Chapter 13: Crimes Against Property

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 concerns the wrongful taking of another person's property. There are many categories of such crimes, including larceny, embezzlement, false pretenses, theft, identity theft, computer crime, receiving stolen property, forgery and uttering, robbery, and extortion.

Larceny is the removal of goods or money from a person without his or her consent with the intention of permanently depriving them of control over and physical possession of said goods or money. This crime requires asportation, or movement, of the stolen property, even if only a very slight one. It also requires caption of the property, asserting control over it. The intent to permanently deprive the victim of the property is the essential mens rea element of the crime and distinguishes it from a taking with the intent so simply borrow the property. If larceny is committed through the use of violence or threat of violence, then the crime is called robbery. Robbery also includes some specialized categories like carjacking. Where robbery requires the use of violence or threat of immediate violence, a separate crime called extortion is a theft that is made under the threat of future violence or other future harm.

When larceny was found to be insufficient to cover all types of theft that were thought unacceptable, English Parliament passed law against embezzlement of property, which today can be considered a felony or misdemeanor dependent upon the value of the embezzled property. While larceny punishes a criminal taking, embezzlement is designed to cover crimes in which the taking itself is lawful but the perpetrator unlawfully converts the property after taking possession of it, meaning that they cause a serious interference with the owner's property rights. This crime is generally carried out by people who are entrusted with the property of others, such as bank workers and auto mechanics.

False pretense is a crime that was defined by common law to encompass the obtainment of property by fraud or deceit. In these cases an individual tricks someone into transferring ownership of property to the perpetrator, such as by misrepresenting the value of property. This crime requires that the perpetrator commit the act knowingly and that he or she acts by design to defraud the victim. In some states, all three of these crimes, larceny, embezzlement, and false pretense, are combined into one statute and collectively punished as theft.

Two special cases of theft that were not foreseen by the drafters of original theft laws are identity theft and computer crime. Identity theft involves stealing another person's

identifying information, such as name, birth date, and social security number. This is typically done for the purposes of obtaining credit and making purchases in the victim's name. Computer crime involves the unlawful access of another person's computer, most commonly access of programs, databases, and personal information. This crime often requires separate legislation because of the uniquely intangible nature of the property in question.

The crime of receiving stolen property occurs when someone gains possession of property that has previously been stolen from another. The mens rea of this crime requires that the recipient of the stolen property be aware of the fact that the property is stolen and must take possession of it with the intention of permanently depriving the owner of such.

Forgery is the crime of counterfeiting or illegally altering a legal document for the purposes of fraud or deceit. While this purpose is required, one can be charged with this crime whether or not the documents are ever actually used for their intended purpose. The use of such documents for fraud or deceit is a separate crime known as uttering. In this chapter of the supplement you will read statutes and case law from Florida that will show how the state is unique in its definitions and applications

I. Theft

Section Introduction: In the state of Florida, crimes like larceny, embezzlement, and false pretense are encompassed by the same statutes and are collectively termed theft. In this section you will find the relevant Florida statutes regarding theft. Below this, and in the following sections on specific types of theft, you will find Florida cases which detail the variety of different ways that these statutes are applied.

Florida statute, sec. 812.012 – Definitions –As used in ss. 812.012-812.037

…

(3) "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; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or

2. Other conduct similar in nature.

(4) "Property" means anything of value, and includes:

(a) Real property, including things growing on, affixed to, and found in land.

(b) Tangible or intangible personal property, including rights, privileges, interests, and claims.

(c) Services.

(5) "Property of another" means property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

(6) "Services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

(a) Repairs or improvements to property.

(b) Professional services.

(c) Private, public, or government communication, transportation, power, water, or sanitation services.

(d) Lodging accommodations.

(e) Admissions to places of exhibition or entertainment.

(7) "Stolen property" means property that has been the subject of any criminally wrongful taking.

Florida statute, sec. 812.014 – Theft

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to 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 from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) (a)

1. If the property stolen is valued at $100,000 or more; or
2. If the property stolen is cargo valued at $50,000 or more that has entered the stream of interstate or intrastate commerce from the shipper's loading platform to the consignee's receiving dock; or
3. If the offender commits any grand theft and:

a. In the course of committing the offense the offender uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense and thereby damages the real property of another; or

b. In the course of committing the offense the offender causes damage to the real or personal property of another in excess of $1,000,

. . . the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(b)

1. If the property stolen is valued at $20,000 or more, but less than $100,000;

2. The property stolen is cargo valued at less than $50,000 that has entered the stream of interstate or intrastate commerce from the shipper's loading platform to the consignee's receiving dock; or

3. The property stolen is emergency medical equipment, valued at $300 or more, that is taken from a facility licensed under chapter 395 or from an aircraft or vehicle permitted under chapter 401,

. . . the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in sec. 775.082, sec. 775.083, or sec. 775.084. Emergency medical equipment means mechanical or electronic apparatus used to provide emergency services and care as defined in sec. 395.002(10) or to treat medical emergencies.

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $5,000.
2. Valued at $5,000 or more, but less than $10,000.
3. Valued at $10,000 or more, but less than $20,000.
4. A will, codicil, or other testamentary instrument.
5. A firearm.
6. A motor vehicle, except as provided in paragraph (2)(a).
7. Any commercially farmed animal, including any animal of the equine, bovine, or swine class, or other grazing animal, and including aquaculture species raised at a certified aquaculture facility. If the property stolen is aquaculture species raised at a certified aquaculture facility, then a $10,000 fine shall be imposed.
8. Any fire extinguisher.
9. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

10. Taken from a designated construction site identified by the posting of a sign as provided for in sec. 810.09(2)(d).
11. Any stop sign.
12. Anhydrous ammonia.

(d) It is grand theft of the third degree and a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if the property stolen is valued at $100 or more, but less than $300, and is taken from a dwelling as defined in sec. 810.011(2) or from the unenclosed curtilage of a dwelling pursuant to sec. 810.09(1).

(e) Except as provided in paragraph (d), if the property stolen is valued at $100 or more, but less than $300, the offender commits petit theft of the first degree, punishable as a misdemeanor of the first degree, as provided in sec. 775.082 or sec. 775.083.

(3) (a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083, and as provided in subsection (5), as applicable.

(b) A person who commits petit theft and who has previously been convicted of any theft commits a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.

(c) A person who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree, punishable as provided in sec. 775.082 or sec. 775.083.

(d) 1. Every judgment of guilty or not guilty of a petit theft shall be in writing, signed by the judge, and recorded by the clerk of the circuit court. The judge shall cause to be affixed to every such written judgment of guilty of petit theft, in open court and in the presence of such judge, the fingerprints of the defendant against whom such judgment is rendered. Such fingerprints shall be affixed beneath the judge's signature to such judgment. Beneath such fingerprints shall be appended a certificate to the following effect:

"I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, _____, and that they were placed thereon by said defendant in my presence, in open court, this the _____ day of _____, (year)." Such certificate shall be signed by the judge, whose signature thereto shall be followed by the word "Judge."

2. Any such written judgment of guilty of a petit theft, or a certified copy thereof, is admissible in evidence in the courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge are the fingerprints of the

defendant against whom such judgment of guilty of a petit theft was rendered.

(4) Failure to comply with the terms of a lease when the lease is for a term of 1 year or longer shall not constitute a violation of this section unless demand for the return of the property leased has been made in writing and the lessee has failed to return the property within 7 days of his or her receipt of the demand for return of the property. A demand mailed by certified or registered mail, evidenced by return receipt, to the last known address of the lessee shall be deemed sufficient and equivalent to the demand having been received by the lessee, whether such demand shall be returned undelivered or not.

(5) (a) No person shall drive a motor vehicle so as to cause it to leave the premises of an establishment at which gasoline offered for retail sale was dispensed into the fuel tank of such motor vehicle unless the payment of authorized charge for the gasoline dispensed has been made.
(b) In addition to the penalties prescribed in paragraph (3)(a), every judgment of guilty of a petit theft for property described in this subsection shall provide for the suspension of the convicted person's driver's license. The court shall forward the driver's license to the Department of Highway Safety and Motor Vehicles in accordance with sec. 322.25.
1. The first suspension of a driver's license under this subsection shall be for a period of up to 6 months.
2. The second or subsequent suspension of a driver's license under this subsection shall be for a period of 1 year.

***Daniels v. State*, 570 So.2d 319 (App. 2 Dist., 1990)**

Procedural History: Defendant was convicted of robbery with a deadly weapon. Judgment was entered in the Circuit Court, Hillsborough County, Robert H. Bonanno, J., defendant appealed. The District Court of Appeal, Campbell, J., held that: (1) trial properly continued, even though defendant absented himself after first day, and (2) specific intent to deprive victim of property, as required for robbery conviction, could consist of intent to deprive either permanently or temporarily.

Issue(s): Appellant first alleges that the trial court erred in allowing his case to proceed to trial after appellant voluntarily absented himself after the jury was selected but prior to it being sworn. He also challenges his robbery conviction on the basis that the trial judge erred in instructing the jury on the elements of robbery.

Facts: Appellant had pled nolo contendere to a charge of delivery of marijuana in November of 1985, and was sentenced to probation. While on probation, on November 21, 1986, appellant was convicted, in absentia, of robbery with a firearm. Appellant was subsequently charged with violating his probation on the marijuana charge by failing to report to his probation officer. The probation violation was unrelated to appellant's

robbery conviction. After appellant was located, he was sentenced on September 18, 1987, for both the robbery and the subsequent probation violation on the marijuana charge. The court used a single guidelines scoresheet showing a recommended guidelines sentence of seven to nine years. The court sentenced appellant to nine years imprisonment for the robbery conviction and to a consecutive five-year term on the marijuana charge. Appellant challenges his conviction and sentence for robbery with a deadly weapon. He also challenges the additional sentence imposed for his violation of probation on a prior marijuana charge. We affirm both his conviction for robbery with a deadly weapon and his subsequent consecutive sentences for that robbery and for delivery of marijuana.

Holding: Affirmed.

Opinion: CAMPBELL, Judge.

Appellant challenges his robbery conviction on two grounds. He first alleges that the trial court erred in allowing his case to proceed to trial after appellant voluntarily absented himself after the jury was selected but prior to it being sworn. We find no error in the trial judge allowing appellant's trial to proceed under the circumstances of this case. It is not disputed that appellant voluntarily absented himself after voir dire. Appellant and a codefendant were present at trial on November 18, 1986, when voir dire was conducted and completed. Appellant failed to appear thereafter. Florida Rule of Criminal Procedure 3.180(b) provides that where a defendant is present at the beginning of a trial but thereafter voluntarily absents himself from the presence of the court, the trial, through the return of a verdict, shall proceed as though the defendant were present. The Florida Supreme Court in *State v. Melendez*, [244 So.2d 137, 139 (Fla.1971)], stated: "It is settled law that trial begins when the selection of a jury to try the case commences."

Appellant next challenges his robbery conviction on the basis that the trial judge erred in instructing the jury on the elements of robbery. The trial judge's instructions charged the jury that an element of robbery was a temporary or permanent intent to deprive the victim of his property. We find no error in that charge as we construe the law of Florida in regard to the elements of robbery as they exist today. In reaching that conclusion, we recede from the previous holding of this court in *Hall v. State*, [505 So.2d 657, 658 (Fla. 2d DCA)], cause dismissed, [509 So.2d 1117 (Fla.1987)], in which we stated that an essential element of proof in regard to the crime of robbery is "that the accused had the specific intent to permanently deprive the owner of property."

There are numerous Florida cases in recent years that discuss the criminal intent required in regard to the taking of property of another to commit the crime of robbery in Florida since the legislature amended the larceny or theft statutes by enacting the Florida Anti-Fencing Act by chapter 77-342, section 2, Laws of Florida (1977), codified as sections 812.012- 812.037. [See *State v. Dunmann*, 427 So.2d 166 (Fla.1983); *Bell v. State*, 394 So.2d 979 (Fla.1981); *State v. Allen*, 362 So.2d 10 (Fla.1978)] Those cases and others have generally discussed the issue and rightly concluded that theft and robbery in Florida, regardless of recent amendments to our theft statutes, still require a specific criminal

intent in regard to the taking of the property of another. Those cases have also rightly concluded that the specific intent necessary is the intent to commit theft or larceny, or the intent "to steal." The confusion which appears to us to have been communicated to our trial courts with regard to the specific intent necessary to commit robbery has resulted from a failure to clearly define that specific intent subsequent to the statutory changes in the necessary elements of larceny or theft made by the Anti-Fencing Act in 1977.

Without discussing each of the above cited cases individually, it is sufficient for us to observe that those which have considered the issue have rightly concluded that theft in Florida, as proscribed by Florida Statutes, section 812.014(1) (1987), now includes the obtaining or using of the property of another with intent to either temporarily or permanently deprive the owner of the property. Unfortunately, several courts have appeared to conclude, as did this court in *Hall*, that robbery in Florida still requires a specific intent to permanently deprive another of property and have specifically or by inference held that a specific intent to temporarily deprive is not sufficient. That appears to us now to be clearly wrong. [But see *Green*, 414 So.2d at 1173, n. 3] "Theft" in Florida has clearly supplanted the former crime known at common law and by previous statutory definitions in this state as "larceny." The offenses of "larceny" and "stealing" are now encompassed by and completely subsumed within section 812.014(1). Therefore, the old crimes formerly described as larceny, stealing, embezzlement and others, are all now known as "theft" and defined by section 812.014(1) as follows:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to 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.

The conclusion that "theft" in Florida now encompasses the former crimes such as larceny, stealing and embezzlement is clearly supported by Florida Statutes, section 812.012(2) (1987), where the phrase "obtains or uses," used in defining theft above, is itself defined as 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; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
>
> 2. Other conduct similar in nature.

Perhaps it has been the blurring of the distinction between the nature of the taking, the animus furandi, and the nature of the intent that has created the confusion in the

temporary versus permanent dichotomy. It appears that confusion was enhanced by reason of some apparently inadvertent language used in *Bell*, [394 So.2d at 979]. In Bell, the supreme court had before it a certified question phrased as follows:

> Whether specific intent (i.e., the intent to permanently deprive the owner of property) is still a requisite element of the crime of robbery as now defined by Section 812.13, Florida Statutes (1975). [*Bell*, 394 So.2d at 979]

The supreme court in its holding in *Bell* stated: "We hold that specific intent is still a requisite element of the crime of robbery and answer the certified question in the affirmative. The decision of the district court to the contrary is quashed." [*Bell*, 394 So.2d at 980]

Throughout Bell, the supreme court is discussing the continued necessity of a specific criminal intent in committing the crime of larceny. The court was not discussing of what that specific intent consisted. However, when the supreme court stated that it answered the certified question in the affirmative and the certified question parenthetically included a statement regarding the intent to permanently deprive, other courts have mistakenly concluded that Bell mandated a specific intent to permanently deprive to commit the offense of larceny. [See *State v. Dunmann*, 427 So.2d at 169] We do not agree.

To further confound the matter, we also conclude that other courts, including this court in *Hall*, misconstrued the supreme court's effort in *Dunmann* to clarify what it had held and what it had not held in *Bell*. Perhaps Judge Cobb's dissent in *Baxley*, which was referred to with approval in *Dunmann*, contains the clearest analysis of what has transpired in Florida under the amendments to our theft statutes. Clearly, "theft" in Florida now requires a specific criminal intent with an animus furandi that may be either the intent to temporarily deprive another of property or the intent to permanently deprive another of property. While the robbery statute, Florida Statutes, section 812.13 (1987), was not specifically amended by the amendments which changed the definitions and elements of theft (formerly larceny), the animus furandi in the "taking" element of robbery was changed when the theft or larceny statutes were amended. Section 812.13(1) defines robbery as the taking from another by force, violence or putting in fear, of money or property which may be the subject of "larceny." The crime of "theft" as now proscribed by section 812.014(1), has taken the place of "larceny" as discussed above. The supreme court in *Dunmann* stated:

> In *Bell v. State*, 394 So.2d 979 (Fla.1981), the third district certified a question regarding section 812.13, Florida Statutes (1975), the robbery statute, in which that district court equated the intent to permanently deprive an owner of his property to the specific intent required by section 812.13. By relying on *Bell* and *Allen*, several district courts have been led to the opposite conclusion from what we reach in this opinion. [See, e.g., *Baxley*; *Dunmann*; *Faison; Hilty*] While section 812.13 deals with a similar subject, we do not find that chapter 77-342 had an impact on that section. By the same token, section 812.13 has no impact on

> the sections involved in this opinion. Therefore, we find *Bell* to have no effect on the instant case. [427 So.2d at 169]

We construe that statement of our supreme court in two ways. First, it is true that chapter 77-342, which created section 812.014(1) defining theft, did not expressly impact on section 812.13 in regard to the nature of the intent, specific or general, necessary to commit the crime. However, it is inescapable to us that in redefining larceny to be included within the "obtaining or using" that now constitutes theft, chapter 77-342 did impact by implication on the animus furandi in the nature of the taking to which the specific intent must be directed. Chapter 77-342 did, therefore, alter the elements of robbery so that the specific intent still required in a robbery may now be met by a specific intent to temporarily or permanently deprive another of his property. Second, we conclude that the statement above-quoted from *Dunmann* was dicta as far as it pertains to the issue before the *Dunmann* court and the issue before us.

We affirm appellant's conviction for the offense of robbery. We also affirm the sentences imposed on the authority of *Williams v. State*, [559 So.2d 680 (Fla. 2d DCA 1990)] and *Washington v. State*, [564 So.2d 168 (Fla. 5th DCA 1990)].

Critical Thinking Question(s): Should the Court be permitted to make such a broad interpretation of statutory intent? Theft customarily required “intent to permanently” deprive. Should there exist separate offenses and differing punishments for those that intend to permanently deprive verses those that only seek to deprive temporarily (e.g., joyride)?

II. Larceny

Section Introduction: Under the common law, larceny requires the unlawful taking possession and transportation to a different location of another person’s property with the intention of permanently depriving the rightful owner of possession of said property. Modern state statutes vary from each other and from common law in different ways, each with its own distinct formulation. In Florida, larceny is covered by a general theft statute, which is cited above in the section on theft. Prior to this legislation, however, Florida recognized larceny as a distinct crime that was defined similarly to the common law. Below is a case from 1938 regarding a conviction of grand larceny.

Fitch v. State, 135 Fla. 361, 185 So. 435 (1938)

Procedural History: The plaintiff in error, Ira Fitch, was convicted of grand larceny, that is, the felonious taking and carrying away of $197 in United States currency, the property of C. W. Gilbert. The accused was a janitor and night watchman in Gilbert's bar, known as 'The Palace Bar,' in Fort Lauderdale. Fitch brings error.

Issue(s): It is contended, first, that the evidence was not sufficient to show the defendant's guilt of any offense; and, secondly, that if it showed any offense whatever, it was the offense of embezzlement rather than larceny.

Facts: The Palace Bar, of which Gilbert was the proprietor, was found by police officers early one morning to have been robbed the night before. Money to the amount of $197, which Gilbert had checked over the night before with the defendant and in defendant's presence and left in the money drawer of a cash register, had been taken. Slot machines were lying on the floor, but unopened. Defendant Fitch was found by the police in a storage room, part of which was used as an ice chest, the door of which had been latched from the outside. He claimed that he had been locked in there by the person or persons (he first said there were two men) who had robbed the cash drawer. He later said that 'Micky' Wolf had taken the money and locked him up, and had threatened to come back and kill Fitch if he ever told on him. Gilbert said that when he arrived on the scene, Fitch said: 'Get Micky Wolf and we will talk.' Wolf, who had a bad criminal record, was located in New York and arrested. Wolf testified on the trial of the case against defendant Fitch that Fitch had initiated and committed the larceny and had gotten Wolf who had been living for a time in Fitch's home, and who arrived at the store after Fitch had taken the money and thrown down the Slot Machines to help him by locking him up, and agreed to pay Wolf $46 which he owed him out of the money taken, and that after Fitch had taken the money he gave Wolf the $46 and Wolf locked Fitch in the Storage room at Fitch's request, in accordance with their agreement. Defendant Fitch denied this, and testified that Wolf had secured admittance into the barroom by a ruse and had locked defendant in the storage room, and that Wolf was the one who took the money; that if he, Fitch, had ever intended to rob the cash drawer he would not have selected a night when there was only $197 in it, because Gilbert frequently left from $700 to $1200 in there over night, when the money in the slot machines was included. Wolf testified that he had pleaded guilty to aiding and abetting Fitch in the commission of the larceny and had been sentenced to two years in the penitentiary, but that Fitch was the principal actor and was the one who took the money. No money was found by the officers in Fitch's possession. In spite of Wolf's bad record as a burglar, which he freely admitted, the jury saw fit to believe him, and found Fitch guilty as charged. The trial judge denied motion for new trial.

Holding: Affirmed.

Opinion: BROWN, Justice.

The jury had the witnesses before them and saw their demeanor on the stand. When there is a conflict in the testimony, the jury, who are the judges of the credibility of witnesses, must solve the problem, and where a case turns upon that question an appellate court is rarely, if ever, authorized to disturb the jury's finding. We do not think we should do so in this case, which we have briefly outlined above, omitting some details, such as the evidence of defendant's intimacy with Wolf, which may have influenced the jury to find as they did.

Nor can we accede to the contention that the state's evidence in this case, even if believed, would only authorize and support a prosecution for embezzlement. As we understand this evidence, it tends strongly to show that the defendant, in his capacity as janitor and night watchman, merely had custody of the property in the store, including the money which was taken. He had no duties to perform with reference to said money other than those of a bare custodian. The general rule in most jurisdictions is that one who merely has the bare custody of money or personal property, the legal possession remaining in the owner, may be guilty of larceny, if he had a felonious intent either at the time he acquired such custody, or afterwards, if, with such felonious intent, he taken it and converts it to his own use, regardless of the fact that the custody may have been lawfully acquired; that in such case he need not have had the felonious intent when he acquired the custody. [See 37 C.J. 776; *Holbrook v. State*, 107 Ala. 154, 18 So. 109, 54 Am.St.Rep. 65, and authorities cited.] Manifestly, if the owner in this case had known that this defendant was going to steal the property or convert it to his own use, he certainly would not have left him in custody of the premises and given him the key to the place. Indeed, it does not appear that Fitch had any right to take the money out of the cash drawer for any purpose, except perhaps to do so if necessary to preserve it for Gilbert, the owner. The evidence shows that the money was left in the cash drawer as had been Gilbert's custom, for the bar tender's use the following day in making change.

Larceny at common law may be defined as the felonious taking and carrying away of the personal property of another, which the trespasser knows to belong to another, without the owner's consent, and with the intent permanently to deprive the owner of his property therein, and convert it to the use of the taker or of some person other than the owner. [See *Driggers v. State*, 96 Fla. 232, 118 So. 20; 36 C.J. 734; 17 R.C.L. 4.] Our statute does not attempt to define it. [See 7223, C.G.L.] The asportation may be completed by even the slightest removal of the thing stolen from its original position. [*Driggers v. State*, supra.]

The general rule is that one who is in lawful possession of the goods or the money of another cannot commit larceny by feloniously converting them to his own use for the reason that larceny, being a criminal trespass upon the right of possession, cannot be committed by one who, being invested with that right, is consequently incapable of trespassing upon it. [36 C.J. 774] However, as has frequently been held in this State, a person in the possession of the goods of another may nevertheless become guilty of larceny at common law by converting them to his own use, if the felonious intent so to convert them existed at the time he acquired the possession, for the felonious intent made his acquirement of the possession unlawful and the subsequent conversion is consequently a trespass upon the rights of the owner. As our own decisions usually express it, one who obtains possession of personal property by a trick, device or fraud with intent to appropriate the property to his own use, the owner or custodian intending to part with possession only, commits larceny when he subsequently appropriates it. [*Finlayson v. State*, 46 Fla. 81, 35 So. 203; *Wilson v. State*, 47 Fla. 118, 36 So. 580; *Synes v. State*, 78 Fla. 167, 82 So. 778]

In *Finlayson v. State*, supra, it was held that a bailee, who has lawful possession, cannot commit larceny, provided his possession was lawfully obtained and without any intent to appropriate the property to his own use. In that case, the plaintiff was convicted of the crime of larceny, and the judgment was affirmed. In that case this court said:

> There was evidence tending to show that the accused fraudulently induced two negroes to deposit their money with him for safe-keeping over night, intending from the beginning to appropriate it to his own use. It cannot be said, therefore, that the owners 'consented' to part with the possession of their money. There was no conventio mentium, the one party intending only to part with the bare possession, the other intending to acquire the property in the thing itself; the consent was not as broad as the taking. The fraud vitiated whatever right might otherwise have been acquired by virtue of the apparent voluntary parting with the possession by those rightfully entitled thereto. Such act was at the common law larceny, and no statute was needed to make it a crime; nor does it come within our embezzlement act. The prime object of this statute is to make criminal certain acts that do not come within the common-law definition of larceny, not those acts that were theretofore punishable as such. Taking this view of the object of the statute, we will not hold an act theretofore larcenous to be embraced within its provisions, in the absence of clear words to that effect. Such is not the case before us. The authorities sustaining the charge are abundant.' (Citing authorities.)

It will be observed that the opinion in that case says that this court will not hold an act which constituted larceny at common law to be embraced within the provisions of the embezzlement statute in the absence of clear words to that effect.

In the case of *Jarvis v. State*, [73 Fla. 652, 74 So. 796], it was held that one who obtains the possession of property by trick, device or fraud, with the intent to appropriate the same to his own use, the owner intending to part with the possession only, commits larceny when he subsequently appropriates it; that 'the consent of the owner in surrendering possession of the property must be as broad as the taking.' [To like effect see *Murray v. State*, 93 Fla. 706, 112 So. 575.]

But there is a strong line of authorities in support of the proposition that at common law one who has merely the custody of a chattel, as distinguished from its possession, is guilty of larceny, if, with felonious intent, he converts it to his own use, regardless of the fact whether the custody was acquired lawfully or unlawfully, or whether the intent to convert was formed at the time the custody was acquired or afterwards. [See 36 C.J. 776, citing in the notes among other cases the case of *Washington v. State*, 106 Ala. 58, 17 So. 546, and *Holbrook v. State*, 107 Ala. 154, 18 So. 109, 54 Am.St.Rep. 65.]

As our statutes on embezzlement provide that the punishment shall be the same as if the accused had been convicted of larceny, it would appear that where the same act or transaction constitutes both larceny and embezzlement, the prosecuting officer may elect as to which of the two crimes the accused shall be prosecuted for.

Section 7247, C.G.L., provides that if any officer, agent, clerk, servant, or member of any incorporated company, or if any clerk, agent or servant of any person, embezzles or fraudulently disposes of or converts to his own use anything of value which has been entrusted to him, or has come into his possession, case, custody or control by reason of his office or employment, shall be punished as if he had been convicted of larceny.

And section 7244, C.G.L., extends the crime of embezzlement common carriers, bailees, etc., 'or any other person with whom any property which may be the subject of larceny is entrusted or deposited by another.'

As far back as *Tipton v. State*, [53 Fla. 69, 43 So. 684], this court said that 'the gist of the offense of embezzlement * * * is a breach of trust.' In one of our neighboring states the crime of embezzlement is denominated 'larceny after trust.' This thought, that embezzlement fundamentally constitutes a breach of trust of some sort, within the relationships designated in the statutes, has been repeated in subsequent decisions. [See *Skipper v. State*, 114 Fla. 312, 153 So. 853.] In the case of *Neal v. State*, [55 Fla. 140, 46 So. 845, 19 L.R.A.,N.S., 371], which was decided by a divided court, Justices Taylor and Parkhill vigorously dissenting, this court held that:

> Evidence that a laundress, upon discovering in a clothes' basket committed to her a bag of money belonging to her employer accidentally placed therein, recognized her duty to return the bag to its owner, but subsequently and before so returning if fraudulently converted the money, will support a conviction of embezzlement under Gen.St. 1906, section 3311, condemning the act by a servant as to anything of value which has come into his possession, care, custody or control by reason of his employment.'

The dissenting Justices thought the facts showed larceny and not embezzlement.

And in *Dunkle v. State*, [98 Fla. 985, 124 So. 725], the third headnote reads as follows:

> 3. To make out a case of 'embezzlement' under the statutes, it is necessary to show, first that the thing converted or appropriated is of such a character as to be within the protection of the statute; second that it belonged to the master or principal, or some one other than accused; third that it was in the possession of the accused at the time of conversion, so that no trespass was committed in taking it; fourth, that accused occupied the designated fiduciary relation, and that the property came into his possession and was held by him by virtue of his employment or office; fifth, that his dealing with the property constituted a conversion or appropriation of the same; and, sixth, that there was a fraudulent intent to deprive the owner of his property.

In this general connection see, also, *Groover v. State*, [82 Fla. 727, 90 So. 473, 26 A.L.R. 373]; *Bussart v. State*, [128 Fla. 891, 176 So. 32]; *Rosenblum v. State*, [19 Ala.App. 442, 98 So. 216]. And in *Murray v. State*, supra, it was said by this Court that:

> The chief distinction between larceny and embezzlement lies in the character of the acquirement of possession of the property.

It would appear from the above review of authorities that if the same set of facts which we have before us in this case, if believed by the jury, were sufficient to constitute both larceny at common law and embezzlement under our statutes (which latter offence is by the way a statutory offence unknown to the common law), the plaintiff in error here could have been prosecuted for either offence, though we are inclined to think that under the facts of this case the jury would have been authorized to find, as they evidently did, that the defendant was a bare servant or custodian and that there was a trespass in the taking and hence the offence was really larceny.

There is no evidence in this case which indicates that the owner of this money voluntarily parted with the possession or the title thereto. The money was in the cash drawer in the owner's store, where he had left it, and hence was still in this possession, and the felonious taking of it was a crime against his possession, which the custodian of the premises had no right to commit. If there was a trespass in the taking, it would be larceny rather than embezzlement, which latter crime generally involves a violation of relations of a fiduciary character. [9 R.C.L. 1264]

Our conclusion is that there is evidence in this case sufficient to sustain the verdict upon the charge of larceny, and that such charge is more appropriate to the facts of the case than would have been a charge of embezzlement. For the reasons above pointed out, the judgment is hereby affirmed.

Critical Thinking Question(s): If embezzlement carries with it a greater sentence, why would the defendant argue against a theft conviction and open himself up to a conviction for embezzlement? What element exists in embezzlement that is not necessary for theft? Do you believe that embezzlement should carry a greater sentence?

III. Embezzlement:

Section Introduction: It is sometimes the case that a person can unlawfully possess property without having to use unlawful means of attaining said property. If a defendant gained possession of another person's property through legal means and then later unlawfully converted the property into their own control, they are guilty of the crime of embezzlement. The Florida statute below defines the penalty for embezzlement, which is encompassed by the general theft statute cited earlier in the chapter. In this section you will also find Florida case law that specifically addresses the issue of embezzlement.

Florida statute, sec. 812.081 - Trade secrets; theft, embezzlement; unlawful copying; definitions; penalty

(1) As used in this section:

(a) "Article" means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole

or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype model, photograph, microorganism, blueprint, map, or copy thereof.
(b) "Representing" means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.
(c) "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) "Copy" means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in sec. 775.082 or sec. 775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied.

***State v. Siegel*, 778 So.2d 426 (App. 5 Dist., 2001)**

Procedural History: Former student, who was charged with grand theft for refusing to return lawfully possessed computer when university requested its return, brought motion for rehearing and sworn motion to dismiss. The Circuit Court, Orange County, Anthony H. Johnson, J., granted motion. State appealed. The District Court of Appeal, Thompson, C.J., held that theft by embezzlement does not require criminal intent be

formed at time of taking. The state timely appeals the trial court's order granting David Paul Siegel's motion for rehearing and sworn motion to dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4).

Issue(s): At issue here is an order on a Florida Rule of Criminal Procedure 3.190(c)(4) sworn motion to dismiss on basis that the defendant did not have intent to deprive at time that he received the property.

Facts: Siegel was charged by Information with grand theft. This charge followed Siegel's expulsion from the University of Central Florida (UCF) for submitting fraudulent financial vouchers as a member of student government. The Information charged that Siegel violated Fla. Stat., section 812.014(2)(c)(2):

> [D]id ... knowingly obtain or use, or endeavor to obtain or use a computer and computer equipment, of a value of THREE HUNDRED DOLLARS ($300.00) or more, the property of another, to-wit: UNIVERSITY OF CENTRAL FLORIDA or MARY BETH LIBERTO or SHARON EKERN, as owner or custodian thereof, with the intent to temporarily or permanently deprive said owner or custodian of a right to the property or a benefit therefrom, or to appropriate the property to the defendant's own use or to the use of a person not entitled thereto.

Both sides agree that Siegel was allowed to use, as part of his responsibilities as a member of the UCF student government, an IBM Thinkpad 755 CDV (laptop computer) owned by UCF. At some point, UCF officials demanded that Siegel return the laptop computer pursuant to UCF Student Government Laptop Policy. Suffice it to say, Siegel refused to return the computer and, among other things, this criminal case resulted from that refusal.

Holding: Reversed.

Opinion: THOMPSON, C.J.

At issue here is an order on a Florida Rule of Criminal Procedure 3.190(c)(4) sworn motion to dismiss. This court has previously held that: [T]his procedure is no substitute for a trial, and if any facts or inferences therefrom establish a prima facie case against the defendant, it should not be granted. [*State v. Upton*, 392 So.2d 1013 (Fla. 5th DCA 1981); *State v. Cramer*, 383 So.2d 254 (Fla. 2d DCA 1980); *State v. Stewart*, 404 So.2d 185 (Fla. 5th DCA 1981)] Recently, the Florida Supreme Court reiterated the purpose of this rule:

> Pursuant to rule 3.190(c)(4), a defendant may move for dismissal alleging in the motion that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Under this rule it is the defendant's burden to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The purpose of this procedure is to avoid a

> trial when there are no material facts genuinely in issue. [See *State v. Kalogeropolous*, 758 So.2d 110, 111 (Fla.2000)]

The trial court dismissed this case, according to the record, because when Siegel first received the laptop computer, he did not have the criminal intent to deprive UCF of the computer. The theft statute Siegel is charged under provides in part:

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to 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 from the property. [Fla.Stat., section 812.014(1)(a)]. In defining "obtains or uses," the theft chapter provides in pertinent part:
>
> > "Obtains or uses" means any manner of:
> >
> > > [1] [c]onduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception.... [Fla. Stat., section 812.012(2)(d)1]

In certain types of theft cases, like larceny or false pretenses, criminal intent must be formed at the time of the original taking. [See *Szilagyi v. State*, 564 So.2d 644 (Fla. 4th DCA 1990)(holding that when the crime is larceny, the state must prove that the defendant knowingly obtained or endeavored to obtain the property of another, with intent to deprive the owner of property, and state must prove that the felonious intent existed at the time of taking); see also *Crawford v. State*, 453 So.2d 1139, 1142 (Fla. 2d DCA 1984); *Adams v. State*, 443 So.2d 1003, 1006-07 (Fla. 2d DCA 1983)]

Under the "Florida Anti-Fencing Act," however, theft is more than just larceny or theft by false pretenses. Theft also includes the common-law crime of embezzlement. [Fla.Stat., section 812.012(2)(d)1] Unlike the crimes of larceny and false pretenses, embezzlement does not require that the defendant have criminal intent when he obtains the property in question. [See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, section 8.6(a) (Second Ed.1986)] The alleged facts, if proven, fit the crime formerly known as embezzlement and now known as theft under the omnibus theft statute. [Cf. *Denson v. Stack*, 997 F.2d 1356, 1362 (11th Cir.1993)("under Florida law, a conversion occurs in violation of the criminal theft statute when a person who has the right to possession of property demands its return, and the property is not relinquished")]

Critical Thinking Question(s): Since the defendant came into possession of the property lawfully, should he not be charged with something other than theft or embezzlement? Each one of those crimes appears to contain the element of “intent at the time of the taking.” How would you redefine the statute to include such an incident?

IV. False Pretenses

Section Introduction: In some cases a defendant may make use of false pretenses to obtain the property of another. This can include making false statements regarding one's financial situation as well as other misrepresentations like impersonation of another individual. The Florida statutes below define various ways in which someone may use false pretense to obtain property, as well as how that person may be punished. Below this you will find a Florida case exemplifying the principle of false pretense.

Florida statute, sec. 817.02 - Obtaining property by false personation

> Whoever falsely personates or represents another, and in such assumed character receives any property intended to be delivered to the party so personated, with intent to convert the same to his or her own use, shall be punished as if he or she had been convicted of larceny.

Florida statutes, sec. 817.025 - Home or private business invasion by false personation; penalties

> A person who obtains access to a home or private business by false personation or representation, with the intent to commit a felony, commits a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084. If such act results in serious injury or death, it is a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Florida statutes, sec. 817.03 - Making false statement to obtain property or credit

> Any person who shall make or cause to be made any false statement, in writing, relating to his or her financial condition, assets or liabilities, or relating to the financial condition, assets or liabilities of any firm or corporation in which such person has a financial interest, or for whom he or she is acting, with a fraudulent intent of obtaining credit, goods, money or other property, and shall by such false statement obtain credit, goods, money or other property, shall be guilty of a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.

***Rosengarten v. State*, 171 So.2d 591 (App. 2 Dist., 1965)**

Procedural History: Prosecution for grand larceny. The Circuit Court for Pinellas County, John U. Bird, J., entered judgment against defendant on guilty verdict, and defendant appealed. The District Court of Appeal, Smith, C. J., held that evidence was sufficient to support grand larceny conviction of defendant who caused individual to part with $25,000 as loan to defendant's corporation in reliance on defendant's misrepresentation that company-owned mortgages taken by individual as security for loan were all first mortgages when defendant knew some were not first mortgages.

Issue(s): The defendant on appeal raises two questions; one relates to whether or not the State proved the prosecution had been commenced within two years from the date of the alleged commission of the crime and the other relates to the sufficiency of the evidence to support a conviction of grand larceny.

Facts: Theodore Rosengarten was informed against under Fla.Stat. <section> 811.021, F.S.A. and was found guilty of grand larceny in a trial by jury. The defendant was president and principle shareholder of a corporation involved in the construction and improvement of homes, their sale and financing and refinancing by mortgages. Maurice Krull loaned the corporation $25,000 and took as security certain company-owned mortgages represented to him by the defendant as being first mortgages. The defendant knew at the time the mortgages were assigned that several of them were in fact not first mortgages. The corporation collected on the mortgages and/or made payments to Krull and there was much shuffling back and forth of mortgages between Krull and the corporation until the corporation was placed in receivership. There was no evidence showing that the defendant personally received any of the funds loaned to the corporation or that he had exclusive access to such funds which were placed in the corporation's bank account. Neither does the record reveal evidence sufficient to prove that Krull would suffer a permanent loss in that he was still possessed of certain mortgages at the time of trial.

Holding: Affirmed.

Opinion: SMITH, Chief Judge.

The record shows the loan transaction occurred between the 1st and 4th day of April, 1961. The information was filed May 17, 1963 and alleged that a warrant was issued by a Justice of the Peace in Pinellas County on October 16, 1962 and was delivered to the sheriff of that county October 22, 1962. This warrant appears in the record as State's Exhibit #18 and is so marked. The appellant's contention is that the warrant was introduced after the State's case was closed and that the court erred in re-opening the case for this purpose and in admitting the warrant over the objection of the defendant that it was not a self-proving document. Since the record evidences nothing to substantiate the above contentions, these points on appeal fall into the rule that reception of evidence to which no objection was made cannot be construed to constitute a ruling of the court which may be reviewed by appeal. By the appearance of the warrant in the record, marked as it is, this court must accept the fact that it is what it purports to be: State's Exhibit #18 filed in evidence without objection. “Unless the record shows to the contrary, it shall be presumed, upon appellate proceedings, that the record transmitted to the Court contains all proceedings in the lower court material to the points presented for decision in the Court. [Fla.App.R. 3.6(l), 31 F.S.A.]

In the light of the foregoing we consider the defendant's contentions that the State failed to prove that this prosecution began within two years of the date of the alleged crime. State's Exhibit #18 is the warrant alleged in the information. It is dated October 16, 1962 and is directed to the sheriff or any constable of the county. It bears a time stamp “received 62 Oct 22 P M 4:21 Pinellas County Sheriff Don Genung” and it contains the endorsement of the Justice of the Peace to the effect that on November 2, 1962 preliminary hearing was waived and the defendant was bound over to Circuit Court under $1500 bond. We find that the warrant and the endorsements thereon are sufficient to

prove that this prosecution was commenced within two (2) years from the date of the alleged crime. For the purposes of the statute of limitations, Fla.Stats., section 932.05, a prosecution has been commenced when a warrant has been issued and placed in the hands of a proper officer for execution. [*Dubbs v. Lehman*, 1930, 100 Fla. 799, 130 So. 36, and *State v. Emanuel*, Fla.App.1963, 153 So.2d 839]

In presenting his points on appeal attacking the sufficiency of the evidence to sustain the conviction of grand larceny, the defendant maintains: (1) the facts fail to show a felonious intent; (2) the evidence fails to show that the defendant received the funds nor that he had sole access to the corporate account in which they were deposited; and (3) the State failed to prove that Krull will sustain any permanent loss. These contentions bring us face to face with the intent and purpose of Fla.Stat., section 811.021 enacted in 1951, and which has been referred to as the 'Consolidated' Larceny Statute. [9 U.Fla.L.R. 209 (1956)] The pertinent part of the statute reads:

> 811.021 Larceny defined; penalties; sufficiency of indictment; information or warrant.
>
> (1) A person who, with intent to deprive or defraud the true owner of his property or of the sue and benefit thereof, of, or to appropriate the same to the use of the taker, or of any other person shall be deemed guilty of grand larceny.

After the passage of Fla.Stat., section 811.021, there existed concurrently Fla.Stat., section 817.01, which defined the crime of obtaining property by false pretenses. The Supreme Court cleared up any confusion between the two statutes, however, in its ruling in *Anglin v. Mayo*, [Fla.1956, 88 So.2d 198] to the effect that Fla.Stat., section 817.01, had been superseded by Fla.Stat., section 811.021, and the crime of false pretenses was encompassed therein. Subsequent to this decision, the legislature repealed Fla.Stat., section 817 .01. This does not mean, however, that the crime of obtaining property by false pretenses was abandoned, but only that it was merged as one of the theft offenses contemplated in Fla.Stat., section 811.021.

Therefore this court must look to the record to see if the evidence contained therein would support a conviction for any of the alternative theft crimes embraced within the statute under the cumulative name of 'Larceny.' We hold the evidence clearly supports a finding of grand larceny by false pretenses and accordingly we affirm.

The Model Penal Code of the American Law Institute, 1962 Revision, and several states which have enacted 'merger' statutes similar to Florida's have substituted the word 'theft' in the title for the word 'larceny' which the Florida statute, perhaps unfortunately, retains. This substitution is prompted by the fact that larceny, classicly defined as 'the stealing, taking and carrying away of personal property of another with intent to permanently deprive the owner thereof' is only one of the alternative crimes embraced within the statute. These states refer to convictions thereunder as grand theft by 'larceny,' grand theft by 'false pretenses,' grand theft by 'embezzlement' etc. But since our statute still retains the word 'larceny' we must live with two conceptions of the term: the historic

narrow one defined above and the broad encompassing meaning established by the statute.

The Model Penal Code, supra, which has served as the pattern for most of these statutes provides in its Article 223 entitled 'Theft and Related Offenses' the following:

> (1) Consolidation of Theft Offenses: Conduct denominated theft in this article constitutes a single offense embracing the separate offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or surprise.

A Federal Court in considering the statute like the one we deal with here said:

> The obvious purpose of this [statute] is to avoid the pitfalls of pleading where a defendant might escape a conviction for one offense by proof he had committed another. [*Crabb v. Zerbst*, 5 Cir. 1938, 99 F.2d 562]

In explaining its consolidated statute the California Court said:

> The crime of grand theft is complete when a man takes property not his own with the intent to take it and a defendant may be convicted of grand theft upon proof of facts establishing (a) embezzlement, (b) larceny or (c) obtaining property by false pretenses. It is likewise established that where criminal acts may constitute one of two or three forms of theft, depending upon how the jury views the evidence, and the facts so warrant, the verdict of conviction can be sustained on either theory. [*People v. Corenevsky*, Cal.1954, 267 P.2d 1048]

In a recent ruling under facts similar to the ones in the present case the Supreme Court of Arizona held:

> [A] conviction for obtaining money by false pretenses could be based on transaction whereby defendants obtained money from victims in return for notes and mortgages by misrepresentation that mortgages were first mortgages on improved property, even though defendants remained liable on notes and asserted an intention to repay. There is no requirement that the victim suffer pecuniary loss so long as he has parted with his property. [*State v. Mills*, Ariz.1964, 396 P.2d 5]

A complete loss of property need not be shown to support a charge of obtaining money under false pretenses. [*People v. Jones*, 1950, 36 Cal.2d 373, 224 P.2d 353] A man is defrauded if, by intentionally false representations of fact he has been induced to make a

donation, or has been induced to pay money or to deliver property upon receipt of something quite different from what he understood he was getting or has been induced to lend money upon the strength of a security which is not what it is represented to be. [Perkins on Criminal Law, (1957), P. 268]

In the case at hand the record reveals an admission by the defendant that at the time of the transaction he knew some of the mortgages were not first mortgages even though represented as such by him. Where property is obtained by an alleged false pretense, the falsity of the representation, if established, will raise a presumption of fact from which a jury could infer an intent to defraud. [2 Am.Jur., False Representations, Sec. 105]

Accepting the conclusion that the crime of obtaining property by false pretenses is included as one of the alternative larcenies under Fla.Stat., section 811.021, we hold that the evidence in this case is sufficient to support the conviction in that it showed a parting with personal property in reliance on a misrepresentation made with knowledge of its falsity from which an intent to defraud could be reasonably inferred. Evidence of defendant's efforts to pay back the money and the failure of the State to prove inevitable loss to the victim do not require reversal. [*State v. Mills*, supra.]

We do not overlook defendant's reliance on the cases of *O'Brien v . State*, [Fla.App.1961, 128 So.2d 621] and *O'Brien v. State*, [128 So.2d 630] as authority for his contention that there must be a showing of appropriation of the property by the defendant to his own or the use of someone else. In the *O'Brien* cases the money was deposited in a company bank account and there was no showing the defendant withdrew the money or had sole access to the bank account. This case is not applicable to the decision we consider here because there was no evidence of false pretenses and the evidence failed to sustain a conviction of larceny or embezzlement. Had O'Brien taken the money under false pretenses with an intent to defraud and then deposited it in the bank the result would be the same as here, and a showing of appropriation would not have been necessary.

In *Mehr v. State*, [Fla.1952, 59 So.2d 259], a conviction for grand larceny was reversed because of insufficient evidence, the State having failed to carry the burden of establishing misrepresentation beyond a reasonable doubt. In our case the defendant himself admitted the misrepresentation.

In concluding, we must also reject defendant's contention that our decision in *Rosengarten v. State*, [Fla.App.1964, 166 So.2d 183], reversing a prior and separate conviction for grand larceny, requires that we reverse the present conviction. The prior case did not establish facts showing the obtaining of property by false pretenses and the facts relied upon by the State for a conviction were squarely within the original narrow definition of larceny which existed prior to the enactment of Fla.Stats., section 811.021. As previously noted this definition continues to exist after the enactment of the 1951 statute not exclusively but together with the alternative larcenies there included. In short, none of the alternative larcenies were involved in the prior *Rosengarten* decision and neither were these alternatives involved in the case of *American Fire & Casualty Company v. Sunny South Aircraft Service*, [Fla.1963, 151 So.2d 276].

Critical Thinking Question(s): Should the State be required to state the method of offense with such specificity and make the fine distinctions that each form of the offense of theft incorporate? Lacking specification, does the defendant have proper notice upon which to defend the claim against him? Note that it would be different defending theft and embezzlement, etc.

V. Receipt of Stolen Property:

Section Introduction: If someone does not personally carry out an act of theft but nevertheless comes to possess property that was unlawfully obtained through theft, they can be held accountable for the receipt of that stolen property. This crime also requires that the individual be aware, or be in the position that they should be aware, of the fact that the property is stolen. Here you will have the opportunity to read Florida statute relating to such dealings in stolen property, as well as read a Florida case on the subject.

Florida statute, sec. 812.019 - Dealing in stolen property

> (1) Any person who traffics in, or endeavors to traffic in, property that he or she knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in sec. 775.082, sec.775.083, and sec. 775.084.
>
> (2) Any person who initiates, organizes, plans, finances, directs, manages, or supervises the theft of property and traffics in such stolen property shall be guilty of a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, and sec. 775.084.

Capaldo v. State, 679 So.2d 717 (1996)

Procedural History: Defendant was convicted in the Circuit Court, Volusia County, Uriel Blount, Jr., Senior Judge, of trafficking or endeavoring to traffic in stolen property, and he appealed. The District Court of Appeal affirmed, [654 So.2d 1207], and question was certified. The Supreme Court, Harding, J., held that: (1) it is necessary to prove existence of actual property in order to convict under statute prohibiting trafficking or endeavoring to traffic in stolen property, and (2) evidence that undercover police officer offered to sell defendant imaginary electronics merchandise priced substantially below fair market value was insufficient to establish defendant had requisite and criminal intent necessary to convict defendant of endeavoring to traffic in stolen property.

Issue(s): Is it necessary to prove the existence of actual property in order to convict under Florida Statues, section 812.019(1) (1993)?

Facts: This case grew out of a law enforcement investigation concerning suspected dealing in stolen property by several individuals. One of the individuals who was the subject of that investigation operated a pawn shop. Petitioner Thomas V. Capaldo

happened into that pawn shop while an undercover officer was attempting to set up a sting operation. The pawn shop operator introduced Capaldo to the undercover officer and later told the officer that Capaldo was "cool." The next day the officer showed Capaldo electronics merchandise at a warehouse and represented that this was the type of merchandise that the officer might be able to sell him at a later date. However, the officer stated that the sample merchandise was not available as it had already been "sold." Capaldo expressed his desire to buy similar electronics in the future and stated that he could be contacted through the pawn shop operator. [*Capaldo*, 654 So.2d at 1207]

The officer subsequently contacted Capaldo through the pawn shop operator and sold Capaldo a shipment of cigarettes at a greatly reduced price. After that transaction, the officer and Capaldo agreed that the pawn shop operator would no longer be included in their dealings. Shortly thereafter, the officer called Capaldo and informed him that electronics merchandise similar to that he had been shown was again available. [Id. at 1207-08] The officer told Capaldo that he had moved his place of business, but he would lead him there after they met in a park. The officer had no actual electronics merchandise, stolen or otherwise. When Capaldo arrived at the park, he was arrested for violating section 812.019(1), which prohibits trafficking or endeavoring to traffic in stolen property.

Capaldo was also charged with Racketeer Influenced and Corrupt Organization (RICO) Act violations and conspiracy violations along with several co-defendants and with other counts of dealing in stolen property. Capaldo received a judgment of acquittal as to the RICO and conspiracy charges and was also granted a severance from the co-defendants on the remaining stolen property counts. Capaldo was ultimately acquitted on the count of dealing in stolen property that was based upon the cigarette transaction, but was found guilty of a second count stemming from the imaginary electronics merchandise.

On appeal, the district court affirmed the conviction on the basis of its previous decision in *Lamar v. Keesee*, [512 So.2d 1066 (Fla. 5th DCA 1987)], which held that there need not be stolen property to sustain a conviction under section 812.019(1). [*Capaldo*, 654 So.2d at 1208] However, the district court also noted that in reaching this conclusion in Lamar it had "distinguish[ed] between trafficking in stolen property and endeavoring to traffic in stolen property as though these [were] two separate offenses under the same statute." [Id. at 1209] The court recognized that this ruling could be inconsistent with this Court's holdings in *State v. Sykes*, [434 So.2d 325 (Fla.1983) (finding that the theft statute containing similar statutory language revealed a legislative intent to define theft as including attempt to commit theft)], and *State v. Tomas*, 370 So.2d 1142 (Fla.1979) (upholding constitutionality of section 812.019(1)). [Id.] Thus, the district court certified the question to this Court. [Id.]

Holding: Affirmed in part and reversed in part. We reverse the conviction and sentence for grand theft since that is the least serious offense, and affirm the conviction and sentence for dealing in stolen property. Appellant was sentenced as a habitual violent felony offender. Our reversal of his grand theft conviction and sentence has no effect on the remainder of his sentences.

Opinion: HARDING, Justice.

We have for review *Capaldo v. State*, [654 So.2d 1207, 1209 (Fla. 5th DCA 1995)], in which the Fifth District Court of Appeal certified the following question to be of great public importance: Is it necessary to prove the existence of stolen property in order to convict under Flroida Statues, section 812.019(1) (1993)? We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. In order to address the issue actually presented in this case, we reword the certified question as follows: Is it necessary to prove the existence of actual property in order to convict under section 812.019(1)? As reworded, we answer the question in the affirmative.

The State acknowledges that there must be some property which forms the basis of a trafficking charge, but asserts that there need not be any actual property where the charge is endeavoring to traffic in stolen property. In construing statutory language similar to the instant statute, this Court concluded that the words "or endeavors" reveals a legislative intent to define the substantive offense as including the attempt to commit the substantive offense. [See *Sykes*, 434 So.2d at 327 (finding that second-degree grand theft, as defined in section 812.014, included an attempt to commit second-degree grand theft)] Under such circumstances, "[t]he substantive, completed crime is fully proved when an attempt, along with the requisite intent, is established." [Id.] Thus, trafficking and endeavoring to traffic in stolen property have the same elements of proof. Accordingly, we find that there must be some property which forms the basis of either charge.

The legislature has statutorily precluded certain defenses to a prosecution for dealing in stolen property, including where "[p]roperty that was not stolen was offered for sale as stolen property." [Fla. Stat., section 812.028(3), (1995)] Florida courts have consistently upheld convictions for endeavoring to traffic in stolen property without proof that the property was actually stolen. [See *State v. Williams*, 442 So.2d 240 (Fla. 5th DCA 1983) (holding that charge of endeavoring to traffic in stolen property could be sustained where state could not prove that air conditioner was stolen, but defendant told undercover officer that item was "hot," "it's brand new," and "You've got to move this and move it fast."); *State v. Rios*, 409 So.2d 241(Fla. 3d DCA) (holding that information charging defendant with trafficking or endeavoring to traffic in stolen property was not subject to dismissal because property at issue was not stolen but belonged to the municipal police department), review denied, 419 So.2d 1199 (1982); *Padgett v. State*, 378 So.2d 118 (Fla. 1st DCA 1980) (same)] Thus, proof of the stolen character of property is not essential to proof of the offense of "endeavoring to traffic in stolen property."

The statute at issue here provides that "[a]ny person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree." [Fla. Stat., section 812.019(1), (1995)] This Court concluded that the statute was not unconstitutionally overbroad because the terms "traffic," "stolen property," and "endeavor" were defined either by statute or case law, and thus the statute was "sufficiently confined in its applicability so as not to reach conduct that is

essentially innocent." [*Tomas*, 370 So.2d at 1143] We also note that "property" is statutorily defined as "anything of value," including real property and the things affixed or growing on it, tangible or intangible personal property, and services. [Fla. Stat., section 812.012(3) (1995)] Thus, by its very terms, the statute requires that something of value be the subject of the trafficking or endeavoring to traffic.

A person can manifest criminal intent to endeavor to traffic in stolen property even where the property actually has not been the subject of a criminally wrongful taking. For example, the defendant in *Padgett* purchased property from undercover police officers that was not stolen, but the defendant thought the property was stolen when he purchased it. [378 So.2d at 119] Thus, there was no question as to the defendant's intent to purchase "stolen" property; he was just mistaken as to the stolen nature of the property. [Id.]

However, proving the requisite criminal intent becomes problematic when no actual property is at issue. In this case, Capaldo was offered imaginary electronics merchandise at a price substantially below the fair market value, which would give rise to the inference that the property was stolen if not satisfactorily explained. [See Fla. Stat., section 812.022(3) (1995) ("Proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that the property had been stolen.")] Capaldo was arrested for violating section 812.019(1) when he arrived at the park to follow the undercover officer to the imaginary warehouse where the imaginary merchandise was located. Capaldo was never given an opportunity to view or inspect the "property" and determine whether he would in fact purchase it. We have no idea what questions Capaldo would have asked about the electronics merchandise or what explanation the undercover officer would have offered. Perhaps Capaldo would have declined to purchase the merchandise after inspecting it either because there was not adequate indicia of ownership or because he determined that the deal was just too good to be legitimate. Under these circumstances, the requisite criminal intent was not proven and Capaldo's conviction must be vacated.

This case points out the danger of construing section 812.019(1) so that no actual property need be involved: an individual could be convicted for conduct that is essentially innocent in nature. Such a construction would be unconstitutionally vague. [See *Tomas*, 370 So.2d at 1143] For the reasons discussed above, we answer the reworded certified question in the affirmative, quash the decision below, and remand for proceedings consistent with this opinion.

VI. Forgery

Section Introduction: The unlawful counterfeit or alteration of legal documents for the purposes of any fraud or injury is termed forgery. Note that forgery does not require the illegal document to actually be utilized in any way. The act of creating or altering the document, along with the intent to use it for criminal purposes, is enough to satisfy the

definition of this crime. Florida statute and case law specifically addressing the issue of forgery are both found in the section below.

Florida statute, sec. 831.01 – Forgery

> Whoever falsely makes, alters, forges or counterfeits a public record, or a certificate, return or attestation of any clerk or register of a court, public register, notary public, town clerk or any public officer, in relation to a matter wherein such certificate, return or attestation may be received as a legal proof; or a charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange or promissory note, or an order, acquaintance, or discharge for money or other property, or an acceptance of a bill of exchange or promissory note for the payment of money, or any receipt for money, goods or other property, or any passage ticket, pass or other evidence of transportation issued by a common carrier, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Florida Statue, sec. 831.07 - Forging bank bills, checks, drafts, or promissory notes

> Whoever falsely makes, alters, forges, or counterfeits a bank bill, check, draft, or promissory note payable to the bearer thereof, or to the order of any person, issued by an incorporated banking company established in this state, or within the United States, or any foreign province, state, or government, with intent to injure any person, commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Florida statute, sec. 831.18 - Making or possessing instruments for forging bills

> Whoever engraves, makes or amends, or begins to engrave, make or amend, any plate, block, press, or other tool, instrument or implement, or makes or provides any paper or other material, adapted and designed for the making of a false and counterfeit note, certificate, or other bill of credit, purporting to be issued by lawful authority for a debt of this state, or a false or counterfeit note or bill, in the similitude of the notes or bills issued by any bank or banking company established in this state, or within the United States, or in any foreign province, state or government; and whoever has in his or her possession any such plate or block engraved in any part, or any press or other tool, instrument or any paper or other material adapted and designed as aforesaid, with intent to issue the same, or to cause or permit the same to be used in forging or making any such false and counterfeit certificates, bills or notes, shall be punished by imprisonment in the state prison not exceeding 10 years, or by fine not exceeding $1,000.

***Watkins v. State*, 826 So.2d 471 (App. 1 Dist., 2002)**

Procedural History: Defendant was convicted in the Circuit Court, Columbia County, Paul S. Bryan,J., of forgery, uttering a forgery, and petit theft. He appealed. The District

Court of Appeal, Lewis, J., held that evidence was insufficient to prove that defendant acted as principal to forgery.

Issue(s): Appellant argues that the trial court erred in denying his Motion for Judgment of Acquittal on the forgery charge as the State failed to prove the essential elements of the charge.

Facts: Appellant was charged in a three-count amended information with: (1) forgery, (2) uttering a forgery, and (3) petit theft based upon a counterfeit check that had been tendered to a grocery store in Lake City, Florida on March 17, 2000. At trial, the grocery store clerk, Heather Sauls, testified that she remembered cashing three payroll checks for three black males from a "McKinsley Construction" company, which turned out to be nonexistent. One of the checks named the payee as "Kurt Watkins." According to Sauls, she matched the man who tendered the "Kurt Watkins" check with the photograph on his Florida identification card. All three checks were subsequently dishonored by Columbia County Bank and returned.

Sauls testified that one of the men wore a goatee beard and was missing several teeth. When the police later showed Sauls nine facial photographs of possible suspects, Sauls, feeling no hesitation regarding her identification, selected a picture of appellant as one of the men who tendered a counterfeit check. Appellant subsequently testified that he had six or seven missing teeth and had previously worn what most people would consider to be a goatee.

The State's final witness, the investigating officer, testified that he did not submit the counterfeit check to a handwriting expert to compare signatures. On cross-examination, the officer testified that he did not know how the check was printed or what ink was used in the process. Nor did he know where any possible check printing machine was located. The officer also testified that he possessed no knowledge as to who actually counterfeited the check.

The State then rested its case and appellant moved for judgment of acquittal. As to count one, appellant argued that he could not be convicted for forgery because the State failed to present any evidence regarding who actually counterfeited the check. The State, for the first time, argued that even though it was unable to present any evidence of who actually counterfeited the check, appellant was a principal to forgery because he uttered the check, knowing that it was counterfeit. The trial court denied the motion without mentioning the principal issue.

Following the defense's case, the trial court denied appellant's renewal of his Motion for Judgment of Acquittal. The trial court instructed the jury based upon the crimes of forgery, uttering a forgery and petit theft. Over defense counsel's objection, the trial court also instructed the jury that if appellant helped another person commit or attempt to commit a crime, appellant would then be considered a principal and could be treated as if he himself had committed the crime. The jury found appellant guilty on all three counts as charged. On counts one and two, appellant received eighteen months, the sentences to

run concurrently, followed by one year of probation. On count three, the trial court sentenced appellant to time served. This appeal followed.

Holding: Affirmed in part, reversed in part, and remanded.

Opinion: LEWIS, J.

Kurt McRae Watkins, appellant, was convicted of forgery, uttering a forgery, and petit theft. Appellant raises four issues on appeal. He first argues that the trial court erred in denying his Motion for Judgment of Acquittal on the forgery charge as the State failed to prove the essential elements of the charge. We agree and reverse appellant's forgery conviction and sentence and remand to the trial court for further proceedings. We affirm appellant's second, third, and fourth issues without further discussion.

Appellant argues that the trial court erred in denying his Motion for Judgment of Acquittal as to count one. In moving for judgment of acquittal, a defendant admits not only the facts stated in evidence, but also admits every conclusion favorable to the State that the jury might fairly and reasonably infer from such evidence. [*Lynch v. State*, 293 So.2d 44, 45 (Fla.1974)] It is the trial judge's duty to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. [State v. Law, 559 So.2d 187, 189 (Fla.1989)]

Because the decision to grant or deny a motion for judgment of acquittal is not one that calls for the exercise of judicial discretion, this Court reviews such decision under the de novo standard. [*Jones v. State*, 790 So.2d 1194, 1196-97 (Fla. 1st DCA 2001) (en banc)] If the State has presented competent evidence to establish every element of the crime, judgment of acquittal should be denied. [*State v. Williams*, 742 So.2d 509, 511 (Fla. 1st DCA 1999)] The court should not grant a motion for judgment of acquittal unless the evidence, when viewed in a light most favorable to the State, fails to establish a prima facie case of guilt. [Id. (citing Dupree v. State, 705 So.2d 90, 93 (Fla. 4th DCA 1998) (en banc)]

Pursuant to Florida Statutes, section 831.01 (1999), "forgery" is defined as:

> [w]hoever falsely makes, alters, forges or counterfeits a ... promissory note, or an order, acquittance, or discharge for money or other property, or an acceptance of a bill of exchange or promissory note for the payment of money, or any receipt for money, goods or other property ... with intent to injure or defraud any person, shall be guilty of a felony of the third degree....

Thus, the crime of forgery requires the making of a writing that falsely purports to be the writing of another, with the intent to defraud. [*Walters v. State*, 245 So.2d 907, 908 (Fla. 1st DCA 1971); see also *Rushing v. State*, 684 So.2d 856, 857 (Fla. 5th DCA 1996)]

In support of his Motion for Judgment of Acquittal and on appeal, appellant relies upon two of this Court's opinions where we reversed the appellants' forgery convictions because the State failed to produce sufficient evidence to prove that the appellants committed forgery as to stolen checks. [See *Barge v. State*, 747 So.2d 481, 481 (Fla. 1st DCA 2000); see also *Clark v. State*, 737 So.2d 634, 634 (Fla. 1st DCA 1999)] If the State had proceeded only on the forgery charge, instead of then averring that appellant was a principal to such charge, both *Barge* and *Clark* would be controlling because the State failed to present any evidence that appellant, himself, counterfeited the check. However, because the State asserted, subsequent to the close of its case, that appellant was a principal to forgery, the question then becomes whether or not the State offered sufficient evidence to prove that appellant was indeed a principal. Pursuant to Florida Statutes, section 777.011 (1999), a "principal in the first degree" is defined as:

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

To be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. [*Banks v. State*, 790 So.2d 1094, 1098 n. 2 (Fla.2001)]

The State correctly argues on appeal that if an information charges a defendant with a substantive crime, such as forgery, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained. [*State v. Roby*, 246 So.2d 566, 571 (Fla.1971); *Jacobs v. State*, 184 So.2d 711, 715 (Fla. 1st DCA 1966)] However, the State incorrectly argues that it presented sufficient evidence to prove that appellant acted as a principal to forgery. The State called Sauls, the store clerk, a bank vice-president and the investigating officer as witnesses during its case-in-chief. However, none of these witnesses provided any evidence that appellant falsely made, altered, forged or counterfeited the check or that he did some act or said some word that was intended to and did incite or cause another individual to counterfeit the check. Because the State produced no evidence as to who actually counterfeited the check, it based its case for forgery solely upon the evidence that appellant uttered the counterfeit check. Therefore, taking the evidence in a light most favorable to the State, while appellant's conduct in uttering the counterfeit check established a prima facie case of uttering a forgery, this evidence, standing alone, did not establish a prima facie case of the separate and distinct crime of forgery. [See *Norwood v. Mayo*, 74 So.2d 370, 371 (Fla.1954) (holding that forgery and uttering a forgery are two separate and distinct crimes).

Moreover, the State proceeded on the theory that either appellant acted as a principal to another person or to himself in committing the forgery. The State attempted to overcome its lack of evidence by arguing, for the first time in response to appellant's Motion for

Judgment of Acquittal, that simply because appellant uttered the check, he also acted as a principal to forgery. If this Court upheld the State's theory, any defendant found guilty of uttering a forgery would also be guilty as a principal to the separate crime of forgery, contrary to the supreme court's holding in Norwood. As such, because the State presented no evidence that appellant committed the actual forgery or that he acted as a principal to such, we hold that the trial court erred in denying appellant's Motion for Judgment of Acquittal as to count one.

Accordingly, we reverse appellant's forgery conviction and sentence and remand the case to the trial court for further proceedings consistent with this opinion. We affirm in all other respects.

Critical Thinking Question(s): Should someone who utters a check such as in the above case, also be charged with facilitation of the forgery? After all, a check forgery amounts to little if not uttered. How would the state prove the forgery?

VII. Uttering

Section Introduction: Once a crime of forgery has been committed, any person who utilizes the forged documents is guilty of the crime of uttering. Read the section below for specific Florida statutes and case law regarding this crime.

Florida statute, sec. 831.02 - Uttering forged instruments

> Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in sec. 831.01 knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Florida statute, sec. 831.09 - Uttering forged bills, checks, drafts, or notes

> Whoever utters or passes or tenders in payment as true, any such false, altered, forged, or counterfeit note, or any bank bill, check, draft, or promissory note, payable to the bearer thereof or to the order of any person, issued as aforesaid, knowing the same to be false, altered, forged, or counterfeit, with intent to injure or defraud any person, commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

Linn v. State, 921 So.2d 830 (App. 2 Dist., 2006)

Procedural History: Defendant was convicted in the Circuit Court, Manatee County, Charles E. Williams, J., of uttering a forged instrument, and his motion for judgment of acquittal was denied. Defendant appealed.

Issue(s): Jon Linn appeals the circuit court's denial of his motion for judgment of acquittal, following his conviction for uttering a forged instrument. In his trial testimony, Linn explained how he came into possession of the instrument and testified that he did not know it was forged.

Facts: Linn was charged by information with uttering a forged instrument, in contravention of section 831.02, Florida Statutes (2004). The State alleged Linn attempted to cash a forged check for $376.50, drawn from the account of Lester Wagler. At trial, Wagler testified he had been carrying a folded blank check in his wallet and did not realize the check was missing until his bank notified him that someone was attempting to cash the check. Wagler testified he was not certain how or when he lost the check but believed the check had either been stolen from him or had fallen out of his wallet. Wagler identified the phone number and address on the check in question as his own but denied writing a notation for house repairs on the memo line. Wagler also denied writing the amount for $376.50 and denied signing his name on the check. Wagler testified he did not know Linn and had never seen him before.

Elsy Raman, a teller at the Bank of America, testified that on April 15, 2004, Linn presented the check at issue, along with his current driver's license and an expired Bank of America check cashing card containing his picture. Raman testified she had a "gut feeling that something was wrong" so she obtained Linn's thumb print and told Linn to wait while she verified the signature. Raman then looked up Wagler's account to verify the signature. After discovering the signature on the check did not match the signature on file in Wagler's account and after conferring with another teller, Raman unsuccessfully attempted to contact Wagler. Raman then returned to where Linn was waiting, advised him that there was a problem with the check because the signatures did not match, and turned the check, driver's license, and check cashing card over to her supervisor.

Cathy Johnson, the assistant banking center manager, testified that after Raman handed her the items, she confirmed the signatures did not match and called the police. Johnson testified that although she did not speak directly to Linn, she overheard him say that he did not write the check and that someone else wrote it. Johnson testified Linn waited in the bank lobby until he was told the check would not be cashed and his check cashing card would be kept by the bank because his account was closed. Linn subsequently left the bank without the check or the check cashing card.

A Manatee County Sheriff's deputy testified the check was made out to "Jon D. Linn," while Linn's check cashing card bore the name of "Jon D. Linn, II." The deputy testified that an attempt to lift fingerprints off the check and check cashing card was unsuccessful. After the State rested, defense counsel moved for judgment of acquittal arguing the State failed to prove that the check was forged or that Linn knew it was forged. The trial court reserved ruling on the motion.

Linn's mother, Anna Mae Lahay, testified she witnessed her son receive a check as payment for car repairs from a customer who identified himself as Lester Wagler. Lahay provided a description of the customer. Linn testified in his own defense and denied

knowing Wagler. According to Linn's testimony, on April 15, 2004, he received a call from someone inquiring about replacing the CV joints on his car. The person identified himself as Lester Wagler. Linn testified that he has several friends who refer work to him, that the caller probably mentioned who referred him, but that Linn was unable to identify which friend it might have been. After the customer brought the car to Linn's house, Linn purchased the parts, performed the repairs, and then contacted the customer via a cell phone belonging to a person who was with the customer. Linn told the customer he only accepted cash and charged the customer $376.50 for parts and labor. However, upon his return, the customer claimed he only had a check. Linn told him to make it out to "Jon D. Linn."

Linn testified he did not believe the check was forged and he did not ask the customer for identification. When questioned why the check was dated for April 14, 2004, when the repairs were not performed until April 15, 2004, Linn testified he did not know what the correct date was at the time. Linn also testified he did not notice the notation for "house repairs" because he was in a hurry to get to the bank. Linn testified he waited at the bank while the teller verified the signatures and he only left when the bank employees refused to cash the check and refused to provide him with the address on the check. Linn explained that he no longer had a receipt for the car parts because he gave the receipt to the customer due to the lifetime warranty on the parts. Linn also maintained that after he left the bank, he attempted to contact the customer at the cell phone number he previously used but no one answered and the number was disconnected about a week later.

After the defense rested, the State declined to call rebuttal witnesses and defense counsel again moved for judgment of acquittal. In support of the motion for judgment of acquittal, defense counsel argued that there was only circumstantial evidence that Linn knew the check was forged and that the State had "failed to rebut the defendant's hypothesis of innocence." The motion was denied. The jury found Linn guilty of uttering a forged instrument, and defense counsel renewed the motion for judgment of acquittal. That motion was also denied. The circuit court withheld adjudication, sentenced Linn to time served, and imposed a fine. Linn now appeals.

Holding: The District Court of Appeal, Canady, J., held that State failed to present evidence to refute defendant's reasonable hypothesis of innocence that he did not know check he attempted to cash at bank was forged. Reversed and remanded.

Opinion: CANADY, Judge.

Jon Linn appeals the circuit court's denial of his motion for judgment of acquittal, following his conviction for uttering a forged instrument. In his trial testimony, Linn explained how he came into possession of the instrument and testified that he did not know it was forged. Because the State failed to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt, we conclude that the trial court erred in denying the motion for judgment of acquittal.

Florida Statutes, section 831.02 provides that the crime of uttering a forged instrument

has the following elements: (1) uttering and publishing as true a false, forged, or altered instrument; (2) knowing the instrument to be false, altered, forged, or counterfeited; and (3) intending to injure or defraud. "The crime is completed by presentation of the forged instrument for payment, regardless of whether or not the bank actually makes any payment to the defendant." [*Henderson v. State*, 572 So.2d 972, 974 (Fla. 3d DCA 1990)] Under section 831.02, it is not sufficient for the State to show that the defendant *should have known* the instrument was forged. Instead, the State is required to prove the defendant had *actual knowledge* that the check had been forged. Such knowledge may be proved by circumstantial evidence. [See *J.N.W. v. State*, 361 So.2d 826, 826 (Fla. 1st DCA 1978) (holding that "the circumstantial evidence of [defendant's] guilty knowledge was sufficient" to support his conviction for uttering a forged instrument)] Here, the State's case against Linn relied on circumstantial evidence to establish that Linn knew the instrument was forged. The State adduced no direct evidence that Linn had actual knowledge of the forgery.

A motion for judgment of acquittal should be granted only where "the evidence is such that no view which the jury may lawfully take of it favorable to the [State] can be sustained under the law." [*Lynch v. State*, 293 So.2d 44, 45 (Fla.1974)] "[A] special standard of review applies," however, when proof of one or more elements of the offense depends entirely on circumstantial evidence. [*Boyd v. State*, 910 So.2d 167, 180 (Fla.2005)] In such a case, a motion for judgment of acquittal should be granted "if the [S]tate fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." [*State v. Law*, 559 So.2d 187, 188 (Fla.1989)] The State is not required to " 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." [*Id.* at 189] In order to avoid the entry of a judgment of acquittal the State must therefore meet this "threshold burden" of presenting evidence which is inconsistent with the defendant's reasonable hypothesis of innocence. [Id.] "[I]t is for the court to determine, as a threshold matter, whether the [S]tate has been able to produce competent, substantial evidence to contradict the defendant's story. If the [S]tate fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant...." [Id. (quoting Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986)]

Accordingly, where the State relies entirely on circumstantial evidence to establish a defendant's knowledge that an instrument was forged, the defendant's reasonable hypothesis of innocence that he lacked knowledge that the instrument was forged requires the entry of a judgment of acquittal unless the State has presented competent evidence inconsistent with the defendant's theory of events. [See *Heath v. State*, 382 So.2d 391, 392 (Fla. 1st DCA 1980) (holding that State failed to prove defendant knew check had been forged where evidence failed to rebut defendant's story that he sold tent to hitchhiker in return for check); *Lampley v. State*, 214 So.2d 515, 516 (Fla. 3d DCA 1968) (reversing conviction where there was absence of evidence as to how or when check came into defendant's possession, other than his testimony that he found check and was attempting to turn it in rather than cash it, and there was nothing to refute defendant's testimony that he was without knowledge that check was forged)]

In arguing that it produced evidence inconsistent with Linn's hypothesis of innocence, the State points out that Linn's first name – Jon - was spelled correctly on the check, despite its unusual spelling. The State maintains it would be unlikely for someone who did not know Linn to spell his first name correctly and contends that this circumstance shows Linn's guilty knowledge. The State also appears to argue that the incorrect date and notation for house repairs on the check were "red flags" sufficient to prove Linn's knowledge of the forgery. Linn's testimony accounted for all these factors, and the State failed to provide evidence inconsistent with Linn's explanation. Moreover, in the circumstances present there, the correct spelling of Linn's name and the minor error in the date inscribed on the check are wholly insufficient to raise an inference of guilty knowledge. While the inaccurate notation regarding home repairs may have been sufficient to prove that Linn *should have known* the check had been forged, it does not prove Linn actually knew the check had been forged, as is required for Linn to be convicted of violating section 831.02.

Contrary to the State's argument, the fact that Linn stated he did not write the check is not inconsistent with his hypothesis of innocence - rather, it supports it. Notably, the statement was made after Linn was notified there was a problem with the check. We have previously held that a defendant's statement disclaiming responsibility did not constitute proof of his knowledge. [See *Woods v. State*, 765 So.2d 255, 257 (Fla. 2d DCA 2000)] There is no basis for applying a different standard to Linn. Although the State points to other factors, such as Linn's inability to say who referred the customer, his inability to provide a cell phone number, and his inability to provide a receipt for the car parts, Linn provided reasonable explanations for each of these factors which were consistent with his hypothesis of innocence. And the State presented no evidence that was inconsistent with Linn's explanation.

We do not agree with the dissent's characterization of Linn's hypothesis of innocence as "not reasonable." It is a common occurrence for businesses to innocently receive forged checks from customers. Linn's defense was that he was a victim of such an occurrence. The uncontradicted defense is undeniably reasonable because such events undeniably occur with great regularity. All the circumstances cited by the dissent to show the supposed unreasonableness of Linn's hypothesis of innocence suggest nothing more than that Linn had a less than perfect memory and engaged in sloppy business practices. Those circumstances do not in any way contradict Linn's version of events. [See *Porter v. State*, 752 So.2d 673, 678-79 (Fla. 2d DCA 2000) (stating that in applying standard concerning "whether there was substantial, competent evidence for a jury to ... conclude" that "every reasonable hypothesis but that of guilt" was excluded, "the version of events related by the defense must be believed if circumstances do not show that version to be false")]

There is nothing in *Sorey v. State*, [419 So.2d 810 (Fla. 3d DCA 1982)] - the primary case cited in the dissent - which is inconsistent with our application of the well-established principle that the State has the burden of presenting evidence to contradict a defendant's reasonable hypothesis of innocence in a circumstantial evidence case. In *Sorey*, the jury was "free to reject the reasonableness," [419 So.2d at 815] of the

hypothesis of innocence suggested by defense counsel because the defense "presented no testimony," [419 So.2d at 814] to support the hypothesis. There was *no evidentiary basis* for the version of events suggested by defense counsel, and the State "was not obliged to contradict defense counsel's unsupported hypothesis." [*Id.* at 814]

As the court in *Sorey* recognized, however, if the defendant "shows through testimony" that incriminating circumstantial evidence can be "reasonably explain[ed]," the defendant's "version of events ... must be accepted as true unless contradicted by other proof showing the defendant's version to be false." [*Id*.] Here, as we have already discussed, Linn reasonably explained his possession of the check and his lack of knowledge that the check was forged, and the State provided no proof contradicting any aspect of Linn's version of events. [Cf. *Hale v. State*, 651 So.2d 97, 97 (Fla. 2d DCA 1994) ("The circumstantial evidence standard does not require the jury to believe the defense version of the facts when the [S]tate has produced conflicting evidence.")]

Weighing the evidence in the light most favorable to the State under the special standard applicable in circumstantial evidence cases, we conclude that the State failed to meet its burden of presenting evidence refuting Linn's reasonable hypothesis of innocence. Therefore, the trial court should have granted Linn's motion for judgment of acquittal. Linn's conviction and sentence are reversed, and the case is remanded with instructions that a judgment of acquittal be entered. Reversed and remanded.

Dissent: WHATLEY, Judge.

I respectfully dissent. To be effective, a reasonable hypothesis of innocence must be reasonable. Here, Linn's hypothesis of innocence was not reasonable and was rejected by the jury. In *Sorey v. State*, [419 So.2d 810, 814-815 (Fla. 3d DCA 1982)], the court noted, "While Sorey's counsel was free to make this argument, the jury was free to reject the reasonableness of his hypothesis." [*State v. Rudolph*, 595 So.2d 297, 298 (Fla. 5th DCA 1992) (Cobb, J., concurring) (quoting *State v. Law*, 559 So.2d 187, 188-89 (Fla.1989)], set forth the rule that: "The state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." [See also *Perez v. State*, 565 So.2d 743 (Fla. 3d DCA 1990)]

The evidence for the jury to consider included: (1) Linn testified he purchased CV joints from Discount Auto, yet Linn had no receipt for the purchase or store employee to confirm such purchase; (2) Linn testified he purchased the parts for $79 each before being paid by a customer unknown to him; (3) Linn testified he was referred to the customer by a friend, but could not recall the friend's name; (4) Linn accepted a check for payment, even though his policy was cash and the check was in a crumpled and folded condition; (5) Linn testified that he did not realize that the wrong date was on the check and he did not notice the notation on the check, "for house repairs"; (6) Linn testified he did not ask the customer for identification; (7) Linn did not have the tag number or vin number of the vehicle allegedly worked on and was uncertain of the model year of the vehicle; and (8) after being allegedly and wrongfully divested of his services and cash,

Linn failed to report such crime to law enforcement. Simply stated, this was a matter for resolution by the jury. [See *Hale v. State*, 651 So.2d 97 (Fla. 2d DCA 1994)] I would affirm the conviction.

Critical Thinking Question(s): Should the State be burdened with proving actual knowledge of a forged instrument or is the more appropriate level of knowledge "should have known"? In other words, do you agree with the Opinion or Dissent? Explain.

VIII. Robbery

Section Introduction: If an act that would otherwise be termed larceny is committed injunction with the use of force or threat of force then the crime is called robbery. In Florida, robbery can be a felony in the first, second, or third degree depending on the specific nature of the crime. Below you will find the Florida statute that addresses robbery and defines its various degrees and types. Also included is a Florida case on the crime.

Florida statute, sec. 812.13 – Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with 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.

(2) (a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery 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.
(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.
(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3) (a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.
(b) An act shall be deemed "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.

Florida statute, sec. 812.131 - Robbery by sudden snatching

(1) “Robbery by sudden snatching” means the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that:

(a) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or

(b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person.

(2) (a) If, in the course of committing a robbery by sudden snatching, the offender carried a firearm or other deadly weapon, the robbery by sudden snatching is a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(b) If, in the course of committing a robbery by sudden snatching, the offender carried no firearm or other deadly weapon, the robbery by sudden snatching is a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3) (a) An act shall be deemed "in the course of committing a robbery by sudden snatching" if the act occurs in an attempt to commit robbery by sudden snatching or in fleeing after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if the act occurs prior to, contemporaneous with, or subsequent to the taking of the property and if such act and the act of taking constitute a continuous series of acts or events.

Florida statute, sec. 812.135 - Home-invasion robbery

(1) “Home-invasion robbery” means any robbery that occurs when the offender enters a dwelling with the intent to commit a robbery, and does commit a robbery of the occupants therein.

(2) (a) If in the course of committing the home-invasion robbery the person carries a firearm or other deadly weapon, the person commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(b) If in the course of committing the home-invasion robbery the person carries a weapon, the person commits a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(c) If in the course of committing the home-invasion robbery the person carries no firearm, deadly weapon, or other weapon, the person commits a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

***Holliday v. State*, 781 So.2d 496 (App. 5 Dist., 2001)**

Procedural History: Defendant pleaded nolo contendere in the Circuit Court, Volusia County, William C. Johnson, J., to armed robbery with a firearm and attempted first degree murder. Defendant appealed entry of convictions as violating double jeopardy. The District Court of Appeal, Palmer, J., held that the offenses could be punished separately even though they were committed during the course of a single criminal episode.

Issue(s): Appellant contends that convictions on both robbery and attempted murder constitute double jeopardy when they arise out of a single criminal episode.

Facts: John Holliday appeals his judgments and sentences which were entered by the trial court upon his plea of *no lo contendere* to the charges of armed robbery with a firearm and attempted first degree murder. The charges arose out of an incident which occurred on December 17, 1996 when Holliday walked into a gas station, brandished a handgun, and demanded money from the store clerk. After receiving money from the clerk, he took off running. When the clerk started to chase him, Holliday stopped, turned, and fired the gun at the clerk. He contends that the entry of convictions on both charges constitutes a double jeopardy violation because the offenses occurred during a single criminal episode. We disagree and therefore affirm Holliday's judgments and sentences.

Holding: Affirmed.

Opinion: PALMER, J.

In *Gordon v. State*, [780 So.2d 17, 19 (Fla.2001)], our Supreme Court recently explained that the standard for "determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature 'intended to authorize separate punishments for the two crimes.' " [*Id.* (quoting *M.P. v. State*, 682 So.2d 79, 81 (Fla.1996)] Stated another way, courts must not look to either the accusatory pleading or proof adduced at trial in determining this issue, but rather, must look only at whether the legislature intended for the courts to impose separate convictions and sentences for the crimes at issue when they are committed during the course of one criminal episode. [*Brown v. State,* 617 So.2d 744, 746 (Fla. 1st DCA 1993), *aff'd*, 633 So.2d 1059 (Fla.1994)]

Florida Statutes, section 775.021(4)(b) (1995) [Rules of Construction] sets forth Florida's legislative intent regarding this issue as follows:

> [4] (b) 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.

Thus, Florida courts are authorized to impose a separate conviction and sentence for each offense committed during the course of a single criminal episode. However, the Legislature set forth a limitation upon this rule of construction; namely, that the imposition of multiple convictions and sentences is prohibited if the offenses at issue fall

within any of three listed exceptions. The three exceptions are: (1) when the offenses require identical elements of proof; (2) when the offenses are degree variants of the same core offense; and (3) when the greater offense necessarily includes the lesser offense. [See Fla. Stat.§ 775.021(4)(b) (1995); See also *Gordon; State v. McCloud*, 577 So.2d 939 (Fla.1991)] This statutory analysis reveals no bar to the imposition of separate convictions and sentences for the offenses of armed robbery with a firearm and attempted first degree murder when they are committed during the course of a single criminal episode.

The elements of the crime of attempted first degree murder are: (1) an act intending to cause death that went beyond just thinking or talking about it; (2) a premeditated design to kill; and (3) the commission of an act which would have resulted in the death of the victim except that someone prevented the defendant from killing the victim or the defendant failed to do so. [*Gordon v. State*, 780 So.2d at 21; *See also* Fla. Std. Jury Instr. (Crim.) 85; Fla. Stat.§§ 777.04, 782.04, (1995)] In contrast, the elements of the crime of armed robbery with a firearm require proof that the defendant: (1) took property from the victim and the property was of some value; (2) used force, violence, assault, or put the victim in fear in the course of the taking; (3) intended to permanently or temporarily deprive the victim of the right to the property; and (4) carried a firearm in the course of committing the robbery. [See Fla. Std. Jury Instr. (Crim.) 219; See also Fla. Stat. § 812.13 (1995)]

Because the offenses of armed robbery with a firearm and attempted first degree murder (1) do not involve identical elements of proof; (2) are not degree variants of the same core offense; and (3) do not involve lesser included offenses, we reject Holliday's claim of constitutional error. Judgments and Sentences AFFIRMED.

Critical Thinking Question(s): It is clear that armed robbery and attempted murder are two distinct crimes as they contain different elements. However, when the individual used the gun to perpetrate the robbery, was fleeing not a part of the same criminal episode and an effort to complete the robbery? If so, why should the defendant be subject to two sentences rather than having the lesser offense be assumed as part of the greater offense?

IX. Carjacking

Section Introduction: Carjacking is a specific type of robbery that applies to the taking of a motor vehicle. This crime has a specific definition and specific punishment that are explained by the statute and case law below.

Florida statute, sec. 812.133 – Carjacking

> (1) "Carjacking" means the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2) (a) If in the course of committing the carjacking the offender carried a firearm or other deadly weapon, then the carjacking 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.
(b) If in the course of committing the carjacking the offender carried no firearm, deadly weapon, or other weapon, then the carjacking is a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(3) (a) An act shall be deemed "in the course of committing the carjacking" if it occurs in an attempt to commit carjacking or in flight after the attempt or commission.
(b) An act shall be deemed “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.

***Lovett v. State*, 781 So.2d 466 (App. 5 Dist., 2001)**

Procedural History: Defendant was convicted in the Circuit Court, Orange County, Maura T. Smith, J., of carjacking and resisting arrest without violence. Defendant appealed. The District Court of Appeal, Orfinger, J., held that defendant used force or violence in the course of taking victim's car.

Facts: In the early morning hours of February 16, 1999, Dawn Nickloy (Nickloy) went to a Winn-Dixie store to lock a friend's truck that had been left in the parking lot. She was by herself, driving her 1991 Corvette. Nickloy located the truck that she was in search of and, after stopping her car, walked to the truck, leaving her Corvette running. About that time, she saw someone run around the front of her car. She immediately ran back toward her car and arrived at the driver's door of her Corvette about the same time a man did. The man, later identified as Lovett, entered the running Corvette. Nickloy then jumped on the hood of the car in an effort to try to prevent Lovett from stealing it. Lovett accelerated the car quickly, throwing Nickloy to the pavement. Nickloy required thirteen staples to close a head wound. A few hours later, the Corvette was recovered, and Lovett was arrested and charged with carjacking and resisting arrest without violence. Thomas F. Lovett (Lovett) appeals his convictions for carjacking and resisting arrest without violence.

Holding: Affirmed.

Opinion: ORFINGER, R. B., J.

On appeal, Lovett contends that he was guilty only of grand theft auto, a violation of Florida Statutes, section 812.014(1) (1999) and not carjacking, a violation of Florida Statutes, section 812.133 (1999). He argues that Nickloy's efforts to prevent the theft

cannot elevate his grand theft to a carjacking. We disagree. To prove carjacking, the State must prove: 1) the defendant took a motor vehicle from the person or custody of the victim; 2) force, violence, assault or putting in fear was used in the course of the taking; and 3) the taking was done with the intent to either temporarily or permanently deprive the victim of his or her right to the motor vehicle or any benefit from it or to appropriate the motor vehicle of the victim to his own use or to the use of someone else. [*See Fryer v. State*, 732 So.2d 30, 32, n. 1 (Fla. 5th DCA 1999)] Grand theft is a lesser included offense of carjacking. [*Fryer*, 732 So.2d at 33] What distinguishes carjacking from grand theft is the use of force, violence, assault or putting in fear in the course of taking a motor vehicle. As the Standard Jury Instructions advise, to constitute carjacking:

> The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim, or by putting the victim in fear so that the victim does not resist. The law does not require that the victim of a carjacking resist to any particular extent or that the victim offer any actual physical resistance if the circumstances are such that the victim is placed in fear of death or great bodily harm if he or she does resist. But unless prevented by fear there must be some resistance to make the taking one done by force or violence. [*Standard Jury Instructions in Criminal Cases (97-1)*, 697 So.2d 84, 94 (Fla.1997); Fla. Stat. § 812.133 (1999)]

By jumping on the hood of her car, Nickloy was attempting, albeit unsuccessfully, to prevent Lovett from taking her car. As the jury instruction requires, "there must be some resistance to make the taking one done by force or violence." Clearly, Nickloy was resisting the taking of her car. By accelerating the car while Nickloy was on the hood attempting to prevent its theft, Lovett clearly committed an act of violence prohibited by the carjacking statute. Accordingly, we find no error in Lovett's conviction for this offense. We also find no merit in the other issues raised by Lovett on appeal and affirm his convictions for both offenses.

Critical Thinking Question(s): Should the offense be raised to car jacking when and individual merely intends to commit a motor vehicle theft? In the instant case, imagine that Lovett did not know that Nickloy was the owner of the car and just saw it as an opportunity. After he starts to drive off and goes down the street half a block, she then jumps on the hood while he is driving. Is that automatically carjacking?

X. Extortion

Section Introduction: Extortion is a crime that involves the threat of future violence or harm for the purpose of obtaining some advantage. This differs from crimes like robbery that require an immediate use of force or threat of immediate use of force. Notice that according to the Florida statute below, no gain need actually be made for extortion to be committed. Also see the Florida case on extortion following the statutes.

Florida statute, sec. 836.05 - Threats; extortion

> Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication

maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

839.11 **- Extortion by officers of the state**

Any officer of this state who willfully charges, receives, or collects any greater fees or services than the officer is entitled to charge, receive, or collect by law is guilty of a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.

***Ford v. State*, 251 So.2d 562 (App. 3 Dist.,1971)**

Procedural History: Defendant was convicted before the Criminal Court of Record for Dade County, Jack M. Turner, J., of extortion, and he appealed. The District Court of Appeal held that evidence sustained conviction.

Issue(s): Appellant contends there was insufficient evidence upon which ot be convicted for extortion.

Facts: Defendant-appellant Ford appeals a judgment of guilty of extortion entered in a jury trial of the cause begun upon a two count information for conspiracy to extort and extortion.

Holding: Affirmed.

Opinion: PER CURIAM.

The sole point on appeal is the sufficiency of the evidence. It would serve no purpose to detail the events surrounding the 'shake-down' of a male nurse by three young persons and the defendant, who was then a probationary officer of the City of Miami.
We have reviewed the record and note that it reveals more than a lack of good judgment by a young officer combined with a peculiar chain of events during a short span of time. Rather, there is sufficient, substantial competent evidence in the record to support the jury verdict. The jury's function as the trier of fact is to evaluate the evidence, weigh the credibility of witnesses, and resolve conflicts in the testimony. They can draw or refuse to draw inferences from the evidence presented. Their determination is accorded *563 great weight and will not be disturbed on appeal except for the lack of substantial competent evidence. Therefore, the judgment and sentence appealed is affirmed.

Critical Thinking Question(s): From the statutes listed above, make a list of events that would constitute extortion.

- Does a child extort another child when he continuously “shakes” down the smaller child for his milk money?
- How does extortion differ from fraud?