Chapter 12: Burglary, Trespass, Arson, and Mischief

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:

The twelfth chapter of the textbook discusses crimes against habitation, or crimes committed against the dwelling of another. These are burglary, trespass, arson, and malicious mischief. At common law, burglary required breaking and entering the dwelling of another with the intention of committing a felony. This definition also required the crime be committed at night. While state statutes vary in how they define burglary now, most states share in common a lack of conformation for many key elements of the common law definition. For instance, burglary does not have to take place at night and in most states does not require a breaking to occur prior to entrance. Burglary also does not have to be limited to dwellings, but can be extended to include other structures as well. As for the intent to commit a felony, this requirement has been changed by some states as well, in some cases to simply require intent to commit a crime.

One important note about burglary is that it is a distinct and separate crime that does not merge into another offense that may be committed at the same time or immediately following it. The counter-intuitive results that this sometimes causes are also pointed out, raising the question of whether or not we need the concept of burglary.

The crime of trespassing requires an individual to enter or remain on the property of another without authorization. In this case the perpetrator is not required to have any intention to commit another crime. Trespass is also distinct in that it is applied to a wide range of different types of property, from something as private and enclosed as a dwelling to a completely unenclosed area of land. The advance of technology has even allowed this crime to be applied to computers, criminalizing unauthorized access to another's computer, sometimes with the requirement that the individual do so with the intent to cause damage or disruption therein.

At common law, arson required a perpetrator to willfully and maliciously burn the dwelling of another. Much like burglary, however, the definition of arson has been expanded. Typically burning is not actually required in state statutes. Now it is more common for other types of fire damage, like smoke damage and soot, to be sufficient for meeting the definition of arson. The crime also no longer has to be limited to a dwelling, but has been expanded to include many other types of structures. Most states, however, have retained the common law standard that arson must be committed with willful intent and malice.

Finally, this chapter addresses the crime of criminal mischief, or malicious mischief, which was a misdemeanor under the common law but is now considered a minor felony

in most states. This crime is often very broadly defined to include many different types of behavior, but is commonly defined as the damaging or destruction of another's personal property. Sentencing for malicious mischief can be tailored to the specific act and will typically vary dependent upon the amount of damage done. In this chapter of the supplemental text you will learn more about Florida's statutes regarding crimes against habitation and how they are applied in state courts.

I. Burglary

Section Introduction: Burglary is the unlawful entry into a private structure for the purposes of committing a crime therein. Note that the second crime need not take place for the requirements of burglary to be met; simply the entry in combination with the intent will satisfy. Here you will find the Florida statute which defines burglary, as well as two examples of Florida cases regarding this crime.

Florida Statutes, sec. 810.02 - Burglary

(1) (a) For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

(b) For offenses committed after July 1, 2001, "burglary" means:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter;or

2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:

a. Surreptitiously, with the intent to commit an offense therein;

b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or

c. To commit or attempt to commit a forcible felony, as defined in sec. 776.08.

(2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if, in the course of committing the offense, the offender:

(a) Makes an assault or battery upon any person; or

(b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or

(c) Enters an occupied or unoccupied dwelling or structure, and:

1. Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or

2. Causes damage to the dwelling or structure, or to property within the dwelling or structure in excess of $1,000.

(3) Burglary is a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:

(a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
(b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
(c) Structure, and there is another person in the structure at the time the offender enters or remains; or
(d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains.

(4) Burglary is a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:

(a) Structure, and there is not another person in the structure at the time the offender enters or remains; or
(b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

***Polk v. State*, 825 So.2d 478 (App. 5 Dist., 2002)**

Procedural History: Defendant was convicted in the Circuit Court, Seminole County, Kenneth R. Lester, Jr., J., of burglary of a dwelling with an assault or battery with a weapon. Defendant appealed. The District Court of Appeal, Thompson, C.J., held that defendant "entered" the house even though only his arm was inside a window.
Issue(s): Polk contends that the state failed to prove that he had entered the dwelling he was accused of burglarizing.

Holding: Affirmed.

Opinion: THOMPSON, C.J.

Faron A. Polk ("Polk") appeals his conviction for the offense of burglary of a dwelling with an assault or battery with a weapon. Polk contends that the state failed to prove that he had entered the dwelling he was accused of burglarizing. Polk also contends that he had ineffective assistance of counsel. We disagree with both arguments and affirm the conviction.

Facts: John Nicholas testified that he was returning from school when he decided to finish smoking a cigarette before entering his parents' home. When he heard glass break in the rear of his parents' home, he walked to the back yard. There he saw Polk with his right hand inside a bedroom window as Polk tried to undo the window safety latch. When Nicholas confronted Polk, Polk put his hands inside his jacket and walked toward Nicholas. When Nicholas grabbed at him, Polk pulled a four-inch screwdriver from his pocket and raised it toward Nicholas's chest. Nicholas then told him he better run, which Polk did. Nicholas immediately called the police and gave them a description of Polk, who was arrested within five minutes. Nicholas went to the location and identified Polk as the man he had seen trying to enter his parents' home.

Polk contends that because the testimony was that only his arm was inside the window, the state failed to prove that he committed a burglary. Citing *Gant v. State,* [640 So.2d 1180, 1181 (Fla. 4th DCA 1994)], Polk contends that the state did not prove the element of "entering the dwelling." We distinguish *Gant*. *Gant* was convicted of burglary of a conveyance when there was no proof that he entered the vehicle. [Id. at 1182] The victim testified that although her car window was broken, nothing was missing from inside her car. [Id.] Further, the state offered no proof that the airspace of the victim's car "was broken by a part of [Gant's] body or an instrument used to commit a felony...." [Id.] For those reasons, the court reversed his conviction. Those are not the facts before this court.

In *State v. Spearman*, [366 So.2d 775 (Fla. 2d DCA 1978)], the court held that the defendant entered the residence when his arm and hand went through the door. [Id.] The court stated that, "[i]t is well established that the unqualified use of the word 'enter' in a burglary statute does not confine its applicability to intrusion of the whole body but includes insertion of any part of the body or of an instrument designed to effect the contemplated crime." [Id. at 776] In the instant case, as in *Spearman*, Polk "entered" the dwelling by putting his hand inside the broken window. Based on *Spearman*, we hold there was sufficient evidence to prove the element of entering in the instant case.

Polk also contends that counsel was ineffective in failing to move for a judgment of acquittal. The standard used to determine whether counsel was ineffective is set forth in *Strickland v. Washington*, [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]. In *Stephens v. State*, [748 So.2d 1028, 1033 (Fla.1999)], the Florida Supreme Court stated that, "[t]he determination of ineffectiveness pursuant to *Strickland* is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether defendant was prejudiced thereby." In the instant case, defense counsel told the court that there would be no motion for a judgment of acquittal because counsel could find no case law to support such a motion. The trial court responded that it would deem defense counsel's statement to be a motion for judgment of acquittal, but would deny the motion. Further, after the defense rested, defense counsel told the court that the motion for judgment of acquittal was renewed. The renewed motion was also denied.

While alleging that defense counsel's performance was deficient, Polk makes no showing that he was prejudiced. First, the trial court did consider whether a judgment of acquittal

would be appropriate. Second, a judgment of acquittal was not appropriate because there was witness testimony identifying Polk as the person whose hand broke the "airspace" of the victim's home. [See *Gant*, 640 So.2d at 1182] Even if we were to conclude that counsel's performance was deficient, Polk has made no showing that he was prejudiced by defense counsel's performance.

Critical Thinking Question(s): Why is it that the Court found that having an arm through the window constituted burglary? Shouldn't it be considered an attempted burglary? What is the import or significance of this decision?

***Gaber v. State*, 662 So.2d 422 (App. 3 Dist., 1995)**

Procedural History: Defendant was convicted in the Circuit Court, Monroe County, J. Jefferson Overby, J., of various offenses relating to burglary of several homes, and defendant appealed. The District Court of Appeal, Gersten, J., held that: (1) armed burglary and grand theft of firearm were completely separate offenses, and (2) defendant's convictions for both offenses did not violate double jeopardy.

Holding: Affirmed, conflict certified.

Opinion: GERSTEN, Judge.

Appellant, Jeffrey Arthur Gaber, appeals his convictions of one count of armed burglary, six counts of burglary of a dwelling, two counts of grand theft, two counts of petty theft, and one count of carrying a concealed firearm, after he was arrested in connection with the burglary of several homes. We affirm.

Focusing on the only issue which merits discussion, we cannot agree with the appellant's argument that his convictions for both armed burglary and grand theft of a firearm violates double jeopardy. We reach this conclusion because the statutory elements of theft and the elements of armed burglary are separate and distinct. Conviction for burglary requires proof that the defendant entered a structure with the intent to commit an offense inside. [Fla.Stat. § 810.02(1) (1993)] If a perpetrator is armed, or arms himself while inside the structure, the offense is reclassified as armed burglary, a first degree felony. [Fla.Stat. § 810.02(2)(b) (1993)] Conviction for grand theft, governed by a completely different statute, requires proof that a perpetrator knowingly obtained the property of another with the intent to either temporarily or permanently deprive the owner of its use. [Fla.Stat. § 812.014(2)(a)-(c) (1993)]

Comparing the necessary elements to sustain a conviction for these two offenses, it is apparent that the grand theft statute neither requires a burglary, nor that the object of the theft necessarily be a firearm. In contrast, the armed burglary statute neither requires a theft, nor that the weapon involved be a firearm. Moreover, the armed burglary statute does not require the intent to commit a theft, but rather the intent to commit an offense. Therefore, because each offense requires proof of an element that the other does not, the

offenses must be considered separate for double jeopardy purposes. [See Fla.Stat. § 775.021(4)(a) (1993); *State v. Smith*, 547 So.2d 613, 615-16 (Fla.1989); *Walls v. State*, 579 So.2d 823, 824 (Fla. 1st DCA 1991); *Peterson v. State*, 542 So.2d 417, 418 (Fla. 4th DCA 1989); *Marion v. State*, 526 So.2d 1077, 1078 (Fla.2d DCA 1988)] We recognize that this decision is contrary to the holding in *Marrow v. State*, [656 So.2d 579 (Fla. 1st DCA 1995)]. The *Marrow* court, citing to the Florida Supreme Court case of *State v. Stearns*, [645 So.2d 417 (Fla.1994)], held that convictions for both armed burglary and grand theft of a firearm violated double jeopardy.

We disagree with the First District's interpretation of *Stearns*. *Stearns* held that double jeopardy barred a separate conviction for carrying a concealed weapon while committing a felony, where the perpetrator had also been convicted for armed burglary and grand theft. All three charges arose from the same criminal episode, and the perpetrator's burglary sentence was enhanced to armed burglary because of the firearm possession. The court reasoned that the perpetrator could not also be convicted of a second possession offense, carrying the same concealed weapon while committing the felony, without violating double jeopardy principles. [*Stearns*, 645 So.2d at 417]
The circumstances here, as well as in *Marrow*, involve the theft of a firearm, not merely the possession of a firearm. Quite simply, in this grand theft charge, the appellant is being punished for taking the weapon with intent to deprive, not for possession of the weapon. Again, quite simply, the appellant is also being punished for the separate offense of armed burglary.

Clearly, if you commit a burglary, and while committing that burglary you steal the original manuscript of Gabriel Garcia Marquez' *Love in the Time of Cholera*, then you can be convicted of burglary and grand theft. It logically flows that if you commit a burglary, and while committing that burglary you steal a firearm, then you can be convicted of armed burglary and grand theft. In conclusion, we hold that armed burglary and grand theft of a firearm are completely separate offenses, and the appellant's convictions for both offenses do not violate double jeopardy. [See Fla.Stat. § 775.021(4)(a) (1993); *State v. Smith*, 547 So.2d at 613; *Walls v. State*, 579 So.2d at 823] Finding no merit in the other issues raised by the appellant, we affirm his convictions and sentence in all respects. Based on our holding, we certify conflict with the First District's decision in *Marrow*.

Critical Thinking Question(s): Note in this case that the defendant admittedly entered the structures without consent or authority. Should he be convicted of aggravated burglary when he steals a firearm in the process? Isn't the stealing part of the original offense of burglary – that is, "with intent to commit a crime therein" – and thus one of the elements rather than an exacerbating factor?

II. Trespass

Section Introduction: Where burglary requires that a defendant enter a private structure with the intention of committing another crime, laws against trespass punish simply the

unlawful entry of private property. Read the statute and case below to see just how Florida defines and applies the concept of trespass.

Florida statute, sec. 810.08 - Trespass in structure or conveyance

(1) Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.

(2) (a) Except as otherwise provided in this subsection, trespass in a structure or conveyance is a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.
(b) If there is a human being in the structure or conveyance at the time the offender trespassed, attempted to trespass, or was in the structure or conveyance, the trespass in a structure or conveyance is a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.
(c) If the offender is armed with a firearm or other dangerous weapon, or arms himself or herself with such while in the structure or conveyance, the trespass in a structure or conveyance is a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084. Any owner or person authorized by the owner may, for prosecution purposes, take into custody and detain, in a reasonable manner, for a reasonable length of time, any person when he or she reasonably believes that a violation of this paragraph has been or is being committed, and he or she reasonably believes that the person to be taken into custody and detained has committed or is committing such violation. In the event a person is taken into custody, a law enforcement officer shall be called as soon as is practicable after the person has been taken into custody. The taking into custody and detention by such person, if done in compliance with the requirements of this paragraph, shall not render such person criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(3) As used in this section, the term "person authorized" means any owner or lessee, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in the case of a threat to public safety or welfare.

***Jones v. State*, 666 So.2d 960 (App. 3 Dist., 1996)**

Procedural History: Following denial of defendant's request that jury be instructed on category two permissive lesser included offense of trespass in a conveyance, defendant was convicted in the Circuit Court, Dade County, Leslie Rothenberg, J., of grand theft of a motor vehicle. Defendant appealed. The District Court of Appeal, Hubbart, J., held

that: (1) trespass in conveyance was category two permissive lesser included offense of greater or charged offense of theft of motor vehicle, but (2) defendant was not entitled to jury charge on category two permissive lesser included offense of trespass in conveyance, since information failed to allege all statutory elements of former charge.

Issue(s): Whether it was reversible error for the trial court, based on this record, to refuse to instruct the jury, at the defendant's request, on the category 2 permissive lesser included offense of trespass in a conveyance.

Facts: The defendant Larry Jones was charged by information with the third-degree felony of grand theft of a motor vehicle [Fla.Stat. § 812.014(1), (2)(c)(4) (1991)]. The state's evidence at trial tended to show that on September 2, 1992, in the late evening hours, the complainant Shirley Byrd drove her car to one of the dog tracks in Dade County; she thereafter visited the track for about half an hour. When she was ready to leave the area, she discovered that her car was missing and reported it to the police as stolen.

The next day in the late afternoon hours, Officer Luis Condom of the Miami Police Department was traveling in his squad car in north Dade County when he observed a car run a red light; this car later turned out to be the car stolen the previous day from Shirley Byrd. Officer Condom pursued, noticed that the car's vent window was broken out, ran a radio check on the car's license number, and learned that the car was stolen. After some back-up police cars arrived to assist, Officer Condom stopped the stolen car and discovered that the defendant was the driver, the steering column of the car had been badly damaged, and there was also a passenger, Jaime Ramon, in the front seat.

Officer Condom then ordered both the defendant and the passenger out of the stolen car. Upon exiting the car, the defendant was patted down, handcuffed and placed in the back of the police car by Officer Condom; another officer took custody of the passenger. Officer Condom testified at trial that, while in the back of the police car, the defendant orally admitted that he knew the car was stolen because of the damage to the car.
At trial, the defense called Reginald Allen as a witness who testified that he was with the defendant earlier in the day prior to the defendant's arrest. He stated that he saw Jaime Ramon [the passenger in the car at time of arrest] drive up in the car [which was, in fact, the stolen car involved in this case] and state, in the defendant's presence, that the car belonged to Ramon's boss and that he [Ramon] was doing some mechanical work on it. Ramon then drove Allen and the defendant to Allen's place of employment where Allen got out of the car. Another defense witness confirmed that Ramon had driven the subject car to the defendant's house and had a conversation with the defendant. Based on this testimony, the defendant argued for an outright acquittal below because he allegedly did not know that the car was being driven without the owner's permission and had no knowledge it was stolen.

During the jury charge conference at trial, the defendant requested that the trial court charge the jury on the lesser offense of trespass in a conveyance [Fla.Stat. § 810.08(1) (1991)], a second-degree misdemeanor; the trial court refused the requested instruction.

The defendant was thereafter convicted by the jury as charged; the trial court adjudicated the defendant guilty of grand theft of a motor vehicle, sentenced him to five years in the state penitentiary, and ordered him to pay the complainant $866.24 in restitution. The defendant appeals.

Holding: Affirmed.

Opinion: HUBBART, Judge.

This is an appeal by the defendant Larry Jones from a final judgment of conviction and sentence for grand theft of a motor vehicle which was entered below based on an adverse jury verdict. The central question presented for review is whether it was reversible error for the trial court, based on this record, to refuse to instruct the jury, at the defendant's request, on the category 2 permissive lesser included offense of trespass in a conveyance. Because (1) a jury instruction on a category 2 permissive lesser included offense [i.e., trespass in a conveyance in this case] does not lie unless all the statutory elements of the lesser offense are alleged in the indictment or information, and (2) one of the statutory elements of trespass in a conveyance was not alleged in the information on which the defendant was tried below, we conclude that the trial court committed no reversible error in refusing to give a jury instruction on this lesser offense. We further conclude that no reversible error is shown by the remaining points on appeal raised by the defendant, and, accordingly, we affirm.

This court has, in effect, held that the misdemeanor of trespass in a conveyance [Fla.Stat. § 810.08(1) (1991)] is a category 2 permissive lesser included offense within the charged offense of grand theft of a motor vehicle [Fla.Stat. § 812.014(1), (2)(c)(4) (1991)]. By definition, a category 2 permissive lesser included offense is an offense "which [m]ay or [m]ay not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at trial." [*Brown v. State*, 206 So.2d 377, 383 (Fla.1968)] Unlike a category 1 necessarily included offense, "such lesser offense is not an essential ingredient of the major offense" charged, in that its statutory elements are not entirely subsumed within the statutory elements of the major [charged] offense. [*Brown v. State*, 206 So.2d at 383] Such an offense is, therefore, "the same as a [category 1] necessarily included offense except that it contains one or more [additional] statutory elements which the charged offense does not contain." [*Nurse v. State*, 658 So.2d 1074, 1077 (Fla. 3d DCA 1995)] In order to qualify, however, as a proper category 2 permissive lesser included offense, the indictment or information must allege all the statutory elements of the subject lesser offense, and the evidence at trial must establish each of these elements. [*Brown*; *Nurse*]

The charged offense in this case is the third-degree felony of grand theft of an automobile proscribed by Florida Statutes, section 812.014(1), (2)(c)(4) (1991), which provides as follows:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit therefrom.
>
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.
>
> (2) (c) It is grand theft of the third degree and a felony of the third degree ... if the property stolen is:
>
> 4. A motor vehicle."

Florida Statutes, section 812.012(2) (1991), defines the term "obtains or uses," as employed in the above statute, as follows:

> (2) 'Obtains or uses' means any manner of:
>
> (a) Taking or exercising control over property.
>
> (b) Making any unauthorized use, disposition, or transfer of property.
>
> (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
>
> (d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzling; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud or deception; or
>
> 2. Other conduct similar in nature.

Based on the above statutes, it is clear that there are three essential elements to the felony of grand theft of a motor vehicle: (1) the knowing and unlawful obtaining or use, or the knowing and unlawful endeavor to obtain or use, (2) the motor vehicle of another, (3) with intent to either temporarily or permanently (a) deprive the owner or lawful possessor of the motor vehicle of a right to the vehicle or a benefit from it, or (b) appropriate the motor vehicle to the accused's own use or to the use of any person not entitled to it.

The lesser second-degree misdemeanor offense of trespass in a conveyance is proscribed by Florida Statutes, section 810.08(1) (1991), which provides as follows:

> Whoever, without being authorized, licensed, or invited, willfully enters or remains in any ... conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a ... conveyance.

Florida Statutes, section 810.011 (1991), defines the term "conveyance" in the above statute to include "any motor vehicle." Based on the above statutes, it is clear that there are three statutory elements of trespass in a conveyance: (1) the willful entry or remaining, (2) in a conveyance [motor vehicle] of another, (3)(a) without being authorized, licensed or invited to enter or remain in the conveyance by the owner or

lessee or a person authorized by the owner or lessee of the conveyance, or (b) after having been so authorized, licensed or invited to enter or remain in the conveyance, refusing to comply with a warning by the owner, lessee or a person authorized by the owner or lessee to depart the conveyance.

It is plain that the second and third elements of trespass in a conveyance, namely, (2) the conveyance [or motor vehicle] of another, and (3) lack of consent, are subsumed in the elements of grand theft of a motor vehicle. Indeed, both offenses expressly contain the element of a conveyance [or motor vehicle] of another, as the protected property; and the offense of grand theft of a motor vehicle implicitly embraces lack of consent by the owner or lawful possessor of the motor vehicle, an express element of trespass in a conveyance, because consent is an affirmative defense to the crime of theft, otherwise lack of consent is presumed. [*State v. Wynn*, 433 So.2d 1341, 1342 (Fla. 2d DCA 1983); see also *Quarterman v. State*, 401 So.2d 1159 (Fla. 3d DCA 1981)]

There is, however, one element which trespass in a conveyance has that grand theft of a motor vehicle does not have, to wit: the willful entry or remaining [in the conveyance or motor vehicle]. Grand theft of a motor vehicle requires that the accused "obtain or use" the motor vehicle or "endeavor" to do so, but does not require an actual entry or remaining in the vehicle. This being so, trespass in a conveyance is, as we have held, a category 2 permissive lesser included offense of the greater or charged offense of grand theft of a motor vehicle.

It is well settled that a properly requested jury charge on a category 2 permissive lesser included offense must be given if two requirements are met: (1) the indictment or information must allege all the statutory elements of the permissive lesser included offense, and (2) there must be some evidence adduced at trial establishing all of these elements. As stated in the leading case of *Brown v. State*, [206 So.2d 377, 383 (Fla.1968)], a category 2 permissive lesser included offense "[m]ay or [m]ay not be included in the offense charged, depending upon (a) the accusatory pleading, and (b) the evidence at the trial. In this category, the trial judge must examine the information [or indictment] to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is [n]ot an [e]ssential ingredient of the major offense alleged. If the accusation is present, then the judge must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present, then there should be a charge on the lesser offense.

Moreover, it would appear that the trial court must, upon proper request, charge the jury on a category 2 permissive lesser included offense even though the evidence adduced at trial establishing this lesser offense also establishes the charged offense; this is so because the jury is privileged on this evidence to exercise its de facto pardon power and acquit the defendant on the charged offense, but convict the defendant on the lesser offense. [*Amado v. State*, 585 So.2d 282 (Fla.1991)]

Under *Brown*, it is clear that a jury charge on a category 2 permissive lesser included offense was required to be given even though there was no rational basis in the evidence

by which the jury could acquit the defendant on the charged offense and convict the defendant on the permissive lesser included offense; it was enough if some evidence was adduced to establish all the elements of the lesser offense, albeit that this same evidence also established all the elements of the charged offense. Indeed, the Florida Supreme Court in *Lomax v. State*, [345 So.2d 719 (Fla.1977)], reaffirmed, in effect, this very proposition. Subsequent to *Brown*, however, many members of the bench and bar bridled at the requirement that the trial judge, upon proper request, had to instruct the jury on all four categories of lesser included offenses outlined in the *Brown* opinion, even where there was no rational basis in the evidence upon which the jury could conclude that the lesser offense was committed, but not the charged offense. Under this now-abandoned practice, the jury was frequently awash in a confusing laundry list of lesser offenses which could not possibly have been committed without also committing the charged offense.

Consequently, to remedy this state of affairs, the relevant rules on lesser offense jury instructions were amended in 1981 to require that all lesser included offenses, except category 1 necessarily included offenses, must be "supported by the evidence." As to permissive lesser included offenses, Fla.R.Crim.P. 3.510(b) was amended to provide that:

> On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> > (b) any offense that ... is a [permissive] lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct [the jury] on any [permissive] lesser included offense as to which there is no evidence.

As explained by the Florida Supreme Court, these rule changes "eliminate the need to give a requested [jury charge on a] lesser offense, not necessarily included in the charged offense [i.e., a category 2 permissive included offense] when there is a total lack of evidence of the lesser offense " - which is to say, when there is no evidence in the record that the category 2 permissive lesser offense was independently committed, rather than the charged offense. [*In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases*, 431 So.2d 594, 597 (Fla.), modified, 431 So.2d 599 (Fla.1981)]

Indeed, the Florida Supreme court in *State v. Wimberly*, [498 So.2d 929 (Fla.1986)], held, based on the omission of any evidentiary requirement for category 1 necessarily included offenses in Fla.R.Crim.P. 3.510(b), that the trial court must instruct the jury on such a lesser offense, upon proper request, even where the only evidence adduced at trial establishing the necessarily included offense also establishes the charged offense; as to all other lesser offenses, however, the Court indicated that a contrary rule prevails. Moreover, this result seems consistent with the result reached in the federal courts based on comparable rules. [See, e.g., *United States v. Langston*, 903 F.2d 1510, 1512 (11th Cir.1990) ("[W]hen the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater, the defendant is entitled to an instruction on the lesser included offense.")]

Stated differently, the cash value difference in this respect, after the 1981 rule changes, between a category 1 necessarily included offense and a category 2 permissive lesser included offense is that the trial court must instruct the jury upon proper request on the former lesser so long as there is enough evidence to go to the jury on the charged offense - but not so on the latter lesser. [*Wimberly*] A category 2 permissive lesser offense must be "supported by the evidence," unlike a category 1 necessarily included offense, and, consequently, there must be some evidence adduced at trial that this lesser was independently committed, rather than the charged offense. If, on the other hand, the provision in Fla.R.Crim.P. 3.510(b) that a permissive lesser included offense must be "supported by the evidence" means only that all the elements of the lesser offense must be proven by evidence at trial, even though this same evidence also proves the charged offense, then the 1981 rule changes on lesser offenses accomplished nothing, as that was the law before these amendments under *Brown* and *Lomax* - plainly an unacceptable result.

We recognize, however, that this analysis is inconsistent with *Amado* and consequently cannot be adopted as we are obliged to follow contrary Florida Supreme Court precedent. [*Hoffman v. Jones*, 280 So.2d 431 (Fla.1973)] Nonetheless, we certify, that our decision passes upon a question of great public importance so as to permit further review of this case by the Florida Supreme Court pursuant to Article V, Section 3(b)(4) of the Florida Constitution, to wit: If the only evidence adduced at trial establishing a category 2 permissive lesser included offense under Fla.R.Crim.P. 3.510(b) also establishes the charged offense as well [so that there is no rational basis in the evidence for the jury to acquit the defendant on the charged offense and convict the defendant on the lesser offense], is such a permissive lesser offense "supported by the evidence" under the above rule so as to require, upon proper request, a jury charge on such an offense where all the elements of the lesser offense are otherwise alleged in the indictment or information?

Turning to the instant case, we have no trouble in concluding that a jury charge on the category 2 permissive lesser included offense of trespass in a conveyance did not lie in this case. This is so because the information on which the defendant was tried does not allege all the statutory elements of trespass in a conveyance; in particular, the information fails to allege that the defendant willfully entered or remained in the complainant's motor vehicle, an essential element of trespass in a conveyance. The information states as follows:

> Larry Jones, on or about September 03, 1992, in the County and State aforesaid, did knowingly, unlawfully and feloniously obtain or use or did knowingly, unlawfully and feloniously endeavor to obtain or to use a motor vehicle, the property of Shirley Bird as owner or custodian, with the intent to either temporarily or permanently deprive the said Shirley Byrd of a right to the property or a benefit therefrom, or to appropriate the same to said defendant's own use or to the use of a person not entitled thereto, in violation of Fla.Stat., sec. 812.014(1), (2)(c), contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Indeed, the information simply tracks the language of the statute proscribing grand theft of a motor vehicle [Fla.Stat. § 812.014(1), (2)(c)(4) (1991)], which statute lacks the element of willful entry or remaining in the complainant's motor vehicle. The allegation that the defendant "did ... obtain or ... use a motor vehicle," as previously explained, does not constitute an allegation that the defendant "enter[ed] or remain[ed]" in the vehicle. Although we agree that the evidence adduced by the state at trial clearly established all the statutory elements of trespass in a conveyance [albeit that this same evidence also established all the elements of grand theft of a motor vehicle] so that the offense of trespass in a conveyance was "supported by the evidence," [Fla.R.Crim.P. 3.510(b)], this alone was insufficient to require a jury charge on trespass in a conveyance as a category 2 permissive lesser included offense. As required by *Brown*, all the statutory elements of a category 2 permissive lesser included offense must also be alleged in the information to require a jury charge on such a lesser offense; this requirement is not met in this case. Accordingly, the trial court correctly denied the defendant's request for a jury charge on trespass in a conveyance.

We find no merit in the remaining points on appeal raised by the defendant, and, therefore, the final judgment of conviction and sentence under review is, in all respects, Affirmed.

Critical Thinking Question(s): This case calls for us to revisit the reasons that theState or Defense may or may not want to include lesser offenses in the jury instructions. The reason the Defense wants the instructions in this case is that he desires a lesser alternative to the higher charged offense. Such is not always the case. Why would the Defense sometimes not want lesser offenses to be included in the instructions? What are the reasons the State would not want them? Better to secure a conviction than lose the case altogether, no?

IV. Arson

Section Introduction: While common law arson was designed specifically to protect homes against burning, today arson laws punish the damage of a variety of structures by the willful and unlawful use of fire or explosion. Note that this damage does not necessarily have to include burning. The Florida statute below describes more fully what is included in the concept of arson, and the case that follows will show you how Florida courts apply this law.

Florida Statutes, sec. 806.01 - Arson

(1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:

(a) Any dwelling, whether occupied or not, or its contents;

(b) Any structure, or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business

establishments, churches, or educational institutions during normal hours of occupancy; or other similar structures; or

(c) Any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being,

. . . is guilty of arson in the first degree, which constitutes a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(2) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged any structure, whether the property of himself or herself or another, under any circumstances not referred to in subsection (1), is guilty of arson in the second degree, which constitutes a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3) As used in this chapter, "structure" means any building of any kind, any enclosed area with a roof over it, any real property and appurtenances thereto, any tent or other portable building, and any vehicle, vessel, watercraft, or aircraft.

Florida Statutes, sec. 806.031 - Arson resulting in injury to another; penalty

(1) A person who perpetrates any arson that results in any bodily harm to a firefighter or any other person, regardless of intent or lack of intent to cause such harm, is guilty of a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.

(2) A person who perpetrates any arson that results in great bodily harm, permanent disability, or permanent disfigurement to a firefighter or any other person, regardless of intent or lack of intent to cause such harm, is guilty of a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3) Upon conviction and adjudication of guilt, a person may be sentenced separately, pursuant to sec. 775.021(4), for any violation of this section and for any arson committed during the same criminal episode. A conviction for any arson, however, is not necessary for a conviction under this section.

***Knighten v. State*, 568 So.2d 1001 (App. 2 Dist., 1990)**

Procedural History: Defendant was convicted of arson by the Circuit Court, Polk County, J. Tim Strickland, J., based upon defendant's setting fire to his shirt while incarcerated in drunk tank of municipal jail. Defendant appealed. The District Court of Appeal held that: (1) minor damage to interior of jail cell from burning shirt was sufficient to support defendant's conviction; (2) all that State needed to show in order to convict defendant was that defendant intentionally started fire, not that he intended to damage structure; and (3) trial court erred in imposing court costs on defendant without adequate prior notice to defendant.

Issue(s): Is it necessary for the State to prove specific intent for arson?

Facts: Knighten, while incarcerated in the "drunk tank" of the Lake Wales municipal jail, set fire to his shirt. It appears that Knighten may have become enraged when the police did not respond to his demand for a telephone call. The burning shirt, which Knighten hung on a wire descending from the ceiling, caused minor damage to the interior of the cell.

Holding: Convictions and sentences affirmed; court costs stricken and remanded.

Opinion: PER CURIAM.

John Henry Knighten appeals his conviction and sentence for arson, a violation of Florida Statutes, section 806.01 (1987). With the exception of that portion of the trial court's order which requires the payment of court costs, we affirm. We believe this structural damage is sufficient to support a conviction. [*Granville v. State*, 373 So.2d 716 (Fla. 1st DCA 1979)] The fact Knighten characterizes the damage as "de minimis" is more relevant, we believe, when considering the severity of the punishment merited by his actions than when determining the legal sufficiency of the evidence.

Knighten also argues that the state failed to prove he intended to damage the structure. Arson, however, is a general intent crime. [*Linehan v. State*, 442 So.2d 244 (Fla. 2d DCA 1983), aff'd, 476 So.2d 1262 (Fla.1985)] All that needed to be shown was that Knighten intentionally started the fire. Knighten admitted this in his own testimony, though claiming the fire was only an attention-getting device. We do agree that the trial court erred in imposing court costs without adequate prior notice to Knighten. [See *Wood v. State*, 544 So.2d 1004 (Fla.1989)] Accordingly, we strike this provision of the judgment and sentence without prejudice to the state to seek reimposition of these costs after proper notice. Convictions and sentences affirmed; court costs stricken; remanded for further proceedings consistent with this opinion.

Critical Thinking Question(s): If arson is a general intent crime, does the intent element require that the person know that s/he is setting a fire that will result in damage or harm, or could it be based on recklessness or negligence?

V. Criminal Mischief

Section Introduction: At common law, criminal mischief was a misdemeanor that punished the damaging of another’s personal property. Today, however, criminal mischief may be upgraded to a felony charge dependent upon the degree of damage done. This Florida statute describes how the courts determine whether this crime is a misdemeanor or felony. Below is also a Florida case regarding the application of the criminal mischief statute.

Florida Statutes, sec. 806.13 - Criminal mischief

(1) (a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.

(b) 1. If the damage to such property is $200 or less, it is a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.

2. If the damage to such property is greater than $200 but less than $1,000, it is a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.

3. If the damage is $1,000 or greater, or if there is interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which costs $1,000 or more in labor and supplies to restore, it is a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

4. If the person has one or more previous convictions for violating this subsection, the offense under subparagraph 1. or subparagraph 2. for which the person is charged shall be reclassified as a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(2) Any person who willfully and maliciously defaces, injures, or damages by any means any church, synagogue, mosque, or other place of worship, or any religious article contained therein, commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if the damage to the property is greater than $200.

(3) Whoever, without the consent of the owner thereof, willfully destroys or substantially damage s any public telephone, or telephone cables, wires, fixtures, antennas, amplifiers, or any other apparatus, equipment, or appliances, which destruction or damage renders a public telephone inoperative or which opens the body of a public telephone, commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084; provided, however, that a conspicuous notice of the provisions of this subsection and the penalties provided is posted on or near the destroyed or damaged instrument and visible to the public at the time of the commission of the offense.

(4) Any person who willfully and maliciously defaces, injures, or damages by any means a sexually violent predator detention or commitment facility, as defined in part V of chapter 394, or any property contained therein, commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if the damage to property is greater than $200.

(5) (a) The amounts of value of damage to property owned by separate persons, if the property was damaged during one scheme or course of conduct, may be aggregated in determining the grade of the offense under this section.

(b) Any person who violates this section may, in addition to any other criminal penalty, be required to pay for the damages caused by such offense.

(6) (a) Any person who violates this section when the violation is related to the placement of graffiti shall, in addition to any other criminal penalty, be required to pay a fine of:

1. Not less than $250 for a first conviction.
2. Not less than $500 for a second conviction.
3. Not less than $1,000 for a third or subsequent conviction.

(b) Any person convicted under this section when the offense is related to the placement of graffiti shall, in addition to any other criminal penalty, be required to perform at least 40 hours of community service and, if possible, perform at least 100 hours of community service that involves the removal of graffiti.

(c) If a minor commits a delinquent act prohibited under paragraph (a), the parent or legal guardian of the minor is liable along with the minor for payment of the fine. The court may decline to order a person to pay a fine under paragraph (a) if the court finds that the person is indigent and does not have the ability to pay the fine or if the court finds that the person does not have the ability to pay the fine whether or not the person is indigent.

(7) In addition to any other penalty provided by law, if a minor is found to have committed a delinquent act under this section for placing graffiti on any public property or private property, and:

(a) The minor is eligible by reason of age for a driver's license or driving privilege, the court shall direct the Department of Highway Safety and Motor Vehicles to revoke or withhold issuance of the minor's driver's license or driving privilege for not more than 1 year.

(b) The minor's driver's license or driving privilege is under suspension or revocation for any reason, the court shall direct the Department of Highway Safety and Motor Vehicles to extend the period of suspension or revocation by an additional period of not more than 1 year.

(c) The minor is ineligible by reason of age for a driver's license or driving privilege, the court shall direct the Department of Highway Safety and Motor Vehicles to withhold issuance of the minor's driver's license or driving privilege for not more than 1 year after the date on which he or she would otherwise have become eligible.

(8) A minor whose driver's license or driving privilege is revoked, suspended, or withheld under subsection (7) may elect to reduce the period of revocation, suspension, or withholding by performing community service at the rate of 1 day

for each hour of community service performed. In addition, if the court determines that due to a family hardship, the minor's driver's license or driving privilege is necessary for employment or medical purposes of the minor or a member of the minor's family, the court shall order the minor to perform community service and reduce the period of revocation, suspension, or withholding at the rate of 1 day for each hour of community service performed. As used in this subsection, the term "community service" means cleaning graffiti from public property.

(9) Because of the difficulty of confronting the blight of graffiti, it is the intent of the Legislature that municipalities and counties not be preempted by state law from establishing ordinances that prohibit the marking of graffiti or other graffiti-related offenses. Furthermore, as related to graffiti, such municipalities and counties are not preempted by state law from establishing higher penalties than those provided by state law and mandatory penalties when state law provides discretionary penalties. Such higher and mandatory penalties include fines that do not exceed the amount specified in ss. 125.69 and 162.21, community service, restitution, and forfeiture. Upon a finding that a juvenile has violated a graffiti-related ordinance, a court acting under chapter 985 may not provide a disposition of the case which is less severe than any mandatory penalty prescribed by municipal or county ordinance for such violation.

***Sanchez v. State*, 909 So.2d 981 (App. 5 Dist., 2005)**

Procedural History: Defendant was convicted in the Circuit Court, Osceola County, Margaret T. Waller, J., of robbery and criminal mischief. He appealed.

Issue(s): Sanchez argues that his request for judgment of acquittal should have been granted because the State failed to present sufficient evidence to prove that he intended to damage the telephone.

Facts: Jose Perez Sanchez entered a convenience store and attempted to purchase merchandise with a credit card that did not belong to him. Upon examination of the requested identification that revealed Sanchez was not the owner of the credit card, the clerk refused to return the card and attempted to call the police. Sanchez leapt over the counter to forcibly retrieve the credit card, and a struggle ensued during which Sanchez bit the clerk on the hand with sufficient force to cause bleeding. During the melee, the clerk dropped the telephone and it broke. When the clerk retreated outside to summon help, Sanchez took several items from the counter and left.

The police subsequently found Sanchez hiding in a shed located nearby. He was apprehended and charged with robbery and criminal mischief. The basis of the latter charge was the broken telephone. During the trial, counsel for Sanchez requested a judgment of acquittal, contending that the State failed to establish a prima facie case of

robbery and criminal mischief. The trial court denied that request and this appeal followed.

Holding: Affirmed in part and reversed in part.

Opinion: SAWAYA, J.

We apply the de novo standard of review when reviewing a trial court's denial of a motion for judgment of acquittal. [*Pagan v. State*, 830 So.2d 792 (Fla.2002), cert. denied, 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137 (2003); *Sutton v. State*, 834 So.2d 332, 334 (Fla. 5th DCA 2003)] Generally, we will affirm the trial court's denial of that motion if the record reveals substantial competent evidence to support the conviction. [*Fitzpatrick v. State*, 900 So.2d 495 (Fla.2005)] "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." [Id. at 507; see also *Sutton*]

Sanchez argues that he had permission of the owner to use the credit card and the clerk's apparent act of bravado in refusing to return it was nothing more than wrongful deprivation of property that rightfully belonged to his friend. More importantly, Sanchez asserts, he paid for the items he took from the store and the State did not produce sufficient evidence to prove otherwise. But the clerk testified to the contrary, creating a conflict in the testimony that was resolved by the jury in favor of the State. We believe that a rational jury could find beyond a reasonable doubt, based on the clerk's testimony, that Sanchez did take the items without paying for them. Because substantial competent evidence supports the jury's finding of unlawful taking, we reject Sanchez's argument.

Sanchez advances an alternative claim: if he actually took the items without paying for them, as the clerk contends, his conduct did not rise to the level of robbery because the taking was accomplished by a mere "sudden snatching," which amounts to nothing more than petit theft. The distinction between the two crimes, according to Sanchez, is one of force. We agree that the element of force appropriately distinguishes the two crimes: force utilized in the course of the taking is a necessary element of robbery, but it is not a necessary element of petit theft. [See Fla. Stat. § 812.13(1) (2004) (requiring the State to show that "in the course of the taking there is the use of force, violence, assault, or putting in fear" to prove the crime of robbery); *Robinson v. State*, 692 So.2d 883, 887 (Fla.1997) ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery."); *Jones v. State*, 652 So.2d 346 (Fla.1995), cert. denied, 516 U.S. 875, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995)]

However, substantial competent evidence was presented to the jury that draws a very clear line between the two offenses in the instant case sufficient for us to conclude that the crime Sanchez actually committed was robbery. The record reveals sufficient evidence of force and violence preceding the taking of the items by Sanchez such that the taking was enabled: Sanchez bit the clerk as they scuffled behind the counter, causing the

clerk to flee for help and leaving Sanchez unobstructed as he helped himself to the items on the counter just before he departed. The fact that the violence occurred prior to the actual taking does not help Sanchez because an act is considered " 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." [*Jones*, 652 So.2d at 349 (quoting § 812.13(3)(b), Fla. Stat. (1989)] We conclude, therefore, that the trial court correctly denied Sanchez's request for a judgment of acquittal regarding the robbery charge.

As to the criminal mischief conviction, Sanchez argues that his request for judgment of acquittal should have been granted because the State failed to present sufficient evidence to prove that he intended to damage the telephone. The State contends that Sanchez failed to properly preserve this argument for our review because he did not raise it in the trial court when he made his request for judgment of acquittal regarding the criminal mischief charge. Litigants, including criminal defendants, must properly preserve for review the issues raised in the appellate court by raising them first in the trial court. Commonly referred to as the contemporaneous objection rule, a litigant must preserve a specific issue by: 1) making a timely contemporaneous objection in the trial court; 2) stating the legal grounds for that objection; and 3) raising the specific argument in the appellate court that was asserted as the legal ground for the objection or motion made in the trial court. [*Harrell v. State*, 894 So.2d 935 (Fla.2005)] The record reveals that Sanchez did not comply with these requirements. Now we must determine whether the exception to the contemporaneous objection rule allows us to proceed to consider the specific argument raised by Sanchez.

The sole and limited exception just referred to allows us to review and correct fundamental errors. It is the definition of fundamental error that draws the boundaries of the exception so narrowly: an error is fundamental if it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." [*Anderson v. State*, 841 So.2d 390, 403 (Fla.2003), cert. denied, 540 U.S. 956, 124 S.Ct. 408, 157 L.Ed.2d 292 (2003)] Thus, "rarely will an error be deemed fundamental, and the more general rule requiring a contemporaneous objection to preserve an issue for appellate review will usually apply." [*F.B. v. State*, 852 So.2d 226, 229-30 (Fla.2003)] The essence of the error alleged by Sanchez is based on the insufficiency of the evidence produced by the State.

Although the general rule requiring a contemporaneous objection applies to errors based on the insufficiency of the evidence, there are two limited categories of such error that are fundamental: 1) errors committed in death penalty cases; and 2) instances where the "evidence is totally insufficient as a matter of law to establish the commission of a crime." [Id. at 230] The instant case falls within the latter category as we will next explain.

Three elements must be sufficiently established to prove the crime of criminal mischief: 1) the defendant injured or damaged specified property; 2) the property belonged to another; and 3) the injury or damage was inflicted willfully and maliciously. [Fla. Stat. §

806.13 (2004); see also *Insignares v. State*, 847 So.2d 1063, 1064 (Fla. 3d DCA 2003) (acknowledging that the offense of criminal mischief requires that the defendant intend to damage the property of another); *C.B. v. State*, 721 So.2d 785 (Fla. 3d DCA 1998) (holding that damage to the property of another is an essential element of the offense of criminal mischief)]

The offense of criminal mischief derives from the common law offense of "malicious mischief." [See *Reed v. State*, 470 So.2d 1382 (Fla.1985)] Explicit in its common law moniker is the requirement that the defendant's wrongful act be committed with malice. The traditional common law concept of malice, within the context of the crime of malicious mischief, incorporated the general notion that the offense was committed out of ill will or hatred toward the owner of the property. [See *Robinson v. State*, 686 So.2d 1370, 1372 (Fla. 5th DCA 1997), review denied, 695 So.2d 701 (Fla.1997)] The element of malice also contemplated that the malicious intent could, alternatively, be directed toward the property of the owner. [Id.]

The common law offense of malicious mischief evolved into the statutory crime of criminal mischief. Without recounting every step in the evolutionary process, see *Reed*, [470 So.2d at 1387 n. 5], suffice it to say that the malice requirement morphed from inclusion of ill will or hatred toward the owner of the property into a statutory element that specifically requires willful and malicious intent to injure or damage the property of the owner. Hence, although malice was incorporated into the provisions of section 806.13 as an element of the offense of criminal mischief, the mischief criminalized under this statute requires that the defendant specifically intend to damage or destroy the property of another: it is not enough that the defendant act with malice toward the person of the owner. [*In the Interest of J.G.*, 655 So.2d 1284, 1285 (Fla. 4th DCA 1995) ("The offense of criminal mischief requires that the actor possess the specific intent to damage the property of another. The intent to damage the property of another does not arise by operation of law where the actor's true intention is to cause harm to the person of another."); *Insignares*] Failure of proof of this element of the crime is fatal.

Here, the defendant, with ill will and malice toward the clerk attempted to rob him and in the process, the clerk's telephone was damaged. There is no evidence that the ill will or malice was in any way redirected from the clerk to the telephone. Accordingly, the State failed to prove that the crime of criminal mischief was committed. This constitutes fundamental error that we must correct by reversing Sanchez's conviction for that charge. We acknowledge that Sanchez expended most of his efforts seeking reversal of the robbery conviction. While those efforts proved unsuccessful, he has obtained a reversal of his misdemeanor conviction for criminal mischief. Perhaps he will consider this limited victory diminished by the fact that he has already served the jail sentence imposed for that charge. But our reversal will extract that conviction from his criminal record, and Sanchez will have to content himself with that.

Critical Thinking Question(s):

- According to the statute and this case, would it be enough for the defendant to cause damage to property while engaged in an altercation with a person s/he hates?
- Why is there no presumed intent to cause such damage when acting recklessly?

- How can one prove that the ill will is toward the property when there is no one to witness the event?