ of another." Translation: It is illegal for a man to place his penis inside the mouth, anus, or vagina of a victim.
> (2) "Oral, anal, or vaginal union with the sexual organ of [the defendant]." Translation: It is illegal for a man to touch the mouth, anus or vagina of the victim with his penis, and it is illegal for a woman to touch the mouth, anus or vagina of the victim with her "sexual organ."
> (3) "Oral, anal, or vaginal union with the sexual organ of [the victim]." Translation: It is illegal for a man to touch the sexual organ of the victim with his mouth or anus, and it is illegal for a woman to touch the sexual organ of the victim with her mouth, anus, or vagina.
> (4) "The anal or vaginal penetration of another by any other object." Translation: It is illegal for a man or a woman to place any object inside the anus or vagina of the victim.

Dividing the statute in this manner demonstrates at least four significant points. First, the crime described in paragraph (1) appears unnecessary because it entirely duplicates the male crime described in paragraph (2). One simply cannot penetrate any of these bodily orifices without first making union with them. This duplication has probably led to some confusing reasoning within the case law. [See, e.g., *Pate*, 656 So.2d 1323; *Bowden*, 642 So.2d 769.

Second, the term "union" and the term "penetration" are used with some precision. Union permits a conviction based on contact with the relevant portion of anatomy, whereas penetration requires some entry into the relevant part, however slight. [For cases concerning union, see *Stone v. State*, 547 So.2d 657 (Fla. 2d DCA 1989), and *Dorch v. State*, 458 So.2d 357 (Fla.1984). For cases concerning penetration, see *Ready v. State*, 636 So.2d 67 (Fla. 2d DCA 1994), and *Davis v. State*, 569 So.2d 1317 (Fla. 1st DCA 1990)]

Third, it is clear that a defendant's finger is an "other object," which must penetrate and not merely have union with the relevant part. [See *Stone*, 547 So.2d 657; *Dorch*, 458 So.2d 357] Fourth, "vaginal" and "sexual organ" are not equivalent terms. We agree with the Fourth District's discussion of legislative intent in *Firkey v. State*, [557 So.2d 582 (Fla. 4th DCA 1989)], disapproved in part on other grounds, and *Wilson v. State*, [635 So.2d 16 (Fla.1994)]. In the process of amending these statutes in the early 1970s, the legislature chose to use an accurate definition of vagina, and used sexual organ as a more generic term comparable to "private part."

In *Pate*, [656 So.2d 1323], the Fifth District refused to adopt a "technical, medical definition" of the term "vagina" in a case involving union between the defendant's mouth and the victim's sexual organ. In that case, a doctor was allowed to testify in terms

similar to those used in this case. However, the problem in *Pate* is that the Court's analysis was misdirected by the unnecessary use of the term "vagina" in the information. In *Pate*, the State merely needed to prove that the defendant's mouth made union with the victim's sexual organ. It was entirely appropriate for a doctor to define "sexual organ" to include the vulva. Thus, the court in *Pate* appears to have reached the right result for the wrong reason. Likewise, in *Bowden*, [642 So.2d 769], the State charged that the defendant had committed capital sexual battery by "union with [the defendant's] penis and the child's vagina." The court reasoned:

> The legislature kept the "private parts" concept of rape by specifying that sexual battery occurs upon "vaginal penetration by, or a union with, the sexual organ of another." The phrase "union with" continues the concept that "any penetration by a male's private organ of any part of a female's private parts also constitutes a crime." [*Firkey v. State*, 557 So.2d 582, 585 (Fla. 4th DCA 1989)]

The foregoing observations indicate that although the term "vagina," may have a very definite medical meaning, the word as used in the statute is a term of art, which connotes "a female's private parts." Thus, where the male offender is charged with committing sexual battery by penile union or penetration, the statute is broad enough to contain within its prohibition penetration or union with the female victim's sexual organ. The sexual battery by an object other than the male organ, however, "occurs only if the victim's vagina is penetrated." [*Firkey*, 557 So.2d at 585; *Bowden*, 642 So.2d at 771]

We disagree with this analysis in *Bowden*. According to *Bowden*, the term "vaginal" has a narrow definition when "other object" penetration is involved and a "private parts" definition when penile union or penetration is involved. It is true that a man penetrates the vulva, and thus the sexual organ, in the process of making union with the vagina, but the statute unambiguously requires at least union with the vagina. Penetration of the vulva without union with the vagina simply is not defined as sexual battery when anything other than the defendant's mouth is used.

We also disagree that there is both a technical definition of vagina and some separate "term of art" that permits the law to expand the well-recognized medical definition to include the entire female sexual organ. We have found no such expanded definition even in common dictionaries. *Webster's New World College Dictionary* [1472 (3d ed. 1996)], for example, defines vagina as: "in female mammals, the canal between the vulva and the uterus."

We do not agree with the conclusion in *Pate* that to adopt what it describes as the medical definition of vagina means there could never be union with the vagina without penetration. To the contrary, evidence showing a defendant made penile contact with the victim's hymen or with the end of the canal in the absence of a hymen would be sufficient to establish union with the vagina. Moreover, *Pate* cites *Pineiro v. State*, [615 So.2d 801 (Fla. 3d DCA 1993)], and *Stone*, [547 So.2d 657], for the proposition that a defendant placing his tongue or mouth on, as opposed to in, the victim's vagina constitutes union with the vagina. While that may be true, it is important to note that under the statute as it

is written, a man can be convicted of sexual battery for placing his mouth or tongue in contact with a female's "sexual organ," a term encompassing more than the term vagina. While the difference between union and penetration of the vagina may only be a millimeter or two apart, it is a distinction the legislature has chosen to make in "other object" sexual battery cases and a distinction we must follow. [If the legislature truly wishes to make penile contact with the vulva or clitoris punishable by life imprisonment without the possibility of parole, it need only add the word "penile" to the phrase "oral, anal or vaginal" in section 794.011(1)(h), Florida Statutes (1991).]

The law is well settled that criminal statutes must be strictly construed. "When the language is susceptible of differing constructions, it shall be construed most favorably to the accused." [§ 775.021(1), Fla. Stat. (1991)] Thus, even if we were to concede that two definitions of vagina exist, in a statute that uses both "sexual organ" and "vaginal," we would be constrained to use the narrower, *Webster's* definition of vagina. Although we conclude that the evidence in this case was sufficient for resolution by the jury, [FN4] see *Stone*, 547 So.2d 657, we must reverse because the confusion created concerning the definition of vagina may have misled the jury into believing that penetration of the vaginal area was sufficient to convict Mr. Richards. The combination of the doctor's testimony and the State's closing argument served to create a reasonable probability that the jury could have been confused or misled in the absence of the requested instruction. [See *Harvey v. State*, 448 So.2d 578 (Fla. 5th DCA 1984); *Carter v. State*, 469 So.2d 194 (Fla. 2d DCA 1985); *Ruiz v. Cold Storage & Insulation Contractors, Inc.*, 306 So.2d 153 (Fla. 2d DCA 1975). We emphasize that we are not holding that an instruction defining vagina is required in every digital penetration case. It was necessary in this case because of the confusion created by the State during the trial. We decline to reach the remaining issues because they may not reoccur during any new trial.

Critical Thinking Question(s): Defendant's argument was quite creative in this case. Should there be a distinction between "penetration" and "union"? What is the definition of "union" and how would one prove it?

***State v. Rife*, 789 So.2d 288 (2001)**

Procedural History: Defendant was convicted in the Circuit Court, Brevard County, Tonya Rainwater, J., of sexual battery on a minor in his custodial authority. State appealed downward departure in guidelines sentence based on victim's consent. The District Court of Appeal, 733 So.2d 541, affirmed and certified question. The Supreme Court, Pariente, J., held that willing participation of a 17-year-old woman was a mitigating factor supporting downward departure, disapproving *State v. Hoffman*, [745 So.2d 985], *State v. Whiting*, [711 So.2d 1212], *State v. Stalvey*, [795 So.2d 968, 2000 WL 370269], *State v. Siddal*, [728 So.2d 363], and *State v. Harrell*, [691 So.2d 46].

Issue(s): The Court addresses the issue of whether or not consent of the victim, albeit under age, can be used as a mitigating factor for sentencing purposes.

<u>Holding:</u> Decision approved.

<u>Facts:</u> [Ronald] Rife admits having sex with the seventeen-year-old victim on numerous occasions but contends, and the victim agrees, that the sexual activities were consensual. Further, it appears that the sexual activities with this minor, who moved in with appellant because she had no other place to reside, began before the victim requested, and appellant agreed, that appellant become her guardian. *[Rife*, 733 So.2d at 542] Both Rife and the victim testified that they had planned on marrying when the victim reached the legal age of eighteen. Rife was convicted of three counts of sexual battery in violation of section 794.011(8)(b), Florida Statutes (1997), which provides:

> (8) Without regard to the willingness or consent of the victim, which is not a defense to prosecution under this subsection, a person who is in a position of familial or custodial authority to a person less than 18 years of age who:
>
>> (b) Engages in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery under paragraph (1)(h) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 794.011(1)(a), Florida Statutes (1997), provides that " 'Consent' means intelligent, knowing, and voluntary consent and does not include coerced submission. 'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender."

Although the trial court recognized that a minor victim's consent could not be utilized by Rife as a defense to the crime of sexual battery, the trial court found that the victim's consent could be considered in imposing a downward departure sentence on the defendant. [See *Rife*, 733 So.2d at 542.] The trial court found that the record supported the fact that the minor victim "willingly participated in this sexual endeavor." [Id. at 543] In imposing a downward departure sentence, the trial court announced:

> I'm basing the downward departure based on statutory grounds that the victim, although she was a minor, was a willing participant in this incident. She apparently agreed to it and was in love with you, and at least thought she was in love with you, and fully participated in this incident. She doesn't have the obligation or the responsibility as a minor to tell you no. Consent is not an issue on the charge. But I am taking that into consideration for the purpose of the downward departure. [Id. at 542]

Rife's sentencing guideline score sheet provided for a state prison sentence range of 297.4 months (approximately twenty-four years) to 495.7 months (approximately forty-one years). The trial court downwardly departed and sentenced Rife to three concurrent prison terms of 102 months (eight and one-half years), followed by ten years' probation on each count, and ordered that Rife receive sexual offender treatment as a condition of

his probation. The State timely objected to the imposition of the downward departure sentences and requested that Rife be given a sentence within the statutory guidelines. The State appealed the imposition of the downward departure sentences to the Fifth District. In an en banc opinion, the Fifth District affirmed the imposition of the downward departure sentence based upon the trial court's finding that the statutory mitigator of "consent" applied. [See *Rife*, 733 So.2d at 542-44] The Fifth District receded from its contrary holding in *State v. Smith*, [668 So.2d 639, 644 (Fla. 5th DCA 1996)], that the trial court did not have the discretion as a matter of law to mitigate a sentence based on a minor victim's consent.

Opinion: PARIENTE, J.

We have for review the decision in *State v. Rife*, [733 So.2d 541 (Fla. 5th DCA 1999)], in which the Fifth District Court of Appeal, in an en banc opinion, certified the following questions to be of great public importance:

> (1) Although willingness or consent of the minor is not a defense to sexual battery of a minor, may it be considered by the Court as a mitigating factor in sentencing?
> (2) Should the mitigation also apply where the defendant was convicted of being in a position of custodial or familial authority with the victim? [See id. at 551]

We have jurisdiction. [See art. V, § 3(b)(4), Fla. Const.] For the reasons explained in this opinion, we answer the certified questions in the affirmative and approve the en banc decision of the Fifth District.

In this case, there is ample support that, in fact, the young woman willingly participated in this sexual endeavor. Hence, the record supports the presence of this mitigating factor. Because of the sordid testimony ... perhaps the closer question is whether the court abused its discretion in mitigating even though the mitigating factor is present. The jury, being instructed to ignore the minor's consent, convicted him of the offenses. Sentencing, however, is a different matter and involves the judge's view of the evidence as it relates to mitigation. It is clear that the judge did not believe the young woman [was] so immature that she could not agree to the encounter or that she was incapable of loving the defendant. The judge saw the minor, heard her testify and observed her demeanor, and was free to determine for herself the maturity (emotional and otherwise) of the young woman. We are not in that position. Further, insofar as it involves sentencing, the court was free to believe such witnesses and such testimony, or portion thereof, that she found credible.... It is important to note that this is not a case in which the judge trivialized the offense by a slap on the wrist. The defendant was sentenced to eight and one-half years in prison to be followed by ten years probation. The judge took this case seriously. She merely realized that had the victim not willingly participated, the offense would have been much more serious and a greater sentence would be justified. In order to recognize this difference, the judge believed that a substantial, but somewhat less than guideline, sentence would be appropriate in this case. The legislature permitted her to do so. [*Rife*, 733 So.2d at 543]

In answering the certified questions in this case, the Court must determine whether the trial court was precluded as a matter of law from imposing a prison sentence of eight and one-half years, followed by ten years probation, or whether the trial court was required as a matter of law to sentence Rife to a prison term of no less than twenty-four years, the minimum sentence under the sentencing guidelines. There is no question that the Legislature has the authority to preclude a trial judge from imposing a downward departure sentence based on willing participation or consent of the minor victim. Our role, however, is limited to determining whether the Legislature intended to do so. Accordingly, it is not this Court's function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute. [See *State v. Mitro*, 700 So.2d 643, 646 (Fla.1997) (citing *Hamilton v. State*, 366 So.2d 8, 10 (Fla.1978)] "When construing a statutory provision, legislative intent is the polestar that guides" the Court's inquiry. [*McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla.1998)] Legislative intent is determined primarily from the language of a statute. [See *Hayes v. State*, 750 So.2d 1, 3 (Fla.1999); *Overstreet v. State*, 629 So.2d 125, 126 (Fla.1993)] "When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.' " [*State v. Cohen*, 696 So.2d 435, 436 (Fla. 4th DCA 1997) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984)] This principle is "not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature." [*State v. Brigham*, 694 So.2d 793, 797 (Fla. 2d DCA 1997)]

Thus, the Court must determine whether the Legislature intended to provide trial judges with the authority under the sentencing guidelines, section 921.0016(4)(f), to impose a downward departure sentence for crimes involving sexual conduct with minors where the trial court finds that the minor "victim was an initiator, willing participant, aggressor, or provoker" of the sexual incident. Section 921.0016, Florida Statutes (1997), provides in pertinent part:

> (1)(a) The recommended guidelines sentence provided by the total sentence points is assumed to be appropriate for the offender.
>
> (2) A departure from the recommended guidelines sentence is discouraged unless there are circumstances or factors which reasonably justify the departure. Aggravating and mitigating factors to be considered include, but are not limited to, those in subsections (3) and (4). The failure of the trial court to impose a sentence within the sentencing guidelines is subject to appellate review under chapter 924, but the extent of the departure from a guidelines sentence is not subject to appellate review.
>
> (4) Mitigating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:
>
>> (f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.

Section 921.0016 is applicable to a defendant who committed a crime before October 1, 1998, and therefore it is applicable to Rife. The Legislature amended the sentencing statute applicable to felonies committed on or after October 1, 1998. [See ch. 97-194, Laws of Fla. (creating the Florida Criminal Punishment Code, codified at sections 921.002-921.0026, Florida Statutes (1997)); see also § 921.0027, Fla. Stat. (1999)]

Section 921.0026(2)(f), Florida Statutes (1999), provides for the same mitigating circumstance as provided by section 921.0016(4)(f), where "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident."

As provided by the Legislature, the sentencing guidelines apply to all crimes, excluding capital felonies. [See § 921.001(4)(b)2., Fla. Stat. (1997)] The plain language of the downward departure statute in question, section 921.0016(4)(f), does not limit its applicability to crimes in which the victims are adults. Thus, in determining whether section 921.0016(4)(f) provides trial judges with the authority to mitigate defendants' sentences for sexual crimes with minors based on the minor victims' consent or willing participation, we must necessarily review that section in conjunction with the criminal statute that Rife was convicted of violating. [See *Hayes*, 750 So.2d at 3]

Because nothing in section 921.0016(4)(f) limits its application, the question becomes whether the criminal statutes under which Rife was convicted preclude a downward departure based on the willing participation of the minor victim. Section 794.011(8), the sexual battery statute that applies to defendants in a position of familial and custodial authority, provides that the "willingness or consent of the victim ... is not a defense to prosecution under this subsection." It is thus clear that the Legislature expressly precluded defendants from asserting the minor's consent as a defense to section 794.011(8).

The State argues that the fact that a minor victim's consent cannot be considered as a defense to the crime of sexual battery on a minor indicates the Legislature's intent that a minor victim's consent or willing participation in sexual behavior with adults cannot be considered for purposes of a downward departure sentence. This ignores the fundamental differences between whether particular conduct should be criminalized and the proper sentence to be imposed in a given case. [*See Bentley v. State*, 411 So.2d 1361, 1363 (Fla. 5th DCA 1982)]]

The very words employed by the Legislature in section 794.011(8), "[w]ithout regard to the willingness or consent of the victim," presume the ability of the minor to have willingly participated in or consented to the sexual activity. If the Legislature had intended to prohibit downward departures even if the minor consented to the activity, it could have expressly provided for such a prohibition in either the laws governing sexual crimes involving minors or the sentencing guidelines. It did neither. In concluding that section 921.0016(4)(f) was inapplicable to sexual crimes involving minors, the Fifth District explained:

> Unless the legislature acts in an unconstitutional manner, courts must permit the legislature to legislate. And unless the legislation is vague, the courts must apply the law as enacted by the legislature.... The legislature is quite capable of enacting minimum and mandatory sentences. Had it intended no mitigation under this statute, the legislature could easily have said so. It did not and this court should not. [*Rife*, 733 So.2d at 543 n. 2]

To the extent, however, that there is any ambiguity as to legislative intent created by the confluence of these statutes, the default principle in construing criminal statutes is codified in section 775.021(1), Florida Statutes (1997). [See *Hayes*, 750 So.2d at 3] "The rules of statutory construction require courts to strictly construe criminal statutes, and that 'when the language is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.' " [Id. (quoting section 775.021(1)); see also *McLaughlin*, 721 So.2d at 1172] The rule of lenity is equally applicable to the court's construction of sentencing guidelines. [See *Flowers v. State*, 586 So.2d 1058, 1059 (Fla.1991)]

The State, however, contends that our decisions in *Jones v. State*, [640 So.2d 1084 (Fla.1994)] and *J.A.S. v. State*, [705 So.2d 1381 (Fla.1998)], mandate a contrary result because in both cases we recognized the Legislature's strong policy of protecting minors from harmful sexual conduct. In both cases, however, the issue before us was the constitutionality of the statutes that criminalized certain sexual behavior even if the minor victim engaged in consensual sex. We rejected the argument that section 800.04, Florida Statutes (1991), entitled "Lewd, lascivious, or indecent assault or act upon or in presence of child," violated the privacy rights of the females with whom the defendants had sexual intercourse. [See *Jones*, 640 So.2d at 1085] We further rejected the defendants' argument that the statute was unconstitutional, as applied, because the females in the cases were not harmed and "wanted to have the personal relationships they entered into with these men; and, they [did] not want the 'protections' advanced by the State." [Id. at 1086]

In *Jones* and *J.A.S.*, we recognized that the Legislature had enacted numerous statutes to protect minors from harmful sexual conduct and that those laws clearly invoked a policy that "any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents.... [Therefore] society has a compelling interest in intervening to stop such misconduct." [*Jones*, 640 So.2d at 1086 (quoting *Schmitt v. State*, 590 So.2d 404, 410-11 (Fla.1991)); see also *J.A.S.*, 705 So.2d at 1385] Thus, we stated in *Jones* that neither the minor victim's maturity nor lack of chastity could override these concerns because "sexual activity with a child opens the door to sexual exploitation, physical harm, and sometimes psychological damage." [640 So.2d at 1086] Finally, this Court concluded that whatever the extent of a minor's privacy rights, those rights "do not vitiate the legislature's efforts and authority to protect minors from conduct of others." [Id. at 108]

We continue to embrace these important holdings from *Jones* and *J.A.S.* However, both *Jones* and *J.A.S.* addressed the question of whether certain sexual conduct could be

criminalized even though the minor victim consented. At no point in either case did this Court address the question of whether the minor victims' consensual activity could be a factor that would allow a trial court to depart from the statutory guidelines and impose a lesser sentence.

The State also contends that providing judges with the discretion to mitigate defendants' sentences based on a minor victim's willing participation in a sexual act with an adult would weaken the laws and public policy of protecting minors. This argument should be directed to the Legislature. In deciding the issues in this case, we do not ignore the State's important interest in protecting minors from harmful sexual conduct and from possible sexual exploitation by adults. Nor does the willing participation of the victim excuse the criminal acts of the defendant. Our decision is based on statutory construction and, based on these principles, we do not find that the Legislature intended to preclude a trial court from utilizing section 921.0016(4)(f) as a basis for imposing a downward departure sentence. As the majority opinion of the en banc Fifth District succinctly explained:

> [I]f consent were a defense to this criminal charge, there would be no need to mitigate in this instance. Although remorse is never a defense to a criminal charge, the legislature has made it a mitigating factor to be considered by the judge. Likewise, the legislature has made the willing participation of the victim a mitigating factor. And the legislature did not limit the applicability of this factor ... to only those victims "of age." [*Rife*, 733 So.2d at 543]

The Fifth District also urged trial courts in determining whether a downward departure sentence is warranted to "consider the circumstances even more carefully depending on the victim's age." [Id.] According to the Fifth District, "the younger and less mature the victim, the less likelihood of a finding that even willing participation is sufficient for mitigating" a defendant's sentence. [Id.] We endorse these cautionary words, noting in particular that "consent" means "intelligent, knowing and voluntary consent and does not include coerced submission." [§ 794.011(1)(a)] Further, the fact that a young victim does not resist is not the same as willing participation. [See *Rife*, 733 So.2d at 544]

With these cautionary words, we answer the certified questions in the affirmative and approve the decision of the Fifth District. Accordingly, we conclude that by reading section 794.011(8)(b) in conjunction with section 921.0016(4)(f), trial judges are not prohibited as a matter of law from imposing a downward departure based on a finding that "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident." Of course, in determining whether this mitigator applies when the victim is a minor, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim.
To the extent that *Stalvey*, [25 Fla. L. Weekly at D961, 795 So.2d 968, 2000 WL 370269], *Hoffman*, [745 So.2d at 987], *Siddal*, [728 So.2d at 364], *Whiting*, [711 So.2d at 1214], and *Harrell*, [691 So.2d at 46], held that as a matter of law a trial court is precluded from considering the applicability of section 921.0016(4)(f) to crimes involving sexual conduct with minors, we disapprove those decisions. We make clear

that we do not address whether in each of those cases the reversal of the downward departure sentence was nevertheless still appropriate based on the facts and circumstances of the particular case. It is so ordered.

Dissent: QUINCE, J.

I agree with Judge Thompson's dissent which says that the consent of a minor to sexual acts performed on her by an adult cannot be used to support a downward departure from the sentencing guidelines. It seems ironic that consent is not a defense to the crime of sexual battery of a minor by one in familial or custodial authority but can be used to negate the punishment for the offense. As Judge Thompson pointed out in *State v. Rife*, [733 So.2d 541, 548 (Fla. 5th DCA 1999)]

> First, this statute, section 794.011(8)(b), and others like it are designed to further the state's compelling interest in protecting minors from sexual exploitation and sexual abuse from adults. [See generally, *Jones v. State*, 640 So.2d 1084 (Fla.1994) (Kogan, J. concurring*); Schmitt v. State*, 590 So.2d 404 (Fla.1991), cert. denied, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992); *State v. Sorakrai*, 543 So.2d 294 (Fla. 2d DCA 1989)] Unlike the others, however, this statute is specifically directed toward defendants who are "in a position of familial or custodial authority." [*State v. Whiting*, 711 So.2d 1212 (Fla. 2d DCA 1998)] This is not a statute that could apply to star-crossed lovers who engage in consensual sex, and are close in age. [See e.g., *B.B. v. State*, 659 So.2d 256 (Fla.1995)] Here, the statute seeks to penalize an adult who preys upon children, and who takes advantage of his or her status to exploit children. The trial court, therefore, should not be able to use as a mitigator that which is statutorily prohibited as a defense at trial. To do so eviscerates the statute and subverts its underlying public policy. [See *Whiting*; *State v. Smith*, 668 So.2d 639 (Fla. 5th DCA 1996)] [*Rife*, 733 So.2d at 548]

The fact that a sixteen-year-old consented to a sexual relationship with a forty-nine year old man, who had taken on the responsibility of her care, is not mitigating. I would answer the certified question in the negative and hold consent by the minor is not a mitigating factor to sexual battery under section 794.011(8)(b).

Critical Thinking Question: The Court decided this case on the basis of statutory construction. If you were a legislator, do you believe that the "consent" of a victim should be considered as a mitigating factor? Explain.

Hogan v. State, WL 1364374 (App. 5 Dist., 2005)

Procedural History: Background: Defendant was convicted in the Circuit Court, Orange County, Julie H. O'Kane, J., of two counts of sexual battery and one count of battery. Defendant appealed. The District Court of Appeal, Monaco, J., held that defendant was prohibited from cross-examining victim regarding whether she had been the victim of prior sexual violence.

Issue(s): Appellant contends that the trial court erred in not allowing him to ask the victim certain questions concerning whether she had previously been the victim of sexual battery.

Holding: Affirmed.

Opinion: MONACO, J.

The appellant, Jason Hogan, appeals his judgment and sentence arising out of his conviction of two counts of sexual battery, and one count of battery. He contends that the trial court erred in not allowing him to ask the victim certain questions concerning whether she had previously been the victim of sexual battery. He also argues that he was prejudiced as a result of alleged "improper discussions" by the jury prior to actual deliberations. We affirm.

We turn first to Mr. Hogan's contention that he should have been allowed to cross-examine the victim regarding whether she had been the victim of prior sexual violence. Assuming the court's decision to prohibit the testimony was properly preserved for appeal, we see no error in the prohibition of the questioning, particularly in view of the facts that the alleged prior attacks were not the subject of discovery by either the state or the defense; there was no testimony, expert or otherwise, that made the victim's history relevant; and there was, therefore, no showing in camera that the evidence tended to establish a pattern of conduct or behavior of the victim so that it was relevant to the issue of consent. [See § 794.022(2), Fla. Stat. (2003); Compare *Minus v. State*, 901 So.2d 344 (Fla. 4th DCA 2005). As to the alleged juror misconduct, we again find no error. [See *Reaves v. State*, 826 So.2d 932 (Fla.2002); *Johnson v. State*, 804 So.2d 1218 (Fla.2001); *Johnson v. State*, 696 So.2d 317 (Fla.1997).

Critical Thinking Question(s): Rape shield statutes were enacted to protect the victim from being “placed on trial,” but the victim’s sexual history and practices may be admitted when considered relevant and necessary to the defense. What sort of instances would make the sexual history of the victim relevant? Explain.

III. Assault and Battery

Section Introduction: Assault and battery are two separate offenses against bodily integrity of the victim. However, it is common for these crimes to be referred to together because they are so closely related. When someone is charged with battery, the inherent commission of assault is not punished separately but is instead seen as the first step in the commission of the battery. Where battery involves the use of force against another person, assault is the threat or attempt of such force. Below you will find Florida statutes addressing the various types of assault and battery, along with Florida cases to show how these statutes are applied.

Florida Statute, sec. 784.03 – Battery; felony battery

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

Florida Statute, sec. 784.041 - Felony Battery

(1) A person commits felony battery if he or she:

(a) Actually and intentionally touches or strikes another person against the will of the other; and

(b) Causes great bodily harm, permanent disability, or permanent disfigurement.

(2) A person who commits felony battery commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Florida Statute, sec. 784.045 - Aggravated Battery

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

2. Uses a deadly weapon.

(b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

***Cuevas v. State*, 770 So.2d 703 (App. 4 Dist., 2000)**

Procedural History: Defendant moved to withdraw guilty plea to felony battery. The Seventeenth Judicial Circuit Court, Broward County, Ilona M. Holmes, J., denied motion. Defendant appealed. The District Court of Appeal, Polen, J., held that: (1) information

that expressly referenced felony battery statute was legally sufficient, and (2) sufficient factual basis existed for guilty plea.

Issue(s): Defendant contends that the complaint did not sufficiently inform her of the charge of felony battery and she sought to withdraw her guilty plea.

Holding: Affirmed.

Facts: Johanna Cuevas pled guilty to felony battery, a third degree felony. Because it was a hate crime, the charge was enhanced to a second degree felony and she was sentenced to ten years in prison. She then moved to withdraw her plea on the grounds that she did not know that she was pleading to a hate crime. The court denied her motion. She then appealed on the ground that she was sentenced for a crime that was never charged, or alternatively that there was no factual basis for her plea. We affirm her conviction, and the denial of her motion to withdraw the plea.

The information charging Cuevas with the above crime read as follows:

> I. FELONY BATTERY - HATE CRIME: JOHANNA CUEVAS ... did then and there commit a battery upon [the victim] by actually and intentionally touching or striking [her] against her will and the commission of this offense evidences prejudice based on ... sexual orientation ... of [the] victim ... contrary to F.S. 784.041, F.S. 777.011 and F.S. 775.085....

During the plea colloquy, the trial court informed Cuevas that she had been accused of felony battery, that it was a third degree felony, but that because the crime was motivated by some type of hate, the charge was upgraded to a second degree felony. The Court fully explained the hate crime charged against her, the maximum sentence she could receive, and the ramifications that a guilty plea would bring. The State proffered as a factual basis for the plea that had the case gone to trial, it would have introduced the "testimony of witnesses to support the charge of felony battery, as the hate crime motivation factor was sexual orientation of the victim. She's a declared lesbian and it's, therefore, part of the statutory protected class." The State further explained that Cuevas, in conjunction with others, traveled down to Broward County from Orlando for the purpose of beating up the victim, who was in a rival gang. It explained that Cuevas' gang abhorred homosexual activity and because the victim was a lesbian, she and her friends beat her up. Cuevas admitted to these facts and then pled guilty.

Four months later at sentencing, the State informed the Court that Cuevas had not cooperated with her end of the plea agreement. The Court sentenced her to ten years in prison, a sentence which was less than the maximum permitted. Cuevas then moved to withdraw her plea and set aside her sentence. She claimed that she was never informed and the plea colloquy did not reflect that the victim fell within any defined class. She maintained that at best she committed a misdemeanor battery. The trial court denied the motion, and this appeal followed. Cuevas now argues that her sentence is fundamentally erroneous because it shows she was convicted of a crime with which she was never

charged. She maintains that the record reflects that at most she pled guilty to misdemeanor battery. The State argues that Cuevas did not preserve this issue for appeal because she objected on a different ground below.

Opinion: POLEN, J.

It is fundamental error where a defendant pleads to one crime but is convicted of a greater crime with which he was never charged. [See *Fulcher v. State*, 25 Fla. L. Weekly D323 (Fla. 4th DCA Feb.2, 2000) (holding a conviction on a charge not made by the indictment or information is a denial of due process of law)] However, fundamental error did not occur in this case. While the body of the information did not trace the language of the felony battery statute, section 784.041, Florida Statutes (1999), expressly referenced this statute and, as such, was legally sufficient. [See id.] Section 784.041 (1999) provides:

> (1) A person commits felony battery if he or she:
>> (a) Actually and intentionally touches or strikes another person against the will of the other; and
>> (b) Causes great bodily harm, permanent disability, or permanent disfigurement.
>
> (2) A person who commits felony battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Cuevas alternatively argues that there was no factual basis to support her plea to a felony as opposed to a misdemeanor under Florida Rule of Criminal Procedure 3.172 and *Koenig v. State*, [597 So.2d 256 (Fla.1992)]. She specifies that the State did not expressly proffer that it would show that Cuevas intended to cause great bodily harm, permanent disability, or permanent disfigurement to the victim. Since she did not raise this issue below, the Court's failure to conduct an inquiry as to whether there was a factual basis for a plea may amount to fundamental error only if it resulted in prejudice to the defendant or manifest injustice. [See *Wuornos v. State*, 676 So.2d 966 (Fla.1995)(noting that failure to follow procedures of rule 3.172 shall not render a plea void absent a showing of prejudice); *Otero v. State*, 696 So.2d 442 (Fla. 4th DCA 1997)(holding failure to conduct inquiry as to whether there was factual basis for defendant's guilty plea was fundamental error, which required reversal of trial court's denial of motion to withdraw his plea, even in absence of objection to this lack of inquiry, where defendant's public defender testified that defendant had told her that he did not commit burglary but nevertheless wanted to plead guilty); Fla. R.Crim. P. 3.172(i) ("Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.")]

In this sense, and while the State did not expressly proffer a factual basis for this element of the felony battery charge, Cuevas' argument fails because she has not established that any prejudice or manifest injustice occurred. Specifically, the arrest warrant stated that Cuevas continuously beat the victim until ordered to stop and that the victim was thereafter transported to the hospital due to her injuries from the beating; the information

specified that the charge against Cuevas was felony battery motivated by hate; prior to the plea the court explained to her that she was being charged with a second degree felony; the state proffered that if the case went to trial it would introduce testimony to establish the elements of felony battery, and explained that Cuevas subjected the victim to the beating because of her sexual preference. Thus, there was sufficient evidence in the record that put both the Court and Cuevas on notice of exactly what crime she was pleading to. [See *Wuornos*, 676 So.2d at 969 ("The colloquy between the trial court and Wournos is not a model, but it nevertheless is apparent from the overall thrust of the conversation that Wournos knew the import of the plea."); *Saint Aime v. State*, 723 So.2d 874 (Fla. 3d DCA 1998) (rejecting defendant's Florida Rule of Criminal Procedure 3.850 claim that there was no factual basis for the plea where the arrest affidavit was a part of the record and sufficiently set forth a factual basis for the charge), rev. denied, 740 So.2d 528 (Fla.1999); *Blackwood v. State*, 648 So.2d 294 (Fla. 3d DCA 1995) (holding depositions or police affidavits were sufficient to support a factual basis otherwise stipulated to by the parties in an attempt to vacate a plea based upon a lack of voluntariness in entering the plea)]

<u>Critical Thinking Question(s):</u> In this case, the defendant received an enhanced penalty for committing a hate crime. In a matter of assault and battery, where the intent is to do harm to another, should it matter what the reason is that the perpetrator commits the crime? Explain why our legislature has enacted this sentencing enhancement.

Florida Statue, sec. 784.011 - Assault

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.

See infra: *Colony Ins. Co. v. Barnes*, 410 F.Supp.2d 1137 (N.D. Fla., 2005)

Florida Statute, sec. 784.021 - Aggravated Assault

(1) An "aggravated assault" is an assault:
- (a) With a deadly weapon without intent to kill; or
- (b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

***Lavin v. State*, 754 So.2d 784 (App. 3 Dist., 2000)**

Procedural History: Defendant was convicted in the Circuit Court, Dade County, Michael A. Genden, J., of aggravated assault and he was sentenced as habitual violent felony offender to a four-year term of imprisonment. He appealed. The District Court of Appeal, Ramirez, J., held that: (1) prosecutor improperly expressed his personal belief in defendant's guilt during voir dire; (2) defendant's post-arrest threats were not admissible to show specific intent element of aggravated assault; and (3) victim's loss of landscaping contract as a result of altercation with defendant was appropriate subject for cross-examination of victim.

Issue(s): Lavin appeals his conviction of aggravated assault and sentence as a habitual violent felony offender claiming that acts after the fact should not be considered in evidence and that the victim’s personal motive in the case should have been subject to cross-examination.

Facts: On October 12, 1998, Enrique Ojeda, while driving his car with Ivan Herrera as a passenger, was involved in a traffic altercation with Lavin in an area where Ojeda and Herrera were doing landscape work. Ojeda and Herrera testified at trial that, after exchanging words, Lavin left the scene, but returned with a shotgun which he aimed at Ojeda and threatened to kill him. Ojeda and Herrera further testified that they continued to work, ignoring Lavin for a period of twenty minutes while Lavin continued his threats, all in broad daylight and in the middle of an apartment complex. When Herrera heard police sirens, he saw Lavin leave. Ojeda then called the police and reported the altercation. Officer Morris, accompanied by other officers, went to Lavin's apartment and searched it. The apartment search, as well as a search of Lavin's vehicle, failed to produce a shotgun. During his arrest, Lavin threatened the police officers and Ojeda.

Holding: Reversed and remanded for new trial.

Opinion: RAMIREZ, J.

During voir dire, the prosecutor remarked:

> Now when we get assigned at the State Attorney's Office, they give us a manual. And our manual instructs us that our mandate is two things. One is to make sure that the innocent are not charged.

A defense objection was sustained. After a discussion sidebar, the prosecution continued:

> "Okay. Basically, our role is it [sic] make sure the innocent are not prosecuted and to make sure ..."

An objection to this comment was overruled. The next day, before the court resumed with jury selection, Lavin's counsel renewed her objection to the prosecutor's comment and moved to strike the panel. Although the trial court agreed that the statement was improper, the judge refused to strike the panel but offered a curative instruction, which

the defense refused. We disagree with the trial court that the statement did not warrant striking the panel.

It is improper for the prosecutor to express his or her personal belief about a defendant's guilt. [See *Gore v. State*, 719 So.2d 1197, 1201 (Fla.1998)] The state's reference to the State Attorney's Manual which instructs all prosecutors to make sure that the innocent are not charged was obviously an expression of personal belief in Lavin's guilt which "compromised the jury's ability to fairly evaluate the evidence and, in turn, [defendant]'s right to a fair trial." [*Fryer v. State*, 693 So.2d 1046, 1048 (Fla. 3d DCA 1997)] The prosecutor's remark here is similar to that condemned in *Riley v. State*, [560 So.2d 279, 280 (Fla. 3d DCA 1990) ("Why would I charge him with first-degree murder? ... Because he's guilty of first-degree premeditated murder.")]. The remarks in *Riley* occurred during closing argument, in contrast with the offending statement here which occurred at the onset of the State's voir dire. The panel could have been stricken and, at that point, it would not have resulted in much wasted judicial effort. [See, e.g., *Reed v. State*, 333 So.2d 524, 525-26 (Fla. 1st DCA 1976) (stating that "[o]nce again the extensive time and money expended in a criminal proceeding must go 'down the drain' because of the over zealous argument of one prosecutor." The prosecutor had stated, among other offensive remarks, that: "The State doesn't prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes.")]

The State argues that this issue was not preserved. Under *Joiner v. State*, [618 So.2d 174, 176 (Fla.1993)], the defendant was held to have waived his *Neil* [*State v. Neil*, 457 So.2d 481 (Fla.1984)] objection when he accepted the jury. *Joiner* has been extended to other jury selection issues outside of the *Neil* context. [See *Karp v. State*, 698 So.2d 577, 578 (Fla. 3d DCA 1997) (denial of motion to strike entire venire panel after potential juror spontaneously made allegedly prejudicial comments; held, issue not preserved); *Stripling v. State*, 664 So.2d 2, 3 (Fla. 3d DCA 1995) (trial court rulings that allegedly unduly restricted defendant's voir dire inquiry; held, issue not preserved); *Green v. State*, 679 So.2d 1294, 1294 (Fla. 4th DCA 1996) (time limitations imposed by trial court on voir dire examination; held, issue not preserved)]

Lavin exhausted his challenges and the trial court simply announced: "That's it. Bring [the jury panel] in." Thus, Lavin did not affirmatively accept the jury immediately prior to its being sworn without reservation of the earlier objection, unlike the defendant in *Karp v. State*, [698 So.2d 577, 578 (Fla. 3d DCA 1997)], where the defendant "unconditionally accepted and tendered the selected jury before it was sworn without renewing his objection." However, this issue has already been decided in *Milstein v. Mutual Sec. Life Ins. Co.*, [705 So.2d 639, 641 (Fla. 3d DCA 1998) ("It is our view that the logic of *Joiner* requires the litigant to renew the previous objection even where, as here, the litigant has made no statement affirmatively accepting the jury.")]. Consequently, the defendant failed to preserve his jury selection issue. [We do not address whether the issue rises to the level of fundamental error because we find the other two grounds raised by the defendant warrant reversal in this case.]

Lavin also challenges the admission of his threats as improper use of evidence of collateral bad acts. We agree that their admission was improper. Lavin's statements were made post-arrest, after he had allegedly attacked Ojeda and was transported back to the scene of the altercation. The trial court admitted the statements as probative of the Lavin's state of mind. Aggravated assault requires proof of a specific intent to do violence to the person of another. [See §§ 784.011, 784.021, Fla. Stat. (1997); *State v. White*, 324 So.2d 630, 631 (Fla.1975); *State v. Shorette*, 404 So.2d 816, 817 (Fla. 2d DCA 1981)] But the threats here were more probative of Lavin's anger over his arrest than of his guilt of the crime charged, which had occurred two hours previously. Furthermore, the witnesses testified not only as to the threats against the victim, but as to threats against the arresting officers. [See *Jervis v. State*, 727 So.2d 981, 982 (Fla. 5th DCA 1999) (finding that the trial court erred, albeit harmlessly, in allowing the deputy to state that the defendant had threatened to kill him after being arrested. "The threats occurred after the attack on [the victim] had been concluded and thus were not part of the criminal episode. They appear to have been the product of [the defendant's] anger at being arrested and possibly his having imbibed too much alcohol."); *Stanley v. State*, 648 So.2d 1268, 1269 (Fla. 4th DCA 1995) (reversing where "the officers testified that appellant was belligerent and threatened them. This testimony was irrelevant to any issue of the crimes charged and should not have been admitted."); *Singer v. State*, 647 So.2d 1021 (Fla. 4th DCA 1994) (reversing convictions for resisting a law enforcement officer without violence and obstructing an officer without violence based on the admission of defendant's post-arrest comment while in the back of the officer's squad car)]

We reject the state's argument that the issue was not preserved. Lavin moved in limine to exclude the evidence, which the trial court denied. When the evidence was offered at trial, defense counsel objected.

Finally, we find that the trial court erred by precluding defense counsel from cross-examining Ojeda concerning his loss of the landscaping contract at the apartment complex as a result of the altercation with Lavin. "Interest, motive and animus are never collateral matters on cross-examination and are always proper." [Charles W. Ehrhardt, Florida Evidence § 608.5 (1999)] The fact that the loss occurred after the incident does not diminish the animosity the witness may have felt for the defendant at the time he was testifying at trial. As this Court has stated, "evidence tending to establish that a witness appearing [sic] before the State for any reason other than to tell the truth should not be kept from the jury." [*Carmichael v. State*, 670 So.2d 1178, 1179 (Fla. 3d DCA 1996) (reversing for the trial court's refusal, in a criminal prosecution, to allow cross-examination of a witness concerning a pending civil action between that witness and the defendant)]

Critical Thinking Question(s): Do you agree that the defendant's remarks and actions should not be admissible at trial for aggravated assault? If his words and actions are probative of his threats during the confrontation, should the evidence be entered and allow him to offer an explanation? Does this interfere with his 5th Amendment rights?

IV. Kidnapping & False Imprisonment

Section Introduction: The crime of kidnapping originally addressed the abduction of a person for the purpose of forcibly sending them to another country. Over time kidnapping laws evolved to include a wider variety of acts and today statutes on kidnapping vary widely from state to state but include the basic element that the perpetrator forcibly move the victim to a different location. False imprisonment, on the other hand, requires only that the defendant forcibly restrain the victim and does not involve any specific movement. In this section you will find the specific statutes that Florida uses to define these crimes, as well as some relevant cases in which they are applied.

Florida Statute, sec. 787.01 - Kidnapping; Kidnapping of Child under Age 13, Aggravating Circumstances

(1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

(b) Confinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian.

(2) A person who kidnaps a person is guilty of a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3)(a) A person who commits the offense of kidnapping upon a child under the age of 13 and who, in the course of committing the offense, commits one or more of the following:

1. Aggravated child abuse, as defined in sec. 827.03;
2. Sexual battery, as defined in chapter 794, against the child;
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of sec. 800.04;
4. A violation of sec. 796.03 or sec. 796.04, relating to prostitution, upon the child; or
5. Exploitation of the child or allowing the child to be exploited, in violation of sec. 450.151, commits a life felony, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(b) Pursuant to sec. 775.021(4), nothing contained herein shall be construed to

> prohibit the imposition of separate judgments and sentences for the life felony described in paragraph (a) and for each separate offense enumerated in subparagraphs (a)1.-5.

***Crain v. State*, 894 So.2d 59 (2004)**

Procedural History: Defendant was convicted in the trial court of capital murder and kidnapping, and was sentenced to death by unanimous jury. Defendant appealed.

Issue(s): Whether there was sufficient evidence to substantiate the conviction of felony murder based on the separate kidnapping offense. Also, whether there was sufficient evidence to substantiate kidnapping with intent to facilitate homicide.

Procedural History: This is a direct appeal of convictions of first-degree murder and kidnapping and a sentence of death. We have jurisdiction. [See art. V, § 3(b)(1), Fla. Const.] For the reasons that follow, we conclude that the State presented legally sufficient evidence of first-degree felony murder based on kidnapping with intent to inflict bodily harm, and therefore affirm the murder conviction and the sentence of death.

Facts: Willie Seth Crain, a then fifty-two-year-old Hillsborough County fisherman and crabber, was charged with the September 1998 kidnapping and first-degree murder of seven-year-old Amanda Brown. At the time, Amanda was three feet, ten inches tall and weighed approximately forty-five pounds. The evidence introduced at trial establishes that on September 9, 1998, Crain's daughter, Cynthia Gay, introduced Crain to Amanda's mother, Kathryn Hartman, at a bar in Hillsborough County. Crain and Hartman danced and talked for four hours, until 1:30 or 2:00 in the morning, then went to Hartman's residence, a trailer located in Hillsborough County, where they remained for approximately thirty minutes. Amanda was spending the night with her father and was not present. However, two photographs of Amanda and some of her toys were visible in the trailer. Before Crain left, Hartman made it clear to Crain that she wanted to see him again.

The next afternoon, September 10, 1998, Crain returned to Hartman's trailer. Hartman testified that Crain smelled of alcohol and carried a cup with a yellow liquid in it. Amanda was present. Crain began talking to Amanda about her homework. He pulled some money out and told Amanda that if she got her homework right, he would give her a dollar. He eventually gave her two dollars. Crain and Amanda sat at the kitchen table playing games and working on her homework. At some point during the afternoon, Crain became aware that Amanda had a loose tooth. After wiggling the tooth, Crain offered Amanda five dollars to let him pull the tooth out, but she refused. Hartman testified that the tooth was not ready to be pulled out. Crain remained at Hartman's residence for approximately one hour. Before he left early in the afternoon, Crain accepted Hartman's invitation to return for dinner that evening.

Crain returned to Hartman's trailer shortly after 7 p.m. Crain still smelled of alcohol and carried the same or a similar plastic cup with a colored liquid. After dinner, Hartman and

Crain played more games with Amanda. At some point, Crain mentioned that he had a large videotape collection and invited Hartman and Amanda to his trailer to watch a movie. Amanda asked if he had "Titanic," which she stated was her favorite movie. Crain stated that he did have "Titanic" and Amanda pleaded with her mother to allow them to watch the movie. Hartman was initially reluctant because it was a school night, but she finally agreed. Crain drove Hartman and Amanda approximately one mile to his trailer in his white pickup truck.

They began watching the movie in Crain's living room but were interrupted by a telephone call from Crain's sister. Crain said he did not get along with his sister and asked Hartman to speak to her. At the conclusion of a twenty- to twenty-five-minute phone conversation with Crain's sister, Hartman found the living room unoccupied. Hartman opened a closed door at the rear of the trailer without knocking, and found Amanda and Crain sitting on the bed in Crain's bedroom, watching the movie "Titanic." Both were dressed and Amanda was sitting between Crain's sprawled legs with her back to Crain's front. Crain's arms were around Amanda and he appeared to Hartman to be showing Amanda how to work the remote control. Hartman testified that although she was not overly concerned about what she observed at that time, she nevertheless picked Amanda up and sat Amanda beside her on the bed. Crain, Hartman, and Amanda then watched the movie together in Crain's bedroom.

Crain testified at trial that they watched the movie in his bedroom because it was the only air-conditioned room in the trailer. At some point in the evening, Amanda and Hartman used Crain's bathroom together. While they were in the bathroom, Hartman did not notice Amanda bleeding from any location that Hartman could observe. Hartman did notice a blue cover on the back of the toilet seat. Amanda did not use the bathroom at any other time that evening. At another point in the evening, Hartman asked Crain if he had any medication for pain. Crain offered her Elavil and Valium. He also offered her some marijuana, which she declined. Crain told Hartman that the Elavil would "really knock the pain out" and would make her sleep for a long time. Hartman elected to take five, five-milligram Valium tablets. Crain took one Valium tablet.

Eventually, Hartman decided that it was time to leave. Crain drove Hartman and Amanda back to their residence and accompanied them inside. Amanda took a shower. While checking on Amanda during the shower and helping her dry off and get ready for bed, Hartman did not notice any sores or cuts on Amanda's body. According to Hartman, Crain suggested that Amanda should not go to sleep with wet hair, so Crain blow-dried Amanda's hair in Hartman's bathroom without Hartman present. According to Hartman, when Amanda went to sleep in Hartman's bed around 2:15 a.m., the loose tooth was still in place and it was not bleeding. According to Hartman, she told Crain, who appeared to be intoxicated at that time, that he could lie down to sober up but she was going to bed. The time was approximately 2:30 a.m. Within five minutes of Hartman going to bed, Crain entered Hartman's bedroom and lay down on the bed with Hartman and Amanda. Hartman testified that she neither invited Crain to lie in her bed nor asked him to leave. Crain was fully clothed and Amanda was wearing a nightgown. Amanda was lying between Hartman and Crain.

At around 8:30 a.m. on September 11, Detective Mike Hurley located Crain in his boat in Upper Tampa Bay. Crain was dressed in "slickers" (rubber pants fisherman wear over their clothes), a blue t-shirt, and loafers. Crain and Hurley returned to the boat ramp in Crain's boat. On the ride back, Hurley noticed a small scratch on Crain's upper arm. At the boat ramp, Crain removed his slickers, revealing jeans with the zipper down. Hurley took Crain to the police station for questioning. Crain was cooperative but denied having anything to do with Amanda's disappearance. At the police station, Detective Al Bracket interviewed Crain. Crain told Bracket that he left Hartman's house alone at about 1:30 in the morning, went home and accidentally spilled bleach in his own bathroom. Crain claimed that he did not like the smell of bleach, so he spent four hours cleaning his bathroom from about 1:30 to 5:30 in the morning. Later in the same interview, Crain said he cleaned his bathroom with bleach, as was his custom, then cleaned the rest of the house until 5:30 a.m., at which time he left to go crabbing.

During the questioning, Bracket noticed multiple scratches on Crain's arms and asked Crain how he got them. Crain claimed that he received the scratches while crabbing, but became defensive when Bracket asked him to demonstrate how the scratches were inflicted. Photographs of Crain's body were taken on the morning of September 11, 1998. A forensic pathologist testified at trial that the scratches on Crain's arms probably occurred within a few hours to a day before the photos were taken. Although the pathologist could not identify the source of the scratches with certainty, he testified that all but two of the scratches were more likely to be caused by the fingernails of a seven-year-old child than by another cause. The pathologist also testified that there was one cluster of small gouges on Crain's arm, and it was more likely that these gouges were caused by the small grasping hand of a child of about seven years of age than by another cause.

During a search of Crain's residence, Bracket noticed the strong smell of bleach and recovered an empty bleach bottle. Bracket testified that there were obvious signs of grime and dirt around the edges of the bathroom sink. A blue fitted rug that would go around the base of the toilet was found in Crain's dryer. Another detective applied Luminol, a chemical that reacts both with blood and with bleach, to Crain's bathroom. The detective testified that the floor, the bathtub, and the walls "lit up." Bracket also recovered two pieces of toilet tissue from the inside rim of Crain's toilet and observed what appeared to be a small blood stain on the seat of the toilet. The tissue pieces, the toilet seat, and the boxer shorts that Crain was wearing on the morning of September 11, 1998 were collected and analyzed for DNA evidence. A forensic scientist for the Florida Department of Law Enforcement (FDLE) testified at trial that two blood stains were found on the toilet seat, one blood stain was found on one of the pieces of toilet tissue, and one blood stain was found on the boxer shorts. The FDLE forensic scientist testified that the blood stain on the boxer shorts and one of the stains from the toilet seat contained DNA consistent with the DNA extracted from personal items belonging to Amanda Brown. The second stain on the toilet seat and the stain on the tissue contained DNA consistent with a mixture of the DNA profiles of Amanda and Crain. Testimony established that the probability of finding a random match between the DNA profile on

the boxer shorts and Amanda's known DNA profile is approximately 1 in 388 million for the Caucasian population.

Detective Hurley supervised an extensive, two-week search for Amanda in Upper Tampa Bay, the land surrounding Upper Tampa Bay (including the Courtney Campbell Causeway), and the land area surrounding the Crain and Hartman residences. Amanda's body was never found. The maroon shirt and dark pants that Darlington saw Crain wearing on the morning of September 11, 1998, also were never recovered. At trial, the State introduced the testimony of Linda Miller, Maryann Lee, and Frank Stem. Miller and Lee, who were neighbors of Crain's daughter, Gay, testified about a conversation with Crain that occurred at Gay's home on the first Saturday after Amanda's disappearance. Miller and Lee both testified that Miller said to Crain, "Don't worry, you don't have anything to worry about," and "Just remember, you didn't do anything, you didn't hurt that little girl." According to the testimony of Miller and Lee, Crain responded, "Yes, I did do it; yes, you're right, I didn't hurt her, I didn't do anything." Gay testified that Crain said, stuttering, "yes, I did ... did ... didn't do it; yes, you're right, I didn't hurt her."

Frank Stem, Crain's friend and in-law, [FN8] testified that about one month prior to Amanda's disappearance, Stem helped Crain lay crab traps in a "special" location. At that time, Crain told Stem that other crabbers would steal the crab traps if they knew of the spot. After Amanda disappeared and during a conversation regarding competing crabbers finding his crab traps, Crain told Stem that if Stem revealed the location of the traps "that it could bury him," meaning Crain, or that Stem had enough "evidence to bury him."

At the conclusion of the State's case, Crain moved for judgments of acquittal of first-degree murder and kidnapping based on the insufficiency of the evidence. The trial court denied Crain's motion. Crain then testified in his defense and denied that he was not involved in Amanda's death. He stated that he last saw Amanda while she lay sleeping in her mother's bed in the early morning hours of September 11, 1998. On the first-degree murder charge in count I, the trial court instructed the jury on the dual theories of premeditated murder and felony murder based on kidnapping "with intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim." On the kidnapping charge in count II, the court instructed the jury that the State had to prove that Crain acted "with intent to commit or facilitate the commission of a homicide." The jury found Crain guilty of first-degree murder on a general verdict form. The jury also found Crain guilty of kidnapping as charged. In the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators: (1) prior violent felonies (great weight), (2) the murder was committed during the course of a kidnapping (great weight), and (3) the victim was under the age of twelve (great weight). The court found no statutory mitigators and eight nonstatutory mitigators, and imposed the death sentence.

Crain raises five issues on appeal: (1) the evidence was insufficient to establish that the murder of Amanda was premeditated; (2) the evidence was insufficient to establish an essential element of kidnapping, that Amanda was abducted with the intent to commit or

facilitate commission of a homicide; (3) the trial court committed fundamental error by giving different jury instructions in the felony murder and kidnapping counts as to the elements of kidnapping; (4) the kidnapping conviction relied on by the State for an aggravating circumstance was not supported by the evidence; and (5) Florida's death penalty scheme is unconstitutional. We address those issues that are necessary to our resolution of this case. Because our analysis regarding the sufficiency of the evidence to sustain Crain's conviction is dependent upon our determination of whether the felony murder jury instruction constituted fundamental error, we discuss that issue first.

Holdings: For the foregoing reasons, we affirm the conviction of first-degree murder and sentence of death in this case, and reduce the conviction of kidnapping to false imprisonment.

Opinion: PER CURIAM.

The indictment on which Crain was tried and convicted charged him in count I with the premeditated murder of Amanda Brown between September 10 and 11, 1998. Count II of the indictment charged Crain with kidnapping Amanda on the same dates "with the intent to commit or facilitate the commission of a felony, to wit, homicide" in violation of section 787.01(1)(a)(2), Florida Statutes (1997). The kidnapping statute found in section 787.01, Florida Statutes (1997), defines the offense in pertinent part as follows:

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> 1. Hold for ransom or reward or as a shield or hostage.
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
> 4. Interfere with the performance of any governmental or political function.

The trial court instructed the jury on first-degree felony murder in count I as follows:

> Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt: One, that Amanda Victoria Brown is dead; two, that the death occurred as a consequence of and while Willie Seth Crain was engaged in the commission of Kidnapping; three, that Willie Seth Crain was the person who actually killed Amanda Victoria Brown.
>
> Kidnapping" is the forcible or secret confinement, abduction or imprisonment of another, against that person's will and without lawful authority.
> The Kidnapping must be done with the intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.

On the separate kidnapping charge in count II, the court gave the following instruction:

> Before you can find the defendant guilty of Kidnapping, the State must prove the following three elements beyond a reasonable doubt: One, that Willie Seth Crain forcibly, secretly or by threat confined, abducted or imprisoned Amanda Victoria Brown, a child under the age of 13 years, against her will; two, that Willie Seth Crain had no lawful authority; three, that Willie Seth Crain acted with the intent to commit or facilitate the commission of homicide.

Thus, while the trial court instructed the jury only on the intent to commit or facilitate the commission of homicide under section 787.01(1)(a)(2) as to the kidnapping charge in count II, the trial court instructed the jury that it could find Crain guilty of felony murder based on kidnapping in count I if it found that he abducted Amanda with either the intent to commit or facilitate the commission of homicide or the intent to inflict bodily harm upon her under section 787.01(1)(a)(3).

Crain argues that because kidnapping with intent to commit homicide was the kidnapping specifically charged in count II of the indictment, the trial court erred in instructing the jury on kidnapping with intent to inflict bodily harm as an alternate method of establishing felony murder based on kidnapping. The State asserts that the trial court did not commit reversible error in instructing the jury on the latter element under an indictment charging premeditated murder. On the facts of this case, we agree.

To determine whether the felony murder instruction based on kidnapping with intent to inflict bodily harm constitutes fundamental error, we must consider two lines of precedent. First, due process prohibits a defendant from being convicted of a crime not charged in the information or indictment. [See *Aaron v. State*, 284 So.2d 673, 677 (Fla.1973) ("The right of persons accused of serious offenses to know, before trial, the specific nature and detail of crimes they are charged with committing is a basic right guaranteed by our Federal and State Constitutions."); *Long v. State*, 92 So.2d 259, 260 (Fla.1957) ("[W]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment*."); Lewis v. State*, 53 So.2d 707, 708 (Fla.1951) ("No principle of criminal law is better settled than that the State must prove the allegations set up in the information or the indictment.")] Consistent with this principle, the Third District Court of Appeal has held that a kidnapping conviction cannot be sustained on evidence of an intent element not charged in the indictment. [See *Mills v. State*, 407 So.2d 218 (Fla. 3d DCA 1981)]

The significance of the intent element flows from the status of kidnapping as a specific intent crime. [See *Sochor v. State*, 619 So.2d 285, 290 (Fla.1993)] Modern, statutory kidnapping as codified in section 787.01, Florida Statutes, differs from its lesser included offense of false imprisonment in its requirement of proof by the State of one of the four intent elements set out in the statute. [See *Sean v. State*, 775 So.2d 343, 344 (Fla. 2d DCA 2000)] As stated in *Keith v. State*, [120 Fla. 847, 163 So. 136 (1935)], the "gist of the offense" is the felonious act of a confinement or abduction with a specific intent. [Id. at 138-39]

On the other hand, it is well settled that if an indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction. [See *Woodel v. State*, 804 So.2d 316, 322 (Fla.2001); *Gudinas v. State*, 693 So.2d 953, 964 (Fla.1997); *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995)] We have held that in felony murder situations the notice required by due process of law and supplied by the charging document as to other offenses is provided instead by our State's reciprocal discovery rules and by the enumeration in section 782.04(1)(a)(2), Florida Statutes (2003), of the felonies on which the State may rely to establish first-degree felony murder. [See *Kearse*, 662 So.2d at 682; see also *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983)] As long as the definition of the underlying felony provided to the jury is sufficiently definite to assure the defendant a fair trial, "[i]t is not necessary ... to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony." [*Brumbley v. State*, 453 So.2d 381, 386 (Fla.1984); see also *Gudinas*, 693 So.2d at 964]

In this case, the State relied on kidnapping to support the felony murder theory of first-degree murder and also charged kidnapping in a separate count of the indictment. However, the instruction on the offense of kidnapping relied upon for felony murder and the instruction on the separate count of kidnapping do not correspond. In the absence of an objection to these divergent instructions, the question becomes whether it was fundamental error for the trial court to give an instruction on the kidnapping underlying felony murder in count I different from the instruction given on kidnapping as charged in count II. We resolve this issue by examining the rationale behind case law allowing instruction on felony murder based on an indictment charging premeditated murder, by looking to the instruction given to Crain's jury on the relationship between the two counts, and finally by looking for any indications in the record that Crain was surprised or prejudiced by the divergent instructions.

First, as we have previously explained, the State need not charge felony murder in a first-degree murder indictment. Second, separate treatment of felony murder and the underlying felony comports with the standard jury instructions which were given in this case:

> A separate crime is charged in each count of the indictment and while they've been tried together, each crime and the evidence applicable to it, must be considered separately and a separate verdict returned as to each. A verdict of guilty or not guilty as to one crime, must not affect your verdict as to the other crime charged.

The jury did not request clarification of the felony murder or kidnapping instructions. Accordingly, we assume that the jury understood and properly applied the instructions, and independently assessed Crain's guilt on each count. [See *Burnette v. State*, 157 So.2d 65, 70 (Fla.1963); see also *Sutton v. State*, 718 So.2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998)]

Third, we note that Crain's argument on appeal that the indictment gave him constitutionally insufficient notice of felony murder resting on kidnapping with intent to

inflict bodily harm is not compelling on these facts. The record contains no indication that Crain was surprised or otherwise prejudiced at trial by the felony murder instruction. The proposed jury instructions provided to Crain's attorney included the alternative of intent to inflict bodily harm as an element of felony murder based on kidnapping. Not only did defense counsel fail to object or otherwise claim surprise, but Crain's attorney specifically referred to the wording of the felony murder instruction in his closing argument. Moreover, Crain's defense at trial in this case was that he was in no way responsible for the disappearance and death of Amanda, not that he lacked the requisite intent.

The instruction further says that the kidnapping must be done with the intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim. On this record, we cannot conclude that there was any unfair surprise, failure of notice, or denial of due process as to the felony murder instruction on kidnapping. In light of these considerations, we conclude that the trial court did not commit fundamental error in instructing the jury on "intent to inflict bodily harm" as an alternative to "intent to commit homicide" in defining the underlying felony of kidnapping. In light of this conclusion, we next determine whether the evidence is sufficient to sustain Crain's convictions.

In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. [See *State v. Law*, 559 So.2d 187, 189 (Fla.1989)] A reviewing court must assess the record evidence for its sufficiency only, not its weight. We explained in *Tibbs v. State*, [397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)]. As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. [Id. at 1123 (quoting Black's Law Dictionary 1285, 1429 (5th ed.1979)]

Although the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent, substantial evidence. [See *Long v. State*, 689 So.2d 1055, 1058 (Fla.1997)] The State acknowledges that the evidence of intent in this case is entirely circumstantial. In *Law*, this Court reiterated the standard of review in circumstantial evidence cases: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." [559 So.2d at 188 (citing *McArthur v. State*, 351 So.2d 972 (Fla.1977), and *Mayo v. State*, 71 So.2d 899 (Fla.1954)]

Crain assumes for the purposes of argument that there is sufficient evidence to support the jury conclusion that Amanda is dead and that he killed her. [Crain has not asserted in

his appeal that the evidence was insufficient to prove either that Amanda is dead or that he killed her.] However, in capital cases, this Court independently assesses the sufficiency of the evidence to determine if it is legally sufficient. [See *Mansfield v. State*, 758 So.2d 636, 649 (Fla.2000)] Thus, we must determine whether there was sufficient evidence to establish that the alleged victim is dead and that the defendant killed her.

Despite the inability of authorities to find the victim's body, there is competent, substantial evidence, inconsistent with any reasonable hypothesis of innocence, to establish that Amanda is dead and that Crain killed her, establishing two of the three essential elements of first-degree murder. [See Fla. Std. Jury Instr. (Crim.) 7.2] These elements subsume the corpus delicti for murder, which consists of the victim's death via the criminal agency of another. [See *Meyers v. State*, 704 So.2d 1368, 1369 (Fla.1997)] The corpus delicti of murder can be proven circumstantially, even without any evidence of the discovery of the victim's body. [See id.; see also *Bassett v. State*, 449 So.2d 803, 807 (Fla.1984)] In this case, the extraordinary unlikelihood that a seven-year-old child would voluntarily disappear from her sleeping mother's side in the middle of the night and remain alive but never be seen or heard from again is strong circumstantial evidence of her death. [See *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982)]

In addition to the abrupt and permanent disappearance of a young child supporting the inference that Amanda is dead, there is also evidence that Amanda was last seen alive in the presence of Crain, that Amanda's blood was found on Crain's boxer shorts, and that scratch marks consistent with a young girl's fingernails were found on Crain's body. Finally, although not independently determinative, we note that Crain's oddly targeted bleaching of his bathroom in the middle of the night along with his unusual behavior the next morning support a conclusion that Crain's actions with Amanda the previous evening were unlawful and resulted in her death. Thus, we conclude that the totality of these circumstances constitutes substantial, competent evidence from which the jury could reasonably have excluded all inferences other than that Amanda is dead and that Crain killed her. [Cf. *Meyers*, 704 So.2d at 1370 (concluding that the State presented sufficient circumstantial evidence of corpus delicti in case involving disappearance of fourteen-year-old victim, and evidence of injuries to defendant including fingernail scratches).

The jury found Crain guilty of first-degree murder on a general verdict form that did not specify whether the verdict was based on premeditated or felony murder. A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation. [See *Jones v. State*, 748 So.2d 1012, 1024 (Fla.1999); *Mungin v. State*, 689 So.2d 1026, 1029-30 (Fla.1995)] We conclude that the evidence is sufficient to establish first-degree felony murder based on kidnapping with the intent to inflict bodily harm.

However, as noted above, in order to establish a kidnapping the State must also prove that the unlawful confinement occurred with a specific intent. In this regard we note that the Second District Court of Appeal has affirmed a conviction of attempted kidnapping

with intent to inflict bodily harm or terrorize the victim in reliance on evidence similar to that in this case, specifically that the defendant took a young, sleeping child from his bed in the middle of the night. [See *Sean*, 775 So.2d at 344] Here, in addition to circumstances similar to *Sean*, the State also presented evidence that blood consistent with Amanda's DNA was found on Crain's boxer shorts and taken from the toilet tissue found in Crain's toilet bowl. Further, multiple scratches and one cluster of gouges were observed and photographed on Crain's arms. All but two of the scratches were more likely to have been caused by the fingernails of a seven-year-old child than by any other cause. The cluster of small gouges was more likely to have been caused by a small grasping hand consistent with that of a seven-year-old child than by another cause. Based on this evidence, we conclude that the State presented legally sufficient evidence of a kidnapping with the intent to inflict bodily harm.

In this case, we determine that the circumstantial evidence supports a verdict of first-degree murder based on felony murder with the underlying felony being kidnapping with intent to inflict bodily harm. The evidence of an abduction, the drops of blood, the DNA evidence, the disparity of size and strength, and the evidence of a struggle between Amanda and Crain are all circumstances from which a jury could properly infer, to the exclusion of any reasonable hypothesis of innocence, that Crain abducted and intentionally harmed Amanda before her death. The fact that we cannot pinpoint when the actual bodily harm and subsequent killing occurred in relation to the time Crain first kidnapped Amanda does not undermine this conclusion. [See *Van Gotum v. State*, 569 So.2d 773, 776 (Fla. 2d DCA 1990)] It is sufficient if the State establishes that the unlawful confinement and the specific intent at some point existed simultaneously and involved the same victim. [See id.] Accordingly, we find sufficient evidence of a killing in the course of a kidnapping with the intent to inflict bodily harm. On this basis, we affirm the first-degree murder conviction.

We next address whether the evidence is legally sufficient to support the conviction of kidnapping with the intent to commit a homicide as charged in count II of the indictment. Unlike the murder charge, which subsumes all valid felony murder theories, the State cannot rely on the unpled alternative of intent to inflict bodily harm as to this count. The State argues that the luminol evidence demonstrates that a large amount of blood was spilled in the bathroom and therefore establishes that the kidnapping was committed with an intent to kill. The State's argument on this point invites this Court to stack inferences, which we decline to do. As we stated in *Miller v. State*, [770 So.2d 1144, 1149 (Fla.2000)], "the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences."

The reaction to luminol in Crain's bathroom may support an inference that Crain was attempting to cover something up rather than cleaning his bathroom in the middle of the night. However, there is no evidence from which the jury could have inferred that there was ever a substantial quantity of blood indicative of a prolonged attack and, therefore, a killing with premeditated intent. Although the DNA blood evidence found on the tissue and the toilet seat in Crain's bathroom independently establishes that Amanda's blood was deposited in Crain's bathroom, it does not establish how much she bled, what caused her

to bleed, or where she was killed. Because of the presence of bleach, it is impossible to tell how much of the luminol "glow" - if any - was attributable to blood and how much was attributable to bleach.

To support its theory that the murder was committed with premeditation, the State also relies on evidence that Crain left his truck running outside Hartman's trailer on the night of Amanda's disappearance, exhibited unusual behavior the next morning, and attempted to conceal his crime. These facts evince a plan to remove Amanda from her mother's residence and to eliminate all evidence of her presence at his residence, but do not support an inference that Crain's intent at any specific point in time was to kill her. [See generally *Norton v. State*, 709 So.2d 87, 93 (Fla.1997) ("Efforts to conceal evidence of premeditated murder are as likely to be as consistent with efforts to avoid prosecution for any unlawful killing."); *Hoefert v. State*, 617 So.2d 1046, 1049 (Fla.1993); see also *Smith v. State*, 568 So.2d 965, 968 (Fla. 1st DCA 1990)]

The impossibility of better reconstructing the circumstances of Amanda's death leaves us unable to conclude that the State presented legally sufficient evidence of a specific intent to kill. Therefore, we conclude that competent, substantial evidence does not exist to support the jury verdict of kidnapping with intent to commit homicide. Accordingly, pursuant to section 924.34, Florida Statutes (1997), [FN17] we reverse the judgment of guilt of kidnapping and direct the trial court on remand to enter judgment for false imprisonment, and to resentence Crain accordingly. [False imprisonment does not require specific intent. See *State v. Sanborn*, 533 So.2d 1169, 1170 (Fla.1988) (concluding that the general intent of false imprisonment is included in the specific intent of kidnapping).

In his fourth issue, Crain asserts that the trial court erred in relying on the aggravator of murder in the course of a felony under section 921.141(5)(d), Florida Statutes (1997), because the evidence of the crime of kidnapping is legally insufficient. Assuming without deciding that Crain is correct in light of this Court's reduction of the separate kidnapping conviction to false imprisonment, we conclude that any error in finding the "murder in the course of a felony" aggravator is harmless beyond a reasonable doubt. This case is analogous to *Geralds v. State*, [674 So.2d 96, 104 (Fla.1996)], in which this Court concluded that the erroneous finding of the "cold, calculated, or premeditated" aggravator was harmless based on two valid aggravators - that the murder was heinous, atrocious, or cruel, and that the murder was committed during a robbery/burglary - three mitigators that the trial court gave little weight, and a unanimous death recommendation. Moreover, we conclude that any error in finding the aggravator of murder in the course of a felony does not affect our proportionality review based on the weight of the two remaining valid aggravators under the circumstances of this case.

Critical Thinking Question(s): How would one go about proving the intent element (e.g., facilitate murder) at the time of the kidnapping? Think in terms of burglary to describe the factors the jury might consider in making such a determination. How can a defendant be charged with felony murder if the underlying crime of kidnapping is reduced to unlawful restraint? Is it not then a part of the greater offense?

Florida Statute, sec. 787.02 - False Imprisonment; False Imprisonment of Child under age 13, Aggravating Circumstances

(1)(a) The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.

(b) Confinement of a child under the age of 13 is against her or his will within the meaning of this section if such confinement is without the consent of her or his parent or legal guardian.

(2) A person who commits the offense of false imprisonment is guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3)(a) A person who commits the offense of false imprisonment upon a child under the age of 13 and who, in the course of committing the offense, commits any offense enumerated in subparagraphs 1.-5., commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

1. Aggravated child abuse, as defined in sec. 827.03;
2. Sexual battery, as defined in chapter 794, against the child;
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of sec. 800.04;
4. A violation of sec. 796.03 or sec. 796.04, relating to prostitution, upon the child; or
5. Exploitation of the child or allowing the child to be exploited, in violation of sec. 450.151.

(b) Pursuant to sec. 775.021(4), nothing contained herein shall be construed to prohibit the imposition of separate judgments and sentences for the first degree offense described in paragraph (a) and for each separate offense enumerated in subparagraphs (a)1.-5.

State v. Smith, 840 So.2d 987 (2003)

Procedural History: Defendant was convicted in a jury trial in the Circuit Court for Osceola County, Frank N. Kaney, J., of burglary of a dwelling, robbery with a weapon, and false imprisonment. Defendant appealed. The District Court of Appeal, Thompson, C.J., 785 So.2d 623, reversed in part, affirmed in part, and remanded. On review, the Supreme Court, Wells, J., held that: (1) defendant was properly convicted of both robbery and false imprisonment, and (2) *Faison* test for determining when a charge of kidnapping could stand in addition to charges of other forcible felonies was inapplicable to offense of false imprisonment; abrogating *Taylor v. State*, [771 So.2d 1233]; *Rohan v. State*, [696 So.2d 901]; *Keller v. State*, [586 So.2d 1258]; *Perez v. State*, [566 So.2d 881].

<u>Issue(s):</u> Whether false imprisonment is a lesser included offense for greater felonies such as robbery and subject to the Faison test for kidnapping charges.

<u>Facts:</u> The respondent was convicted by a jury of burglary of a dwelling, robbery with a weapon, and false imprisonment. The facts are more fully set forth in the district court's opinion. [See *Smith*, 785 So.2d at 624-25] The district court agreed with the respondent's argument that the false imprisonment was incidental to and inherent in the robbery, reversed the conviction for false imprisonment, but otherwise affirmed. [See id. at 625-26] Regarding the reversal of the false imprisonment conviction, the district court compared *Formor v. State*, [676 So.2d 1013, 1015 (Fla. 5th DCA 1996)], which reversed a kidnapping conviction based on the test announced in *Faison v. State*, [426 So.2d 963 (Fla.1983)]. [See *Smith*, 785 So.2d at 625-26] The district court held [under the *Faison* test]:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> > (a) Must not be slight, inconsequential and merely incidental to the other crime;
> > (b) Must not be of the kind inherent in the nature of the other crime; and
> > (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

[*Faison*, 426 So.2d at 965 (quoting *State v. Buggs*, 219 Kan. 203, 547 P.2d 720, 731 (1976)]

Although the State argues that *Faison*, which involved a kidnapping charge, should not be applied to cases involving false imprisonment charges, this court has previously done so. [See *Keller v. State*, 586 So.2d 1258, 1261-62 (Fla. 5th DCA 1991) (reversing convictions for false imprisonment where false imprisonment was incidental to sexual battery); but see *Chaeld v. State*, 599 So.2d 1362 (Fla. 1st DCA 1992) (refusing to apply Faison to false imprisonment charge)] Therefore, there is no real legal difference between the convictions in *Formor*, robbery and kidnapping, and the convictions in the instant case, robbery and false imprisonment. Although *Smith* did not object below to this error, the error is fundamental. [*Smith*, 785 So.2d at 626]

<u>Holding:</u> Accordingly, we quash the decision below in part, approve the decision of the First District Court of Appeal in *Chaeld*, [599 So.2d at 1364], and hold that the *Faison* test is not applicable to the offense of false imprisonment. On remand, the respondent's false imprisonment conviction should therefore be affirmed.

<u>Opinion:</u> WELLS, J.

We have for review *Smith v. State*, [785 So.2d 623, 625-26 (Fla. 5th DCA 2001)], which expressly and directly conflicts with the decision in *Chaeld v. State*, [599 So.2d 1362, 1364 (Fla. 1st DCA 1992]). We have jurisdiction. [See art. V, § 3(b)(3), Fla. Const.] For the reasons that follow, we quash the decision below in part and direct that respondent's false imprisonment conviction be affirmed. The respondent was convicted of false imprisonment under section 787.02(1)(a), Florida Statutes (1997), and robbery under section 812.13, Florida Statutes (1997). Section 787.02(1)(a) defines false imprisonment as:

> forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.

Section 812.13 defines robbery as:

> the taking of money or other property which may be the subject of larceny from the person or custody of another, with the intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Section 775.021(4)(b), Florida Statutes (1997), entitled "Rules of construction," expressly states:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

Exceptions to this rule of construction are:

> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Because the respondent's convictions for false imprisonment and robbery do not meet the exceptions listed in section 775.021(4)(b), the convictions are separate criminal offenses committed in the course of one criminal episode. Thus, the respondent was properly convicted of both robbery and false imprisonment, and the district court erred in reversing the respondent's false imprisonment conviction. [Convicting the respondent of both robbery and false imprisonment does not violate the Double Jeopardy Clause. See U.S. Const. amend. V; art. I, § 9, Fla. Const. "The Double Jeopardy Clause in both the state and federal constitutions protects criminal defendants from multiple convictions and punishments for the same offense." *Gordon v. State*, 780 So.2d 17, 19 (Fla.2001)]

The Faison test is not applicable to false imprisonment convictions because the test was established for a particular element of the kidnapping statute that is not included in the

false imprisonment statute. Kidnapping is defined in section 787.01(1)(a), Florida Statutes (1997), as follows:

> The term kidnapping means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> 1. Hold for ransom or reward or as a shield or hostage.
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
> 4. Interfere with the performance of any governmental or political function.

As this Court stated in *Berry v. State*, [668 So.2d 967, 969 (Fla.1996)], the *Faison* test was established because this Court recognized that a literal interpretation of subsection 787.01(1)(a)2 would result in a kidnapping conviction for "any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery." Thus, in an effort to limit the circumstances under which a confinement, abduction, or imprisonment will constitute kidnapping under subsection 787.01(1)(a)2, this Court in *Faison* adopted the test of the Supreme Court of Kansas. [*Berry*, 668 So.2d at 969] False imprisonment does not contain a provision requiring proof of the intent to commit or facilitate commission of any felony and therefore *Faison* is not applicable. [This Court recognized the difference between the crimes of kidnapping and false imprisonment in *State v. Sanborn*, 533 So.2d 1169, 1170 (Fla.1988)]

A comparison of sections 787.01(1)(a) and 787.02(1)(a) reveals they are identical except for the question of intent. We find the general intent of section 787.02(1)(a) (false imprisonment) is included in the specific intent of section 787.01(1)(a) (kidnapping), consequently false imprisonment is a necessarily lesser included offense.

In *State v. Lindsey*, [446 So.2d 1074, 1076 (Fla.1984)], this Court cited to *Faison* as support for upholding a false imprisonment conviction. This passing reference to *Faison* has understandably caused some confusion. After *Lindsey*, several district courts applied the *Faison* test to false imprisonment. [See, e.g., *Taylor v. State*, 771 So.2d 1233, 1234 (Fla. 2d DCA 2000); *Rohan v. State*, 696 So.2d 901, 903 (Fla. 4th DCA 1997); *Keller v. State*, 586 So.2d 1258, 1261-62 (Fla. 5th DCA 1991); *Perez v. State*, 566 So.2d 881, 884 (Fla. 3d DCA 1990)] However, *in Chaeld v. State*, [599 So.2d 1362, 1364 (Fla. 1st DCA 1992)], the court held that a jury instruction based on *Faison* was not applicable when a charge alleges false imprisonment. The *Chaeld* court held:

> This so-call *Faison* instruction must be given upon the defendant's request whenever the State charges kidnapping with the intent to commit or facilitate the commission of a felony under § 787.01(1)(a)2. It has no application when the charge alleges that the defendant kidnapped the victim with any of the other specific intentions identified in § 787(1)(a)1, 3 or 4. [See *Bedford v. State*, 589 So.2d 245, 251 (Fla.1991) (holding that a defendant charged with kidnapping with

> the intent to inflict bodily harm upon or terrorize the victim is not entitled to a Faison instruction)]

Because the *Faison* instruction is implicated only when the state is attempting to prove a kidnapping with the intent to commit or facilitate the commission of a felony, and the crime of false imprisonment by definition and as interpreted by the Supreme Court in *Sanborn* does not require proof of such intent, we conclude that the judge properly denied the appellant's request for a *Faison* instruction. [Id. at 1364] The *Chaeld* court noted that its holding possibly conflicted with other district court decisions. [See id.]

The *Chaeld* court cited this Court's decision in *Bedford v. State*, [589 So.2d 245 (Fla.1991)], in which this Court stated:

> Bedford was charged with confining, abducting, or imprisoning [the victim] with the intent to "[i]nflict bodily harm upon or to terrorize" [the victim] under section 787.01(1)(a), (3), rather than with the intent to "[c]ommit or facilitate commission of any felony," under subsection 787.01(1)(a), (2). Our decision in *Faison v. State*, [426 So.2d 963 (Fla.1983)], which held that the latter subsection does not apply to unlawful confinements or movements that were merely incidental to or inherent in the nature of the underlying felony, has no application here. [*Bedford*, 589 So.2d at 251]

This Court's decision in *Bedford* clearly supports the conclusion that the *Faison* test does not apply to the offense of false imprisonment. False imprisonment does not include an element requiring the intent to commit or facilitate commission of a felony, and therefore *Faison* is not applicable to the offense of false imprisonment. If a criminal defendant can be charged with kidnapping based on intent to terrorize and also be convicted of robbery based on confinement that is inherent to both crimes, it is illogical to find that a person could not be convicted of false imprisonment and robbery when false imprisonment only requires general intent. Requiring *Faison* to be applied to false imprisonment would effectively be writing an intent element into the false imprisonment statute in derogation of the clear statutory language. [Cf. *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla.1998) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.").

PARIENTE, J., dissenting.

I dissent because I would hold that the reasoning of *Faison v. State*, [426 So.2d 963 (Fla.1983)], is applicable to cases of false imprisonment. *Faison* was intended to prevent all unlawful confinements incidental to other felonies from also being punished as kidnappings by providing a framework for analyzing whether a defendant's conduct amounts to a confinement crime separate from other felonies that inherently involve the use of force. Without the *Faison* limitations, any felony that "inherently involves the unlawful confinement of another person, such as robbery or sexual battery," would also

be a kidnapping. [Mobley v. State, 409 So.2d 1031, 1034 (Fla.1982); see generally *Berry v. State*, 668 So.2d 967 (Fla.1996)]

As Judge Gross explained in *Rohan v. State*, [696 So.2d 901, 903 (Fla. 4th DCA 1997)], in concluding that the *Faison* test applies to false imprisonment:

> *Chaeld* [*v. State*, 599 So.2d 1362, 1364 (Fla. 1st DCA 1992)] holds that a Faison analysis does not apply to a false imprisonment charge, only to kidnapping. To reach this conclusion, the court focuses on the scienter requirement of the kidnapping and false imprisonment statutes. However, the rationale of *Faison* is that the conduct element of section 787.01(1)(a) - "confining, abducting, or imprisoning another person against his will" - must be limited to avoid a broad construction that would doubly criminalize the same conduct. [*Berry*, 668 So.2d at 969] The false imprisonment statute, section 787.02(1)(a), Florida Statutes (1995), contains a conduct element similar to that of kidnapping; without any limitation it might apply in almost every forcible felony. For this reason, a *Faison* analysis is as appropriate to limit the scope of false imprisonment as it limits kidnapping. [Id. at 903 n. 1]

I agree. False imprisonment is a necessarily lesser included offense of kidnapping. [See *State v. Sanborn*, 533 So.2d 1169, 1170 (Fla.1988)] Because both the kidnapping statute and the false imprisonment statute contain the same conduct element that without limitation might apply to almost every forcible crime, a *Faison* analysis is equally applicable to both offenses.

Similar to the kidnapping statute, a literal reading of the false imprisonment statute would turn every forcible crime into a false imprisonment, including the brief motel room robbery in this case. [See *Smith v. State*, 785 So.2d 623, 624 (Fla. 5th DCA 2001)] The purpose of *Faison* is to ensure that the confinement crime is distinct from other criminal charges involving forcible felonies. For this reason, I would hold that the *Faison* test is as applicable to false imprisonment as it is to kidnapping.

Critical Thinking Question:

- From a practical standpoint, how exactly does false imprisonment differ from kidnapping?
- Try to develop a fact scenario in which the case will border between the two offenses to get a comprehensive understanding of the sometimes rather fine line between the two.