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CHILD ABUSE STATUTES

CHAPTER 827: CHILD ABUSE STATUTES

Statutory Definitions:

Child

Any person under the age of eighteen years.

State v. Ashley, 701 So.2d 338 (Fla. 1997):

> Expectant mother cannot be criminally charged with death of her born alive child resulting from self-inflicted injuries (gunshot to terminate pregnancy) during third trimester of pregnancy.
>
> Murder and manslaughter statutes pursuant to which defendant was charged contain no indication that legislature intended to modify common law principles by eliminating immunity of pregnant woman for causing injury or death to fetus.

Johnson v. State, 602 So.2d 1288 (Fla. 1992):

> During her two pregnancies, petitioner used drugs within 24 hours of giving birth. Petitioner was convicted of delivering a controlled substance to an infant under Fla. Stat. Ann. § 893.13(1)(c)(1) (1989). The appeals court affirmed the convictions, and certified a question to the supreme court as to whether the statute permitted prosecution of a mother who ingested a controlled substance prior to giving birth, and for delivery of a controlled substance to the infant during the time following the birth, but before the umbilical cord was severed. The supreme court held that petitioner could not be prosecuted under § 893.13(1)(c)(1), because the legislative history indicated that the legislature rejected a provision that authorized criminal penalties against mothers who delivered drug-affected babies. Such prosecutions violated public policy because they could discourage women from seeking prenatal care.

State v. Gethers, 585 So.2d 1140 (Fla. 4th DCA 1991):

Child abuse statute did not reach unborn fetus and therefore defendant could not be prosecuted for aggravated child abuse for permitting her unborn child to be injured by her introduction of cocaine into her own body during gestation period of her unborn child.

Discussion: This Broward case was argued before Judge Carney. The State charged a mother with felony child abuse for permitting the injury of her unborn fetus by ingesting cocaine. The appellate court relied heavily on public policy and F.S. 415 to rule that the mother cannot be criminally punished.

Cocaine Babies: See "Child" category above

Constitutionality

Mack v. State, 836 So.2d 1062 (Fla. 3rd DCA 2003):

F.S. 827.03(1)(b), relating to child abuse is constitutional.

Contributing to the Delinquency or Dependency of a Minor

Note: Please note that the legislature rewrote all of the child abuse statutes effective October 1, 1996. In so doing, they chose to delete the clause of the statute that referred back to the laws of Florida for the meaning of dependency and delinquency. This omission has resulted in the statute being ruled unconstitutional as noted in the Fuchs case.

B.J. v. Department of Children and Families, 2016 WL 1578492 (Fla. 3rd DCA 2016)

This is a dependency case that provides us some guidance when we consider whether to file contributing to dependency of a minor charges based upon drug use in the home:

An abused child is one who is subjected to "any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." § 39.01(2), Fla. Stat. (2015). "Harm" is defined by statute to include a parent's "continued chronic and severe use of a controlled substance or alcohol" if "the child is demonstrably adversely

affected by such usage." § 39.01(30)(g), Fla. Stat. (2015). Here, there is nothing in the record to suggest that either of the parents exhibit "continued and chronic" or "severe" use of marijuana and nothing in the record suggest that A.G. is demonstrably adversely affected by such usage. The parents testified that they rarely smoked marijuana, and the record shows the child was always observed to be in good health, clean, and well cared for.

In re O.C., 934 So.2d 623, 627–28 (Fla.App. 2 Dist.,2006)

Case law has established, however, that a single incident of a serious bruise on the buttock of a child, perhaps caused by corporal punishment, will not support a finding of dependency. See T.G. v. Dep't of Children & Families, 927 So.2d 104 (Fla. 1st DCA 2006) (holding single instance of corporal discipline meted out by the mother to one of five children resulting in bruise that was not significant and did not require medical attention did not support finding of dependency); A.A. v. Dep't of Children & Families, 908 So.2d 585 (Fla. 5th DCA 2005) (holding dependency ****628*** *was improper based on evidence that mother had her older son discipline her difficult younger child, and discipline resulted in punches that left bruises or welts on child's back and shoulder); J.C. v. Dep't of Children & Families, 773 So.2d 1220 (Fla. 4th DCA 2000) (finding stepfather's routine of spanking his oldest child with a belt, which on one occasion caused a bruise on the child's buttocks, did not qualify as excessive corporal discipline because the bruises were insignificant, did not constitute temporary disfigurement, and did not put the child at risk of imminent abuse or cause the child to suffer significant mental impairment); R.S.M. v. Dep't of Health & Rehabilitative Servs., 640 So.2d 1126 (Fla. 2d DCA 1994) (mere presence of bruises resulting from corporal punishment is not competent, substantial evidence of excessive corporal punishment or temporary disfigurement); In re S.W., 581 So.2d 234 (Fla. 4th DCA 1991) (holding that evidence was insufficient to support finding of abuse based upon a single incident in which mother repeatedly hit child with a belt and child was observed with recent bruises, including bruises to the face which may have been caused when child tried to run away, none of which required medical treatment); In re W.P., 534 So.2d 905 (Fla. 2d DCA 1988) (finding evidence that father slapped his child on the face and left a mark insufficient to support a finding of dependency because the mark did not require medical attention). Usually, some evidence of a pattern of excessive punishment or a single punishment resulting in a more serious injury is required. See, e.g., J.L. v. Dep't of*

Children & Families, 899 So.2d 1254 (Fla. 4th DCA 2005) (dependency was supported by finding that father hit naked child with a belt twice within same week as punishment, leaving bruising and welts, and intended to continue such punishments); O.S. v. Dep't of Children & Families, 821 So.2d 1145, 1148 (Fla. 4th DCA 2002) (finding mother's paddling of daughter excessive as it left bruises over majority of daughter's buttocks, legs, and neck; some of the bruises persisted for more than six weeks; the child testified that this was not even the most severe beating she had received; and there was evidence of daughter's self-mutilation reflecting a mental injury resulting from abuse).

Admittedly, the cited cases address children in the care of a parent who are disciplined by the parent. Nevertheless, if a single incident of bruising would not support a finding of dependency if it occurred in the mother's care, it is difficult to see how it could be characterized as the "abuse" necessary to support a finding of dependency when it occurs in the care of people entrusted by the mother to care for the child.

Barnette v. State, 756 So.2d 1069 (Fla. 5th DCA 2000):

Statute proscribing contributing to delinquency or dependency of child has been previously held constitutional by the Florida Supreme Court.

State v. Veltre, 768 So.2d 1211(Fla. 4th DCA 2000):

Contributing to delinquency or dependency of a minor is not unconstitutionally vague.

State v. Fuchs, 769 So.2d 1006 (Fla. 2000):

Contributing to delinquency or dependency of a minor is not unconstitutionally vague for failing to define terms "delinquent child," "dependent child," and "child in need of services."

Discussion: This case provides a good discussion of the topic and is a good general reference source.

Barnette v. State, 768 So.2d 1246 (Fla. 5th DCA 2000):

Statute proscribing contributing to delinquency or dependency of child has been previously held constitutional by the Florida Supreme Court.

State v. Fuchs, 751 So.2d 603 (Fla. 5th DCA 1999) *reversed*: *State v. Fuchs, 769 So.2d 1006 (Fla. 2000):*

Contributing to the delinquency or dependency of a minor statute is unconstitutionally vague because statute fails to define terms "delinquent," and "dependent child," or "child in need of services".

Discussion, Prior to October 1, 1996, the Florida statutes included the phrase "under the laws of Florida" to explain how one is to learn the definitions of dependency, delinquency, and child in need of services. When the Legislature rewrote the child abuse statutes, they left that phrase out and therefore there is no specific reference to the average citizen as to where he is supposed to find the meaning of these terms. The appellate court ruled that the terms used in the statute are not of such a common and ordinary meaning that they could be understood without reference to a particular statutory definition. The court left open the question whether the Legislature can cure this problem by adding the phrase back into the statute.

Broers v. State, 606 So.2d 480 (Fla. 1992):

Statute prohibiting criminal action contributing to delinquency of minor does not require that underlying criminal act be achieved; violation occurs when individual commits act under such circumstances that person of common understanding would know that acts would cause or tend to cause or encourage or contribute to delinquency or dependency of person under age of 18 years.

Discussion: The defendant was on probation when she was charged with contributing to the delinquency of a minor. The police searched her trash and found cans with cocaine residue on them. There was also marijuana found in the refrigerator. The State presented other evidence of drug activity at the house also. The court ruled that it was not even remotely likely that the two year old daughter would have been adversely affected either by the drug's presence or discovery.

Purvis v. State 377 So.2d 674 (Fla. 1979)

Statue proscribing child abuse by contributing to delinquency or

dependency of minors is not unconstitutionally vague or overbroad.

Neglect of a Child:

"A caregiver's failure or omission to provide a child with the car, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or a caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person."

"Neglect of a child may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child."

Note: This charge is typically considered when a defendant leaves a child unattended in an automobile. Please note that F.S. 316.6135, which states:

> No parent, legal guardian, or other person responsible for a child younger than 6 years of age shall leave such child unattended or unsupervised in a motor vehicle for a period in excess of 15 minutes; however, no such person shall leave a child unattended for any period of time if the motor of the vehicle is running or the health of the child is in danger.

The penalty for a violation of this section is a noncriminal traffic infraction. In essence, this statute says that if the child is left in the car for less than 15 minutes it is not a crime unless the child's health is in danger. Keep this in mind when you decided whether or not to charge a parent with felony child neglect.

Lanier v. State, 2019 WL 961450, (Fla.App. 1 Dist., 2019)

> A five-month-old child was taken to emergency room with skull fractures, retinal hemorrhaging swollen head, limp neck and other obvious injuries. They were at various stages of healing. It was not determined who inflicted the injuries, so both the mother and the live-in boyfriend, Lanier, were charged with child neglect. This opinion discusses why there was sufficient evidence to send the case against the boyfriend to the jury. The following excerpt

from the case discusses some of the factors considered in determining whether the suspect acted with culpable negligence:

The length of time between L.L. sustaining multiple injuries and her receiving medical attention was anywhere between seven days and three weeks. L.L.'s symptoms of trauma, her persistent and worsening condition, and need for immediate medical attention would have been obvious to any reasonable person. See, e.g., Moore v. State, 790 So.2d 489, 492 (Fla. 5th DCA 2001) (affirming conviction for child neglect where father allowed infant to fall and then failed for two days to seek medical advice despite infant's noticeable symptoms and abnormal behavior). Several witnesses, including Lanier, testified that for at least three weeks before the infant was admitted to the emergency room, L.L. cried inconsolably when picked up and could not hold her head up on her own. Lanier stated that L.L.'s neck felt "loose." The evidence showed that L.L.'s head was visibly swollen and that her body was covered in bruises. L.L. was a five-month-old infant—she was not walking or even crawling. The medical testimony established that a five-month-old could not injure herself to such an extent.

A finding of culpable negligence in a child neglect case does not require proof that the defendant knew the specific nature of the child's injuries. Rather, it requires a showing that the defendant either knew or should have known that the extent of the child's injuries was such that the failure to seek medical attention amounted to a willful failure to provide for the child's well-being.

Hicks v. State, 2018 WL 6803746, at *1 (Fla.App. 1 Dist., 2018)

Hicks was arrested after he left a child in his truck for an hour and a half with the windows up. It was the middle of September in the Florida Panhandle. By the time police discovered the child, he was already dehydrated, with an elevated heart rate and cracked, bloody lips. The child also had other serious injuries: he had an inch-long laceration on his forehead, bruising all over his body, and a severely swollen scrotum. There was no food or water in the truck, but there was a bag of loaded firearms.

Under these facts, the court ruled the suspect could be convicted of aggravated child abuse, neglect of a child causing great bodily harm and leaving a child unattended in a car causing great bodily harm.

Double Jeopardy did not prevent convictions for both neglect of a child and leaving a child unattended in a car.

Poczatek v. State, 2017 WL 945529 (Fla.App. 2 Dist., 2017)

Evidence was insufficient to show that defendant's failure to obtain medical services or treatment for child after he initially sustained injuries during incident in defendant's garage caused great bodily harm, permanent disability, or permanent disfigurement to child, and thus there was insufficient evidence to support defendant's conviction for aggravated child neglect; although there was evidence focusing on child's injuries that were the result of an impact and defendant's role in that impact, there was no evidence that defendant's actions after the incident exacerbated the injury in any way.

Even where an incident or omission could reasonably be expected to result in serious injury or death to the child, that neglect becomes criminal only when the State proves that the caregiver has acted willfully or by culpable negligence.
"Culpable negligence" within meaning of child neglect statute is more than a failure to use ordinary care for others; for negligence to be called culpable negligence, it must be gross and flagrant and committed with an utter disregard for the safety of others.
Evidence was insufficient to show that defendant willfully or by culpable negligence neglected child who suffered injuries during incident in defendant's garage, and thus there was insufficient evidence to convict defendant, who had been convicted of aggravated child neglect, of the lesser included offense of child neglect; although evidence indicated that child suffered injuries while in defendant's care, doctors testified that child's injuries were caused by blunt force trauma and that such injuries might not show symptoms immediately, and while there was evidence of blood in child's bedroom, that was consistent with defendant's testimony that he took child into bedroom because he was crying and then decided to seek medical treatment.

Masters v. State, No. 1D14-5828, 2016 WL 1437734, at *1 (Fla. Dist. Ct. App. Apr. 12, 2016)

We find that a single incident of excessive alcohol consumption standing alone, under the particular facts of this case, was insufficient to show culpable negligence.

This is a very short opinion addressing child neglect.

Ibeagwa v. State, 141 So.3d 246 (Fla.App. 1 Dist.,2014)

Whether defendant engaged in child neglect by culpable negligence was question for jury in prosecution on two counts of aggravated manslaughter of a child arising from drowning deaths of her two children, ages six and three, in a neighbor's pool, based on evidence that defendant drove away from her home where she left children alone, that she remained away from home for a period of hours despite knowing that children were unsupervised for a long portion of that time, and that she was or should have been aware that children had access to a ladder in the backyard.

Thompson v. State, 2014 WL 1921318 (Fla.App. 3 Dist.):

Defendant's actions in willfully exposing two-year-old child in his arms to multiple drug transactions constituted conduct which could reasonably be expected to result in serious physical injury or substantial risk of death to child, supporting finding of child neglect as element of child neglect not causing great bodily harm, given potential for violence inherent in drug dealing.

We find little difficulty in concluding that Thompson's willful exposure of his two-year-old child to multiple drug transactions could reasonably be expected to result in serious physical injury or a substantial risk of death to the child. As this court has already recognized, "drug rip-offs" are "common place" in our community "and usually involve violence with a firearm resulting in death or injury." Reyes v. State, 581 So.2d 932, 934 (Fla. 3d DCA 1991).

Burns v. State, 2014 WL 811582 (Fla.App. 1 Dist.):

State failed to present a prima facie case of child neglect so as to allow case to go to jury; state's theory of the case was that defendant committed child neglect by asking ten-year-old boy to call child's mother, rather than 911, when he realized the child was in respiratory distress, there was no evidence as to how long the mother had been gone, where she was when she received the call, or how long it took her to return, and while defendant's choice to

seek assistance by calling the child's mother, rather than 911, might have been a failure to use ordinary care, it did not rise to the level of willful or culpable negligence.

Parrish v. State, 2011 WL 3055393 Fla.App. 1 Dist.,2011.

To prove criminal child neglect, the State is required to show the defendant acted willfully or with culpable negligence in creating the situation or in allowing the questionable conditions to occur, and must present evidence that the defendant's act or omission created a potential risk of serious—not minimal—harm to the child; expert testimony is not required to prove the risk of mental or physical injury.

State failed to present evidence that condition of home in which defendant and his minor child resided created a potential mental or physical danger to the child, as required to support defendant's conviction for child neglect; there was no evidence the child was unclothed, unsupervised or unfed, child's teacher and aunt both testified the child appeared in good health and was well groomed, and even the arresting officer testified the girl was friendly and talkative.

State failed to present evidence that defendant's refusal to send his minor daughter inside created a risk of serious physical or mental injury to the child, after police officer approached defendant at gunpoint and ordered defendant to keep his hands on the table, as required to support defendant's conviction for child neglect; officer lowered his weapon when child came outside, defendant complied with officer's commands to keep his hands on the table, and ten to fifteen minutes after the altercation, the child was calm, friendly and talkative.

Discussion: Once again, the appellate courts have made it clear that prosecuting for child neglect based upon a dirty house is an uphill battle. The relevant testimony concerning the living conditions in the house is as follows:

Officer Connell testified to the following: there was no air conditioning in the house; the windows were all closed and covered with spider webs and mold; the furniture was covered with clothing and trash; the kitchen smelled like rotten food; there were moldy dishes in the sink; there was no food in the kitchen cupboards; the food in the kitchen was old and moldy; the rooms smelled like urine and feces;

> *and the lights would not turn on even though there was electricity in the house. In addition, the floor of the child's room was covered with clothes, trash, and dirt, and smelled like urine and mold. The couch where the girl was supposedly sleeping was covered with clothes and cobwebs, and there was no room for her to lie down.*

State v. Nowlin, 50 So.3d 79 (Fla. 1st DCA 2010):

> 17-year-old babysitter could be prosecuted for child neglect for allowing two-year-old child she was supervising to be mauled by her pit bull.
>
> Court erred in granting motion to dismiss based upon chapter 39 requiring "other person responsible for a child's welfare" be an adult. The language of chapter 827 is clear and there is no need to refer to chapter 39 for the definition.

State v. Brooks, 17 So.3d 1261 (Fla.App. 2 Dist.,2009)

> Sufficient evidence that defendant was culpably negligent in leaving her nine-month-old son and two-year-old daughter unattended in bathtub with the water running supported conviction for neglect of a child involving great bodily harm, permanent disability, or permanent disfigurement arising out of son's drowning.

State v. Lanier, 979 So.2d 365 (Fla. 4th DCA 2008):

> Evidence was insufficient to support two charges of child abuse; defendant was a school teacher, teacher allegedly stomped on a student's foot after student did the same to another child, the "stomp" caused no bruises or physical trauma, in second incident defendant pushed chair towards steps and student fell down steps, and placing chair near steps or pushing chair near steps was not reasonably expected to result in physical injury to student.
>
> Evidence was insufficient to support charge of child neglect; defendant, a teacher, placed disruptive child in hallway on chair near stairs, child later fell down stairs, child was within defendant's sight in hallway, and defendant asserted that she kept an eye on child.

Hyde v. State, 929 So.2d 1183 (Fla. 4th DCA 2006):

Trial court erred in failing to grant a judgment of acquittal on child neglect case against child's mother. In so finding, the court stated the following:

> "The only testimony presented concerning Hyde's conduct was that her child had a very bad diaper rash which caused her buttocks and genital areas to be red and blistered, with an "unusual and foul body odor." The only expert testimony at trial came from the child's primary care pediatrician, Dr. Moshe Adler. Dr. Adler had been a pediatrician for twenty-three years and had personally treated the child on nine occasions. Dr. Adler described the child as a very premature baby born after only twenty-five weeks of gestation. He treated her for many childhood illnesses, including rashes, allergic reactions, ear infections, coughing, wheezing, fevers, and diarrhea. He and his colleagues consistently found the child to be alert, active, strong, and happy. There was never any notation made on the child's forms of any signs of neglect or abuse, she was current on all of her immunizations, and, although small for her age, was growing as expected. The state called no expert witness and presented only lay witnesses whose testimony was insufficient to support the conviction."

State v. Christie, 939 So.2d 1078 (Fla. 3rd DCA 2005):

> Under statute defining "caregiver," for purposes of statute criminalizing child neglect by a caregiver, as a parent, adult household member, or other person responsible for a child's welfare, public-school teacher was an "other person responsible for a child's welfare" and thus was a "caregiver" during school hours; teacher stood in loco parentis to child during school hours.
>
> A public school owes a general duty of supervision to the students placed within its care.
>
> Definition of "other person responsible for a child's welfare" in statutory chapter governing proceedings relating to children did not apply when determining whether criminal defendant, a public school teacher, was an "other person responsible for a child's welfare" for purposes of statutory definition of "caregiver" for statute

criminalizing child neglect by a caregiver; a teacher fell within the plain meaning of "caregiver" under child-neglect statute, and adopting statutory definition in statutory chapter governing proceedings relating to children would have served to insulate from prosecution a group of adults who stand in loco parentis to students that they oversee during school hours.

Wesson v. State, 899 So.2d 382 (Fla. 1st DCA 2005):

Evidence submitted to prove that mother's unhygienic housekeeping caused death of son, who suffered from chromosomal abnormality that made him "immune-comprised," was legally insufficient to go to jury, and thus, mother was entitled to judgment of acquittal on charge of child neglect causing great bodily harm; although home contained soiled toilet paper that ended up near son's body and pet droppings were present in filthy home, neither medical examiner nor anyone else testified as to type of bacteria which caused septicemia which led to son's death, state conceded that no expert testified that it was more likely that lethal organisms came from child's home than from somewhere else, and physician testified that oysters son ate day before he died were more likely source of fatal bacteria than dirty home.

In order to be admissible, expert medical testimony as to cause of victim's death need not be stated with reasonable medical certainty and is competent if expert can show that, in his opinion, occurrence could cause death or that occurrence might have or probably did cause death.

While expert medical testimony as to likelihood or probability of causal connection between defendant's act and victim's death is generally sufficient to establish causation, expert testimony as to mere possibility of causal relation between act and death is generally insufficient to support criminal conviction.

Durand v. State, 820 So.2d 381 (Fla. 5th DCA 2002):

Claim that there was no evidence at trial to establish that defendant was a "caregiver" to victim a necessary element of neglect of a child, was not sustained given defendant's

position in household and evidence of his involvement in supervision and direction of child.

Discussion: The victim, her father and her younger brother all moved into the defendant's house. He exercised some parental-type authority while the child lived there.

Moore v. State, 790 So.2d 489 (Fla. 5th DCA 2001):

"To allow a baby to fall in a manner which produced a skull fracture, to recognize that the baby was noticeably inactive in the following two days, and to refrain from seeking medical counsel during this subsequent period, could constitute culpably negligent conduct which cause great bodily harm."

Discussion: This is a rather unusual case. The baby boy victim was taken to the hospital and diagnosed with shaken baby syndrome and subsequently died from his injuries. The child also had a small skull fracture. The child's father told the police that two days before being taken to the hospital the child was lying on the sink in the bathroom and fell off, striking his head on the bathtub. The child exhibited signs of illness after that, but was not taken to the hospital for two days. The jury acquitted the suspect of aggravated manslaughter of a child, but convicted him of neglect of a child. The appellate court noted that the charging document did not specify the manner in which it is alleged the child was harmed, but the defendant waived the issue by not objecting. Since it was not clear under what theory the state was charging child neglect, the court ruled that allowing the child to fall off the sink *and* failing to seek prompt medical treatment constituted child neglect. It is not clear from the opinion whether either of the two acts standing alone would have been sufficient.

State v. Wynne, 794 So.2d 642 (Fla. 2d DCA 2001):

There was factual basis supporting prima facie case of child neglect based on defendant's having removed his six-year-old son from vehicle on side of highway after son ignored defendant's admonitions to stop fighting with another child who was in the car, driven away, and returned five minutes later.

Common law privilege for corporal punishment announced in *Kama v. State* should not have been applied to present case in view of court's prior holding that the privilege relied upon in *Kama* should not have been applied to present case in view of court's prior holding that the privilege relied upon in *Kama* had been overruled by statute.

Parental privilege does not apply to child neglect.

Discussion: The court held that the defendant failed to provide his six-year-old child with the supervision necessary to maintain the child's physical and mental health when he abandoned him on the side of the road. The incident could have reasonably been expected to result in serious physical or mental injury to the child.

Bernard v. State, 769 So.2d 1066 (Fla. 3d DCA 2000):

Defendant's action in leaving her seven-year-old daughter alone in her apartment while she walked to child care facility to pick up her baby did not rise to level of criminal child neglect, where apartment was left stocked with food, apartment was clean except for kitchen, and defendant called to check on daughter when she reached child care facility. Error to deny motion for judgment of acquittal as to charge of probation violation for child neglect.

Discussion: The child was reported to be running around the apartment complex and riding the elevators unattended. When the officer arrived, the girl said she did not know where her mother was or how long she had been gone. The officer stayed with the child in the apartment for about 45 minutes and when the mother did not return, he left a note for her and took the child to the police station. The mother arrived to pick up the child two to three hours later. The mother said her car was being repaired, so she had to walk to a friend's house to pick up her youngest child and did not want the seven year old to have to walk with her. She said she had left the child in a similar fashion in the past.

Sieniarecki v. State, 756 So.2d 68 (Fla. 2000):

Provisions of neglect of a disabled adult statute proscribing neglect which is caused either willfully or by culpable negligence do not violate due process.

Defendant's own testimony reflected that she assumed responsibility for the care of her mother, and defendant's resulting conduct in failing to adequately address her mother's most basic needs, either by providing for them herself or by seeking the assistance of others, squarely fell within statute's proscription.

Total de facto impairment exhibited by defendant's mother clearly fell within statute's definition of disabled person.

Discussion: Although this case deals with elderly abuse, the issues involved can be applied to child neglect cases and lewd acts on disabled adults.

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

Evidence that mobile home in which child lived was grimy, smelly, and repulsive was insufficient to prove prima facie violation of statute, where there was no evidence that conditions in home put child at risk of serious physical or mental injury and no evidence that defendant acted willfully or with culpable negligence in creating the situation or permitting the conditions to exist.

Discussion: This case should be read carefully. Although the opinion seems to eliminate child neglect charges in many of our most commons cases, there are certain distinctions made in the opinion that may allow us to occasionally distinguish our case from this one. The facts as presented in the opinion are that the police and a DCF investigator responded to an anonymous call regarding a dirty house trailer. The following is an excerpt of the case's factual scenario:

> "Upon being admitted to the trailer by Mrs. Arnold, Officer Belk found the home grimy, smelly, and repulsive. Garbage littered the floor, spoiled and decomposing food was strewn about, and feces were smeared on the living room floor and were piled in another room. As to the latter, a large puppy

> appeared to be the culprit. A plywood board with nails protruding outward had been left where someone could step on it. A steak knife, partially covered by a newspaper, also lay on the floor. In what appeared to be a child's room, the mattress had been so badly shredded that the coils had poked through the covering. The officer noticed a fuse box with exposed wiring and mold between the doors of the refrigerator. He heard cockroaches skittering and was bitten by fleas, although he did not see any flea bites on the child."

The court noted that the condition of the trailer may not have been quite as dangerous as the facts presented. The exposed wiring was not connected to the electrical current, the child had not eaten any of the spoiled food, the puppy had torn apart the child's mattress and the child was 9 years old and able to avoid many of the dangers presented. The court implied that the case may have been different with a very young child. The court concludes by stating "Fortunately, when children live in conditions similar to these, which are unclean but significantly dangerous, or when their parents or caregivers are negligent but not criminally so, our child welfare system can provide services to help those children and the adults responsible for them."

The legal basis for the court's concern comes from F.S. 827.03(3)(a)(2), which states that failure or omission can be based on repeated conduct or, as in this case, "on a single incident or omission that … could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death to a child." The court notes that "the legal precedents have acknowledged that only the most egregious conduct, done either willfully or with criminal culpability, should be criminalized." The court also points out that the conduct must be willful or culpably negligent. The term "culpable negligence" means that "the conduct must show an indifference to consequences; or such a wantonness or recklessness or grossly careless disregard of the

> safety and welfare of the public…" In summary, the state must show the defendant's act or omission created a potential risk of serious- not minimal - harm to the child, and it must have been done intentionally or with reckless disregard for the consequences.

Fetzer v. State, 722 So.2d 279 (Fla. 1st DCA 1998):

> Convictions of child neglect not causing great bodily harm were supported by photographs regarding failure to provide medical treatment, restrictions on children to trailer during daylight hours, conditions of living quarters in which six children and two adults lived in twelve foot trailer with no heat and minimal bathroom facilities, continuing deprivation, and physical condition in which children were found.

Sexual Performance:

Performance is defined as any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

The case law for this section can be found in the chapter entitled "Sexual Performance and Computer Crimes."

Shaken Baby Syndrome:

Lowery v. State, 2019 WL 2528787, (Fla.App. 1 Dist., 2019)

> Young child died from blunt trauma to the head and possible shaken baby syndrome while in daycare. Defense expert argued child had a vein abnormality that increased the chance of excessive bleeding with a minor head trauma. Defendant argued that State's circumstantial case did not rebut his reasonable hypothesis of innocence. Appellate court noted that the State's experts all disagreed with the defense expert on these points and the defendant made some comments that could be construed as consciousness of guilt. Court was correct in not granting a motion to dismiss.

Johnson v. State, 933 So.2d 568 (Fla. 1st DCA 2006):

Frye hearing was not required prior to admission of testimony from medical examiner in murder trial that infant victim's death resulted from Shaken Baby Syndrome; Shaken Baby Syndrome was accepted in the relevant scientific community and, therefore, was no longer new or novel, and identification of Shaken Baby Syndrome as the cause of death was an expert opinion based on medical examiner's personal training and experience.

Brian Herlihy, 927 So.2d 146 (Fla. 1st DCA 2006):

Expert opinion testimony relating to the diagnosis that victim suffered from "shaken baby syndrome" was not subject to *Frye* analysis for "new or novel" scientific evidence.

Expert opinion testimony "which is based on an expert's personal experience and training is not subject to *Frye* testing.

Caban v. State, 892 So.2d 1204 (Fla. 5th DCA 2005):

Evidence was presented that was inconsistent with defendant's theories of innocence, so as to support convictions for felony murder and aggravated child abuse based on circumstantial evidence, even though defendant's theories seemed to be that victim, who was two-year-old child, fell off of bed while jumping or otherwise or that cause of death was injury that occurred at earlier time; intensive-care physician and pediatrics professor testified that victim's injuries were inconsistent with fall from bed, and victim's mother testified that she talked with defendant several times during day about children's well-being and that defendant never said that anything was wrong with victim.

Trial court acted within its discretion in trial for felony murder and aggravated child abuse in finding that pediatrics professor was qualified as expert to render opinion on cause of child's death, where professor had two decades of experience in pediatrics with additional training in child-abuse issues, was published authority, and had been qualified as expert and testified in approximately 250 cases involving pediatrics and child abuse.

Discussion: The State called a pediatric ophthalmologist and an intensive care physician who both testified the injury was consistent with a shaken baby. The State also called Dr. Randall Alexander, a pediatric professor who has written much on shaken baby syndrome. The defense countered with two physicians who

testified the injuries were more consistent with blunt trauma and could have been caused by the child falling from the bed.

State v. Coffman, 746 So.2d 471 (Fla. 2d DCA 1998):

Abuse of discretion to order new trial on basis that verdict was against weight of evidence where medical evidence indicated that child suffered from shaken baby syndrome and that injuries were inflicted at time when child was in exclusive care of defendant.

Defendant charged with aggravated child abuse predicated on malicious punishment is not entitled to jury instruction on simple battery as lesser included offense.

Dixon v. State, 691 So.2d 515 (Fla. 1st DCA 1997):

Error to deny motion for judgment of acquittal where only proof of guilt was circumstantial, evidence was not inconsistent with defendant's hypothesis that someone else had shaken infant, and evidence presented at trial showed that defendant was one of several people, both adults and children, who had access to or cared for infant during period in which, according to state's expert, injury could have occurred.

Discussion: Read this case carefully when you are thinking of filing a shaken baby case. The fact scenario in this case is very similar to the scenario we see repeatedly in this unit. The case suggests you cannot assume the suspect committed the criminal act simply because he was the last one with the child prior to hospitalization.

Torture:

Every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused.

Note: This definition was removed from the statute in the October 1, 1996 revision.

Crowell v. State, 2019 WL 4458770 (Fla.App. 1 Dist., 2019)

Any error in jury instruction on torture and caging theories was harmless error in light of evidence which supported alternative theories including premeditated murder and felony murder while committing aggravated child abuse; there was evidence defendant knew of pregnancy but, upon giving birth at home, never checked to see if the baby was breathing or crying before depositing the baby headfirst in a trash bag and then abandoning the bag outside her home, there was evidence baby remained outside for hours before dying of hypothermia and asphyxia, and there was evidence defendant then lied about having a baby to both hospital personnel and law enforcement.

Evidence warranted inclusion of caging theory in felony murder jury instruction based on evidence defendant put her baby headfirst in a trash bag and then abandoned the bag outside her home; even if enclosure was not made of sturdy materials, infant could not be expected to free herself from life-threatening confinement in trash bag, and baby was freed only when law enforcement officers arrived many hours later.

Evidence warranted inclusion of torture theory in felony murder jury instruction based on evidence defendant placed her baby headfirst in a trash bag and abandoned the bag outside her home; there was evidence the baby bled out, while being left for hours outside in cold, after defendant severed but did not clamp umbilical cord, that baby fought for her life for four hours as she struggled to breathe, that baby was significantly hypothermic after hours outside in cold, and that defendant played cat-and-mouse game with hospital officials denying her pregnancy and baby's existence.

Wheeler v. State, 4D15-3693, 2016 WL 6611100 (Fla. 4th DCA Nov. 9, 2016)

Evidence did not show that minor victim was willfully tortured or maliciously punished so as to support defendant's conviction for aggravated child abuse; defendant arrived at house party where teenagers were drinking alcoholic beverages, and exercising poor judgment, defendant began a fight with the victim, defendant and the victim did not have the type of relationship contemplated by child abuse statute where punishment might be administered, the extent of the battery committed did not rise to the level of

"maliciousness" required by aggravated child abuse statute, there was no medical testimony, victim did not testify, and battery that occurred in this case did not rise to such an extreme level that amounted to torture.

Aggravated child abuse committed through malicious punishment is reserved for cases involving parental discipline that results in great bodily harm or permanent disabilities and disfigurements or that demonstrates actual malice on the part of the parent and not merely a momentary anger or frustration.

Evidence did not show that battery committed by defendant caused great bodily harm, permanent disability, or permanent disfigurement to the minor victim so as to support defendant's conviction for aggravated child abuse; there was no medical testimony, victim did not testify, there was an absence of evidence that the victim suffered great bodily harm, and testimony that the victim was moaning and crying in the video were, at best, proof of moderate harm insufficient to support a conviction.

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

Aggravated child abuse statute includes not only willful acts of commission, but also acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to a child.

Evidence that defendant was in complete control of child's diet, and, on several occasions, emphatically denied child food offered by third person, exercised controlling influence over child's mother, directed mother's punishment of child, and prohibited child from eating when she was offered food from third persons was sufficient to support finding of "willful intent," and, thus, was sufficient to support defendant's conviction for aggravated child abuse.

Discussion: This rather bizarre case resolved a conflict between different district courts of appeal. *see* State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989); Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983): The mother of the victim child believed that the child was possessed by demons. The defendant advised the mother on spiritual matters and instructed her on how to get rid of the demons. Eventually, custody of the child was given to the defendant. As part of her religious ritual, the child was deprived of

food etc. The court ruled that "willful torture" included acts of omission as well as acts of commission. In overruling Jakubczak and Harris, the court notes that negligent omissions are not encompassed by section 827.03 not because they are omissions, but because they are committed without the requisite specific intent.

State v. Carwile, 615 So.2d 748 (Fla. 2d DCA 1993):

Aggravated child abuse statute (willful torture) includes not only willful acts of commission, but also willful acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to child.

Discussion: This case involved a situation where a two year old child received a head wound while in the custody of the defendants. Testimony was clear that the child's behavior became very strange after the injury and that she should have received medical treatment. The defendant intentionally never took the child to the hospital until it was too late. There was an implication that she was afraid to take the child to the hospital because it was her 13 year old son who caused the injury. The trial court relied on Jakubczak and Harris in granting a motion to dismiss. The appellate court relied on Nicholson, which had not yet been decided at the time of the trial court's ruling. It ruled that *negligent* omissions do not qualify for section 827.03, but *willful* omissions do. The court also noted that intent is not an issue to be decided on a motion to dismiss, and the prosecutor should have filed a traverse based on that issue.

State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989):

Statutory definition of "torture" did not encompass failure to seek prompt and timely medical attention for a burned child.

Discussion: The facts of this case are only briefly discussed in the opinion. This case was overruled by Nicholson v. State, 600 So.2d 1101 (Fla. 1992). The Florida Supreme Court disapproved the decision insofar as it holds that only acts of commission constitute aggravated child abuse under section 827.03. The Supreme Court ruled that the Harris decision was correct, however, in its ultimate ruling that failure to seek prompt and timely medical attention for an injured child was aggravated child abuse. *Negligent* omissions are not encompassed by section 827.03.

Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983):

Statute providing criminal penalties for aggravated child abuse was not violated by acts of negligence, and thus, where record was devoid of sufficient evidence, circumstantial or otherwise, to establish willful acts of commission by child's mother, conviction for aggravated child abuse could not be sustained.

Mother who left nine week old child with her husband knowing that he was often not in control of his mental faculties because of an abuse of alcohol or drugs, and also knowing that the infant had previously suffered serious injuries while in the exclusive care and custody of the husband could properly be convicted of child abuse by an act of omission or culpable negligence. Mother could also be convicted based upon her failure to seek prompt medical attention for the injured child, an act of negligent abuse.

Discussion: This case was overruled by Nicholson v. State, 600 So.2d 1101 (Fla. 1992) to the extent that it is inconsistent with that opinion. See the discussions of Nicholson and Harris for further discussion. Basically, the father inflicted all of the injuries and the defendant mother just let it happen. This case should not be relied upon without reading it in conjunction with the subsequent holding in Nicholson.

Faust v. State, 354 So.2d 866 (Fla. 1978):

Statute defining offense of aggravated child abuse was not unconstitutionally vague and indefinite nor overbroad.

Leath v. State, 333 So.2d 122 (Fla. 1st DCA 1976):

Evidence, in prosecution for child torture, supported defendant's conviction.

Discussion: The defendant was left home alone with his girlfriends 3 and 6 year old children. Defendant testified that he went to answer the front door while he was starting to give the 3 year old girl a bath. He asked the 6 year old brother to start running the water. When he returned, the girl was sitting is steaming hot water. He indicated that he did not know how the girl got burned. Doctors testified that the resulting burns on the child were the result of hot water and must have caused excruciating pain. The 6 year old told a detective that his father had put his sister into the tub because she had messed her britches. He also

stated that the appellant had heated water on the stove and poured it into the tub. The court ruled that this was sufficient evidence. Read this case carefully whenever you get a case with a similar fact pattern.

Hester v. State, 310 So.2d 455 (Fla. 2d DCA 1975):

Evidence, in prosecution of defendant for unlawfully torturing or punishing her 15 month old child, was sufficient when considered entirely independent of, and without reference to, any part of confession of defendant for the trier of fact to infer that vaginal injury to 15 month old baby girl was more likely than not brought about by criminal means, thereby establishing a prima facie showing of a corpus delicti independent of the confession.

Discussion: The primary issue in this case was whether there was a sufficient independent prima facie showing of a corpus delicti so as to render the confession admissible. Since the child was too young to speak, medical testimony was offered to show the extent of the wound to the child's vaginal area. The court ruled that the nature of the injury by itself tended to show that a crime had been committed, thereby establishing the corpus by which to admit the mother's confession of causing the injury.

Non-Statutory Definitions:

Age:

Witt v. State, 780 So.2d 946 (Fla. 5th DCA 2001):

Knowledge of age of victim at time of abuse is not an element of offense.

Statute providing that aggravated child abuse occurs when a person "knowingly or willfully" abuses a child requires only that the abuse be committed knowingly or willfully.

Discussion: The 20-year-old defendant punched the 16-year-old victim in the head, causing him to fall and strike his head and subsequently die. The defendant argued that he did not know the victim was a child. The appellate court ruled that the statute would be nonsensical if it required the defendant to know the victim's age when an aggravated battery was at stake, but not when willful

torture, unlawful caging and malicious punishment was involved. The court also compared this situation with Grady v. State, 701 So.2d 1181 (Fla. 5th DCA 1997), which held that knowledge of the age of the victim in a procuring a minor for prostitution charge was not an element of the crime.

KBS.v. State, 725 So.2d 448 (Fla. 2d DCA 1999):

State was authorized under statute to prosecute fourteen-year-old juvenile for child abuse, a third degree felony, where juvenile intentionally inflicted injury on nine-year-old victim by intentionally burning victim with lighted cigarette. Statute does not place age based restriction on these types of prosecutions.

Discussion: The appellate court made an interesting observation: "However, the State could, under the statute, prosecute a nine-year-old (or younger) for child abuse if he or she intentionally inflicted a mental or physical injury upon a fourteen-year-old. This would appear to us to be an unintended result, and the legislature may well wish to review this issue." It should be noted that the same argument applies to the Indecent Assault statute and the appellate courts have already ruled that the issue should be left to the sound discretion of the State Attorney.

Acts of Omission:

Conine v. State, 752 So.2d 4 (Fla. 1st DCA 2000):

Evidence insufficient to support conviction of defendant for 3rd degree murder of her infant daughter where there was no showing that defendant participated in act of abuse by child's father which caused death.

State failed to present evidence that anything defendant did was due to cause of child's death.

Discussion: The defendant in this case was the mother of the deceased child. The father killed the child by an act of child abuse. The State presented evidence that the mother frequently abused the children and showed a callous disregard for their health and safety. The State argued that the mother knew of the father's abusive behavior towards the children and permitted the children to live in an environment which allow this tragedy to happen. The court ruled that since the defendant had no direct participation in the

specific act that led to the death of this child, she could not be held responsible for the death. The Court distinguished the Pauline Zile case where a mother was convicted for murder because she knowingly allowed her boyfriend to kill her child. In the Zile case, the mother was present at the time of the beating but in this case she was not. Therefore, the court noted that although the mother seemed to be a horrendous parent, she had no direct knowledge of the specific act that lead to the death of the child and therefore could not be held responsible.

Zile v. State, 710 So.2d 729 (Fla. 4th DCA 1998):

Evidence supported mother's conviction for felony murder, with aggravated child abuse as the underlying felony; evidence showed that mother's husband beat child to death and that mother made no attempt to interfere until after child lost consciousness.

Act of omission in failing to protect child when she was being beaten to death constitutes aggravated child abuse.

Jury could have determined that mother failed to execute her duty to protect her child by standing by and allowing her husband to punish child so severely as to result in child's death, supporting felony-murder conviction; mother knew that abuse was taking place, but she allowed assault to continue until child had lapsed into unconsciousness, at which time mother said "that's enough [husband]" in a calm and quiet voice.

Mother could not be convicted of aggravated child abuse arising out of incident in which mother was in a different room, with door closed, when her husband hit child with his belt four times, taking "half swings."

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

Aggravated child abuse statute includes not only willful acts of commission, but also acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to a child.

Evidence that defendant was in complete control of child's diet, and, on several occasions, emphatically denied child food offered by third person, exercised controlling influence over child's mother, directed mother's punishment of child, and prohibited child from eating when she was offered food from third persons was sufficient to support finding of "willful intent," and, thus, was

sufficient to support defendant's conviction for aggravated child abuse.

Caging a Child

Crowell v. State, 2019 WL 4458770 (Fla.App. 1 Dist., 2019)

Any error in jury instruction on torture and caging theories was harmless error in light of evidence which supported alternative theories including premeditated murder and felony murder while committing aggravated child abuse; there was evidence defendant knew of pregnancy but, upon giving birth at home, never checked to see if the baby was breathing or crying before depositing the baby headfirst in a trash bag and then abandoning the bag outside her home, there was evidence baby remained outside for hours before dying of hypothermia and asphyxia, and there was evidence defendant then lied about having a baby to both hospital personnel and law enforcement.

Evidence warranted inclusion of caging theory in felony murder jury instruction based on evidence defendant put her baby headfirst in a trash bag and then abandoned the bag outside her home; even if enclosure was not made of sturdy materials, infant could not be expected to free herself from life-threatening confinement in trash bag, and baby was freed only when law enforcement officers arrived many hours later.

Evidence warranted inclusion of torture theory in felony murder jury instruction based on evidence defendant placed her baby headfirst in a trash bag and abandoned the bag outside her home; there was evidence the baby bled out, while being left for hours outside in cold, after defendant severed but did not clamp umbilical cord, that baby fought for her life for four hours as she struggled to breathe, that baby was significantly hypothermic after hours outside in cold, and that defendant played cat-and-mouse game with hospital officials denying her pregnancy and baby's existence.

Blow v. State, 993 So.2d 540 (Fla. 2d DCA 2007):

Plain meaning of the language “willfully and unlawfully cages a child,” as contained in aggravated child abuse statute, limits the

statute's application to confining a child in some type of wire or bar boxlike structure or a small restrictive enclosure.

Caretaker of Child:

Pena v. State, 17 So.3d 788 (Fla. 5th DCA 2009):

Defendant could be convicted of child abuse even though he was not in a parental or custodial relationship with the victim.

It was within State Attorney's discretion to charge defendant with child abuse, rather than battery, even if State was influenced by penalties available upon conviction.

Discussion: 14-year-old boy flipped off adult-stranger who reciprocated by pushing boy off his bicycle.http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.08&ifm=NotSet&fn=_top&sv=Split&docname=FLSTS827.03&tc=-1&pbc=EF068F2E&ordoc=2019606133&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31

Tate v. State, 864 So.2d 44 (Fla. 4th DCA 2003):

Non-caretaker child can be convicted of aggravated child abuse.

Statute clearly specifies that child abuse occurs when a "person" abuses a child.

Culpable Negligence:

Standard Jury Instructions:

Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a

> course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

Kelley v. State, 2022 WL 2196885 (Fla.App. 5 Dist., 2022)

Defendant's act of drunkenly walking his 4-year-old son down the middle of a street was negligent and irresponsible but did not constitute "culpable negligence" to support a child neglect charge.

Defendant drank a 24 pack of beer over the course of 24 hours and decided to take his 4-year-old son to the park. An undercover officer observed him at 4:30 pm staggering on the center line of a two-way road with his son at his side. It was a 25-mph zone, and the traffic was light. The suspect stumbled and fell multiple times, but made it to the park. Witnesses observed him falling down drunk at the park as he supervised his child. When officers confronted him, he was practically incoherent and couldn't even provide his name.

The appellate court ruled the trial court should have granted a judgment of acquittal because the defendant's conduct did not rise to the level of culpable negligence. The opinion provides a good discussion of culpable negligence and how it applies to child neglect. The court stated,

> *Therefore, to establish culpable negligence, the State must adduce evidence showing a defendant acted with "a gross and flagrant character, evincing reckless disregard for human life" or an "entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them."*

The opinion shows that the standard we must use is very high. The court implied that if the suspect had done the same thing on a busy highway, it may have had a different result. Even if we are outraged at the inadequate supervision of a young child, it doesn't necessarily mean we have met this standard. Is it possible this young child could have walked out in front of a car while his dad was falling down drunk? Absolutely, but "possible" is not enough.

Mutch v. State, 2020 WL 7380418 (Fla.App. 1 Dist., 2020)

The defendant was charged with aggravated manslaughter by culpable negligence of a child. His defense was that the child accidentally fell out of the car and hit his head. The medical examiner testified that the child died from repeated blows to the head. *Appellant now argues the trial court committed reversible error by allowing the medical examiner to testify that the injuries resulted from "blows," because the State did not charge Appellant with intentionally causing the injuries.* The appellate court affirmed the conviction and stated, *[t]he trial court did not err by allowing the medical examiner's testimony that the fatal injuries were inconsistent with Appellant's exculpatory statements made before trial. The medical examiner's testimony was relevant to prove that the fatal injuries could not have been caused in an accident that did not involve criminal conduct, whether by intentional blows or some other type of force… The State's charging decision did not render the evidence at issue inadmissible.*

This is a good case to review when we have a child abuse/child neglect case where the child suffered serious injury and the defendant argues it was an accident.

Jones v. State, 2020 WL 1222935 (Fla. 2d DCA Mar. 13, 2020):

Defendant was watching his six-month-old child while the mother ran errands. At one point he called the mother and said something was wrong with the child. The mother noted the child was unconscious and suggested they call 911. The defendant asked her to wait for a few minutes to see if the child would revive on his own. Several minutes later, the child vomited milk and blood. The mother immediately called 911. The defendant was convicted of aggravated child abuse and child neglect with great injury. The appellate court reversed the child neglect with injury count because the state's expert testified that delaying medical treatment could exacerbate the injury, but she never said that it actually did. The court also said the lesser included offense of child neglect was not appropriate because the facts presented did not establish culpable negligence.

Lanier v. State, 2019 WL 961450, (Fla.App. 1 Dist., 2019)

A five-month-old child was taken to emergency room with skull fractures, retinal hemorrhaging swollen head, limp neck and other obvious injuries. They were at various stages of healing. It was not determined who inflicted the injuries, so both the mother and the live-in boyfriend, Lanier, were charged with child neglect. This opinion discusses why there was

sufficient evidence to send the case against the boyfriend to the jury. The following excerpt from the case discusses some of the factors considered in determining whether the suspect acted with culpable negligence:

> *The length of time between L.L. sustaining multiple injuries and her receiving medical attention was anywhere between seven days and three weeks. L.L.'s symptoms of trauma, her persistent and worsening condition, and need for immediate medical attention would have been obvious to any reasonable person. See, e.g., Moore v. State, 790 So.2d 489, 492 (Fla. 5th DCA 2001) (affirming conviction for child neglect where father allowed infant to fall and then failed for two days to seek medical advice despite infant's noticeable symptoms and abnormal behavior). Several witnesses, including Lanier, testified that for at least three weeks before the infant was admitted to the emergency room, L.L. cried inconsolably when picked up and could not hold her head up on her own. Lanier stated that L.L.'s neck felt "loose." The evidence showed that L.L.'s head was visibly swollen and that her body was covered in bruises. L.L. was a five-month-old infant—she was not walking or even crawling. The medical testimony established that a five-month-old could not injure herself to such an extent.*
>
> *A finding of culpable negligence in a child neglect case does not require proof that the defendant knew the specific nature of the child's injuries. Rather, it requires a showing that the defendant either knew or should have known that the extent of the child's injuries was such that the failure to seek medical attention amounted to a willful failure to provide for the child's well-being.*

Medina v. State, 2017 WL 3721822 (Fla.App. 2 Dist., 2017)

> Mother's boyfriend was watching her 4-year-old child while she was at work. As boyfriend was playing video games downstairs, the child asked if he could come down and play. The boyfriend said yes and asked the child to bring his controller. The excited child ran down and stairs and fell. He cracked open his skull and had serious head injuries.
>
> Evidence was insufficient to show that defendant was culpably negligent or willfully failed to care for child's well-being by allowing him to descend staircase unassisted or unsupervised, in prosecution for neglect of a child causing great bodily harm; mother's testimony and defendant's recorded statements reflected that child regularly traversed the staircase without significant incident on numerous occasions, and without any evidence that child had more than one prior incident with stairs, an incident that

apparently did not result in serious injury to the child, the State fell short of proving defendant was culpably negligent.

The failure to supervise a child, including leaving children home alone for a few hours, does not always constitute culpable negligence or criminal neglect.

State failed to present any evidence that defendant's purported use of marijuana adversely affected his ability to supervise and care for child, created a dangerous situation, or contributed to injuries child sustained when he fell on stairway, in prosecution for neglect of a child causing great bodily harm.

Ideally, a sole caretaker of a child should be in the full possession of his or her faculties while caring for the child; however, a caretaker may be under the influence to a limited extent without the caretaker's conduct rising to the level of culpable negligence if the caretaker's slightly altered state does not negatively affect the caretaker's duty to supervise and care for the child, create a dangerous situation, or contribute to the child's injuries.

The appellate court did an extensive review of the case law on child neglect and found the defendant did not do an act that rose to the level of culpable negligence. Great weight was placed on the fact that the child descended the stairs on a regular basis without the assistance of adults.

> *In closing, we are obliged to state that we neither approve nor condone Mr. Medina's conduct as described in this opinion. The stairs in his residence were steep and unfinished, and the hand railings were inadequate. The exercise of ordinary prudence would suggest that an excitable, four-year-old child should be assisted or—at the least—supervised while ascending or descending such a flight of stairs. Nevertheless, we are not persuaded that Mr. Medina's failure to supervise or to assist J.A. under the facts shown here rose to the level of willful or culpably negligent conduct. See Arnold, 755 So.2d at 798 ("[T]he legal precedents have acknowledged that only the most egregious conduct, done either willfully or with criminal culpability, should be criminalized."). The only other reported appellate decision involving similar facts reached the same conclusion that we reach here. For all of the foregoing reasons, we reverse Mr. Medina's judgment and sentence for neglect of a child causing great bodily harm*

and remand with directions to the trial court to enter a judgment of acquittal and to discharge Mr. Medina.

Ristau v. State, 2016 WL 6248878 (Fla. 2d DCA 2016)

Although defendant's decision to leave his sick infant child with friend with whom defendant and his children were staying while he went to job interview was negligent, his conduct did not rise to level of willful or culpable negligence, as required to support conviction for neglect of child causing great bodily harm; there was no evidence that defendant had recognized seriousness of child's illness and then acted with utter disregard for child's safety by leaving him in friend's care regardless, child was sleeping in when defendant dropped him off and was not showing signs of distress, when friend informed defendant that he needed to take child to see doctor, defendant told friend he would take child to doctor later in day and that friend should call ambulance if child's condition worsened, and there was no evidence of accident or injury that would have put defendant on notice of serious ailment that was not obvious upon visual inspection.

"Culpable negligence" requires more than mere negligence and is reserved for only the most egregious conduct, done either willfully or with criminal culpability.

To establish culpable negligence, the defendant must show a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or that entire want of care which would raise the presumption of indifference to consequences.

Kish v. State, 2014 WL 4242757 (Fla.App. 1 Dist.)

Evidence that defendant arranged for her children who were 10, 8, and 7 years old to be dropped off after school at the home of her ex-husband and biological father of oldest child and that children were sick while doing their homework and watching TV alone there for a few hours did not support culpable negligence conviction, even though defendant did not confirm whether ex-husband and his wife would be home; defendant encountered a family emergency mid-day while children were at school,

defendant arranged change to school bus route because she did not expect to be home due to emergency, ex-husband and wife were trusted caregivers who were often home at that time and welcomed children, 10-year-old could and did provide appropriate care for sick siblings until ex-husband and wife arrived, and children had gone to school for a full day and taken bus home without any evidence of being significantly debilitated.

Griffis v. State, 848 So.2d 422 (Fla. 1st DCA 2003):

Fundamental error occurred where defendant was charged with aggravated child abuse, and trial court gave then-standard jury instruction on lesser included offense of child abuse which erroneously allowed jury to find defendant guilty of child abuse by acting "willfully by culpable negligence" to inflict or permit the infliction of physical injury to the victim.

Culpable negligence is element of child neglect, and information did not allege either neglect or culpable negligence.

Language was contradictory to other language in instruction that correctly indicated that child abuse is an "intent" crime.

Error lowered state's burden of proof on vigorously disputed essential element by possibly misleading jury to believe it did not have to find intent to injure on defendant's part in order to convict of child abuse.

Instruction given was also erroneous because it included causing "great bodily harm" to victim as an element of child abuse.

Because jury used general verdict, specific findings underlying factual basis of guilty verdict are not in record.

Eversley v. State, 748 So.2d 963 (Fla. 1999):

Trial court properly overturned jury's verdict of guilt on manslaughter charge where evidence show that defendant's infant son died after defendant failed to take him to the hospital emergency room although nurse and doctor at clinic repeatedly told defendant that she should take him to the hospital because clinic did not have equipment to verify whether infant had pneumonia.

Medical testimony can be basis for establishing causation, and conflicting medical testimony was sufficient to support jury's finding as to causation element.

Although current statute includes failure to provide medical care within definition of manslaughter, under statute in effect at time of offense, failure to provide medical care did not satisfy culpable negligence element of manslaughter.

Discussion, It should be noted that this decision was based upon statutes that existed prior to October 1, 1996. The appellate court made it clear that similar conduct would fall within the current statutes. This case provides an excellent discussion on the issue of causation. The terms "cause and effect" and "proximate cause" are discussed at length and should be read carefully whenever such issues arise in one of your cases. Also keep in mind that this case was summarized in my outline earlier and has since been over ruled by this case.

A.J. v. State, 721 So.2d 761 (Fla. 2d DCA 1998):

Juvenile could not be adjudicated guilty of misdemeanor child abuse based on aggravated child abuse petition alleging intentional touching or striking, where information did not include allegations of any injury through culpable negligence.

Misdemeanor child abuse is not lesser-included offense of aggravated child abuse.

Discussion: This case has little relevance today because there is no longer a crime of misdemeanor child abuse.

State v. Eversley, 706 So.2d 1363 (Fla. 2d DCA 1998): *overruled*

Evidence that defendant's infant son died after defendant failed to take infant to hospital emergency room although nurse and doctor at clinic repeatedly told defendant that she should take infant to hospital because clinic did not have equipment to verify whether infant had pneumonia sufficient to support manslaughter conviction.

Parent's failure to provide medical care for child suffering from injury or illness may be legal cause of child's death.

Felony child abuse is proven by evidence that a person willfully or by culpable negligence deprives or allow a child to deprived of medical treatment.

Discussion: Although this case was decided on old child abuse statute, it contains some very good language about the responsibilities of parents to seek medical treatment for their children. The court noted that the defendant's failure to attempt to obtain medication to treat the cold she allegedly believed her son was suffering from epitomizes willful and wanton recklessness.

State v. Mincey, 658 So.2d 597 (Fla. 4th DCA 1995):

Statute providing that "whoever, though financially able, negligently deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired shell be guilty of a misdemeanor of the second degree" is unconstitutional because it criminalizes simple negligence. Question certified to Florida Supreme Court.

Discussion: Note that the child neglect statute was subsequently repealed effective October 1, 1996. Negligent treatment of children is now a third degree felony with a new definition.

Hermanson v. State, 604 So.2d 775 (Fla. 1992):

Child abuse statute and spiritual treatment accommodation provision, when considered together, were ambiguous and denied due process to parents convicted of child abuse resulting in third degree murder for failing to provide daughter with conventional medical treatment for juvenile diabetes; statutes failed to give parents notice of point at which their reliance on spiritual treatment lost statutory approval and became culpably negligent.

Discussion: This case basically involves a conflict between F.S. 827.04(1) and 415.503(7)(f). This case will be applicable only where a defendant fails to provide medical attention to her child based upon religious beliefs.

Leet v. State, 595 So.2d 959 (Fla. 2d DCA 1991):

In prosecution for child abuse and third degree felony murder, finding that mother's boyfriend had duty to protect child from

mother's abuse was supported by evidence that mother and her children had moved into boyfriend's home for extended and indefinite period, that boyfriend bathed child, played with him, and took him for car rides, and that on at least one occasion mother left child in boyfriend's sole care, even though mother was primarily responsible for child care and discipline.

Finding that mother's boyfriend was culpably negligent in permitting mother's severe abuse of child was supported by evidence that boyfriend knew that mother had previously been charged with child abuse and that mother was capable of making excuses to cover her acts of child abuse, that boyfriend saw extensive bruises and swellings on child's body for which mother could offer no satisfactory explanation, and that boyfriend failed to report evidence of abuse to proper authorities, even though boyfriend had never witnessed acts of abuse, and authorities had returned child to his mother after previous abusive incidents.

Felony child abuse applies to acts of omission as well as acts of commission.

For purposes of felony child abuse statute, culpable negligence is not common law theory of intent, it is objective standard, and if State can prove that defendant's conduct would be gross and flagrant, evincing reckless disregard for human life, if committed by ordinary reasonable man, issue of guilt must be submitted to jury.

Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983):

Mother who left nine week old child with her husband knowing that he was often not in control of his mental faculties because of an abuse of alcohol or drugs, and also knowing that the infant had previously suffered serious injuries while in the exclusive care and custody of the husband could properly be convicted of child abuse by an act of omission or culpable negligence. Mother could also be convicted based upon her failure to seek prompt medical attention for the injured child, an act of negligent abuse.

McDaniel v. State, 566 So.2d 941 (Fla. 2d DCA 1990):

There was overwhelming evidence that defendant was culpably negligent in withholding food or medical treatment from his infant son where three babysitters testified that the child had severe diarrhea and projectile vomiting and yet defendant did not seek

medical treatment.

Deadly Weapon:

Standard Jury Instructions:

A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm

Brown v. State, 35 Fla. L. Weekly D1172 (Fla. 4th DCA 2010):

Defendant was charged with aggravated child abuse by knowingly causing great harm. The state argued and the judge instructed the jury on aggravated child abuse by using a deadly weapon. The case was reversed because, "the jury instructions and the State's closing argument permitted the jury to convict the defendant based upon a theory of the crime not charged."

False Reports of Child Abuse

State v. Grayson, 965 So.2d 334 (5th DCA 2007):

Competing statutes governing child abuse reporting and abuse investigations, respectively encouraging persons to report by protecting accusers' anonymity on the one hand but ensuring thorough investigations on the other, was resolved in deference to the latter as to afford investigators discretion to disclose information necessary for an adequate investigation; and thus, that DCF investigator disclosed factual allegations of defendant's abuse report while discussing matter with mother, thereby disclosing defendant's identity without mentioning her name, did not constitute unlawful disclosure of defendant's identity as to warrant dismissal of information alleging false child abuse report.

Discussion: A similar situation was addressed in State v. White, 867 So.2d 594 (Fla. 2d DCA 2004), which held that the trial court could dismiss false reporting charges against a defendant when the investigating law enforcement officer played the hotline tape to the alleged child abuser for the purpose of identifying who made the call. The *Grayson* opinion distinguishes the two cases. It is important to note that the confidentiality of the hotline call is

eliminated if DCF conducts their own investigation and determines the allegation to be false.

State v. White, 867 So.2d 594 (Fla. 2d DCA 2004):

Where audiotape of anonymous call to child abuse hotline was made available to the subjects of the abuse report so that they could identify the voice of the caller, trial court properly suppressed the audiotape, any transcript of the call, the voice identification of defendant as the caller, and statements defendant made to police after she was questioned as the result of the identification.

Law enforcement was prohibited from publishing a copy of the anonymous central abuse hotline call to the subjects of the call for the purpose of identifying the caller.

Discussion: The problem here is not that the detective voice identified the tape, but that he did it prior to determining the abuse complaint was false. Had the protective investigator done an internal investigation pursuant to F.S. 39 and determined that the complaint was false, the identity of the caller would have lost its privileged character. Since the investigator simply unfounded the allegation without making a finding that it was false, the defendant maintained her right to anonymity until such a finding was made.

Intentional Act That Could Reasonably be Expected to Result in Physical or Mental Injury:

Stillions v. State, 2020 WL 3042026, at *1 (Fla. 1st DCA June 8, 2020)

Stillions was a teacher in a pre-kindergarten program for children with disabilities. The alleged victim was three years old when he enrolled in the pre-K program and was assigned to Stillions' class. The child was nonverbal and on the autism spectrum. Stillions taught the child for two years while he was enrolled in the program. During this time, the child's father observed an increase in the child's aggressiveness and stated that the child was reluctant to go to school.

During trial, the jury heard of three separate incidents of child abuse. A witness testified she saw the defendant knee the child in

the chest on 3 or 4 occasions to get him to move out of the way. The second incident involved a situation where the child was trying to leave the lunchroom and the defendant tripped him. The third incident happened outside when a witness saw the defendant push the child to the ground. The defendant moved for a judgment of acquittal, arguing that there were no injuries and her acts were not reasonably likely to result in physical or mental injury. The court disagreed and ruled that the jury could find that these acts were reasonably likely to result in injury.

Burrows v. State, 2011 WL 2498113 (Fla. 3d DCA 2011)

State's alleged failure to present evidence that child suffered an actual mental injury as a result of watching defendant punch and stab child's mother did not preclude conviction for child abuse; defendant successfully had evidence of whether child had gone to counseling excluded from the trial, and child abuse statute required only an act that "could reasonably be expected to result" in a physical or mental injury, which requirement was satisfied by defendant's actions.

Delgado v. State, 2011 WL 2060061 (Fla.):

Evidence was insufficient to support a kidnapping conviction when defendant stole a pickup truck with a baby sleeping in the back seat and the State could not prove that the defendant knew of the child's presence during the theft.

Even though the defendant ransacked and abandoned the vehicle a short time later, discovery of the presence of the child during the ransacking would not be sufficient to support kidnapping charges.

In dicta, the court noted that had the defendant abandoned the truck with knowledge of the child's presence, it may have supported child abuse charges.

State v. Lanier, 979 So.2d 365 (Fla. 4th DCA 2008):

Evidence was insufficient to support two charges of child abuse; defendant was a school teacher, teacher allegedly stomped on a student's foot after student did the same to another child, the "stomp" caused no bruises or physical trauma, in second incident defendant pushed chair towards steps and student fell down steps,

and placing chair near steps or pushing chair near steps was not reasonably expected to result in physical injury to student.

Evidence was insufficient to support charge of child neglect; defendant, a teacher, placed disruptive child in hallway on chair near stairs, child later fell down stairs, child was within defendant's sight in hallway, and defendant asserted that she kept an eye on child.

Zerbe v. State, 944 So.2d 1189 (Fla. 4th DCA 2006):

Sole allegation that defendant pestered child victim about going to bathroom was insufficient to support conviction for child abuse; there simply was no evidence that defendant's repetitive requests for child to go to bathroom was done intentionally or could reasonably be expected to cause mental injury.

State v. Coleman, 937 So.2d 1226 (1st DCA 2006): *conflict with 4th DCA certified*

Speech that causes such mental injury to child as to constitute child abuse is not constitutionally protected.

Remand was required to determine whether state's information charging defendant with three counts of felony child abuse based on oral statements he had made to victims could withstand overbreadth challenge on ground that speech constituted proscribed child abuse only if it met the definitions of "abuse" and "mental injury."

Discussion: This case conflicts with the recent decision in *Munao v. State*, 31 Fla. L. Weekly D2268 (Fla. 4th DCA 2006). Basically, the 4th says you cannot charge child abuse based upon speech as a matter of law and the 1st days you can charge it if the resulting injury complies with the definitions in physical and mental injury. The court did not rule whether the speech involved in this particular case would constitute child abuse, but remanded the case for the trial court to figure it out.

Munao v. State, 939 So.2d 125 (Fla. 4th DCA 2006):

Father's oral statements to his six-year old son to go into the kitchen, get a knife, and stab his mother cannot, standing alone, support conviction for child abuse under section 827.03(1)(b), which defines child abuse as an intentional act that could

reasonably be expected to result in physical or mental injury to a child.

As presently constructed, statute cannot be applied to speech of any kind.

Discussion: This case was based primarily on statutory construction and constitutional issues. The court noted that the legislature would have to re-word the statute to allow prosecution based upon speech. In this case, the minor victim called his father on the phone and said that mother was being mean to him. The father instructed the child to go to the kitchen, grab a knife and stab her. The State called psychologist to testify that based upon the child's psychological issues, the father's instruction to stab the mother were reasonably likely to result in mental injury to the child. The court allowed a conviction for solicitation to commit aggravated battery, but not child abuse.

S.J.C. v. State, 906 So.2d 1115 (Fla. 2d DCA 2005):

Corporal punishment that could reasonably be expected to injure a child is criminally punishable abuse, even if the act is not completed to bring about the expected injury.

Discussion: This is a case where a child was claiming self defense when he allegedly struck his mother as she was holding a board with a nail in it in a threatening manner. The court ruled that since the mother was technically committing child abuse (imminent unlawful force), the child had a right to self defense.

Ford v. State, 802 So.2d 1121 (Fla. 2001):

In challenge to propriety of child abuse indictment made after state rested its case, defendant is required to show, not that the indictment is technically defective, but that it is so fundamentally defective that it cannot support a judgment of conviction.

Fact that indictment charged defendant with violating section 827.03, which embraces three separate child abuse-related offenses, and the grounds set forth in the indictment could have supported charges under two of those offenses is not a sufficient basis for invalidating conviction.

Inquiry concerning technical propriety of indictment should have been raised prior to trial.

Evidence that defendant murdered parents and left 22-month-old child strapped into car seat in open truck in isolated wooded area, and that child was found dehydrated, flushed with heat, and covered with insect bites is sufficient evidentiary basis for third-degree felony child abuse conviction.

Clines v. State, 765 So.2d 947 (Fla. 5th DCA 2000):

Evidence that defendant, who was the father of child, got into argument with mother of child, made verbal threat which implied that he would kill child, and went into room where child was sleeping and pointed loaded and cocked gun at ceiling, sufficient to support conviction of child abuse by an intentional act that could reasonably be expected to result in physical or mental injury to child.

Discussion: The appellate court noted that there is little appellate guidance on how to apply the subsection that states "An intentional act that could reasonably be expected to result in physical or mental injury to a child." The court noted "This type of irrational, hostile and reckless behavior by an excited or agitated person, unfortunately often results in shootings, which perhaps were not intended…In our view, these undisputed facts and inferences arising therefrom were sufficient for the trial judge to have concluded Clines's intentional acts placed the child in a zone of 'reasonably expected' physical danger." If you follow this rationale, it may be easier to charge child abuse than child neglect in certain circumstances. You may recall Arnold v. State, 24 Fla. L. Weekly D931 (Fla. 2d DCA April 14, 2000), where the Second DCA ruled that the deplorable conditions in the trailer did not rise to the level of child neglect. In so ruling, the *Arnold* court noted the verbiage of the child neglect statute that requires "a single incident or omission that … could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death to a child." Thus, the child abuse statute only requires the threat of physical or mental injury and the child neglect statute requires at least the threat of serious physical or mental injury.

Maliciously (Malicious Punishment):

Standard Jury Instructions:

Maliciously means wrongfully, intentionally, without legal justification or excuse.

Please note that this definition has been ruled inapplicable by Young v. State, which held that "malice" is better defined as "ill will, hatred, spite, and evil intent".

Note: The state of the law is in constant flux in this area. The legislature rewrote the child abuse statutes effective October 1, 1996 and the appellate courts have been redefining them ever since. If the cases below appear to conflict with one another, that is because they do. This section contains all of the cases that deal with excessive discipline of children.

Please note that effective June 10, 2003, the legislature cleared up the definition of malice by enacting F.S. 827.03(4) which reads:

For purposes of this section, "maliciously means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.

Standard Jury Instructions Amendment, 911 So.2d 766 (Fla. 2005):

F.S. 827.03(2) – Child Abuse-Malicious Punishment-

"Maliciously" means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child or any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.

Lowery v. State, 2019 WL 2528787, (Fla.App. 1 Dist., 2019)

Young child died from blunt trauma to the head and possible shaken baby syndrome while in daycare. Defense expert argued child had a vein abnormality that increased

the chance of excessive bleeding with a minor head trauma. Defendant argued that State's circumstantial case did not rebut his reasonable hypothesis of innocence. Appellate court noted that the State's experts all disagreed with the defense expert on these points and the defendant made some comments that could be construed as consciousness of guilt. Court was correct in not granting a motion to dismiss.

A Williams Rule witness testified that the defendant used to grab the child by the ankles and drop him head first onto the couch. Defendant objected, claiming since her defense was that she did not do it, the prior acts were not relevant to rebut absence of mistake, etc… The court ruled that since the type of acts described by the Williams Rule witness could have resulted in the current injury, they were admissible. See the opinion for an extensive discussion on this issue.

The court improperly read the malicious punishment instruction even though that theory was not charged in the information. In light of the facts and verdict, the error was harmless.

Reinard v. State, 2019 WL 1613603 (Fla.App. 1 Dist., 2019)

Defendant's repeated act of forcing his girlfriend's three-year old son to eat his own feces as punishment for defecating in his pants while being toilet-trained constituted aggravated child abuse, and thus required revocation of defendant's probation, despite defendant's argument that victim did not suffer great bodily harm, permanent disability, or permanent disfigurement, where defendant stood in loco parentis to victim and his actions demonstrated actual malice.

Parental discipline that demonstrates actual malice is sufficient to support aggravated child abuse.

Wheeler v. State, 4D15-3693, 2016 WL 6611100 (Fla. 4th DCA Nov. 9, 2016)

Evidence did not show that minor victim was willfully tortured or maliciously punished so as to support defendant's conviction for aggravated child abuse; defendant arrived at house party where teenagers were drinking alcoholic beverages, and exercising poor judgment, defendant began a fight with the victim, defendant and the victim did not have the type of relationship contemplated by child abuse statute where punishment might be administered, the extent of the battery committed did not rise to the level of "maliciousness" required by aggravated child abuse statute, there was no medical testimony, victim did not testify, and battery that occurred in this case did not rise to such an extreme level that amounted to torture.

Aggravated child abuse committed through malicious punishment is reserved for cases involving parental discipline that results in great bodily harm or permanent disabilities and disfigurements or that demonstrates actual malice on the part of the parent and not merely a momentary anger or frustration.

Evidence did not show that battery committed by defendant caused great bodily harm, permanent disability, or permanent disfigurement to the minor victim so as to support defendant's conviction for aggravated child abuse; there was no medical testimony, victim did not testify, there was an absence of evidence that the victim suffered great bodily harm, and testimony that the victim was moaning and crying in the video were, at best, proof of moderate harm insufficient to support a conviction.

Graham v. State, 2015 WL 1044221 (Fla.App. 3 Dist.):

In affirming defendant's conviction for aggravated child abuse by malicious punishment, the court stated,

The jury was presented with ample evidence from which it could conclude that Geralyn Graham's actions in locking Rilya in a laundry room and binding Rilya to the bed with plastic cuffs were motivated by Graham's resentment

toward and hatred for Rilya. For example, Robin Lunceford testified that Geralyn Graham considered Rilya a "demon," referred to Rilya as "it," and that Rilya put Geralyn Graham "over the edge." The jury heard evidence that Geralyn Graham tried to return Rilya to DCF because, to Graham, the aggravation caused by Rilya was not worth the benefits Pamela received from DCF.

Kennedy v. State, 2011 WL 1660937 (Fla.App. 4 Dist.)

Although defendant did not object to the definition of "maliciously" when trial court instructed jury on charge of aggravated child abuse, trial court's failure to give complete definition of the term constituted fundamental error because instruction, as given by court, reduced State's burden of proof by failing to require jury to find that primary purpose of act was to cause unjustifiable pain; court instructed jury that "maliciously" meant wrongfully or intentionally, and court left out the explanatory second sentence of the instruction which clarified that maliciousness required that the primary purpose of acts was to cause the victim unjustifiable pain or injury.

In response to jury's question during deliberations, trial court's oral instructions, telling jury that it could substitute "omission or neglect" for torture in aggravated child abuse instructions, were improper because they reduced State's burden of proof; written jury instructions stated that "torture" meant every act, omission, or neglect by which unnecessary or unjustifiable pain was caused, and if jury substituted "omission or neglect" for "torture" in instruction, the replaced instruction would read that defendant willfully omitted or neglected victim, and this was not correct because, under definition of torture provided in written instructions, the act, omission, or neglect must have caused unnecessary pain.

Decision upon the competency of a child to testify is one peculiarly within the discretion of the trial judge because the evidence of intelligence, ability to recall, relate and to appreciate the nature and obligations of an oath are not fully portrayed by a bare record.

Trial court did not abuse its discretion in finding that nine year old developmentally disabled child, who was present in bathroom

when her younger sibling received scalding burns in bathtub, was competent to testify against her mother in child abuse prosecution; however, because the issue was so close, and the passage of time might have impaired child's ability to testify, should child's testimony again be required in any retrial, trial court must make a renewed finding of competency, and appellate court's finding that the trial court did not abuse its discretion in the original trial should not be considered as establishing child's competency in further proceedings.

Shelby v. State, 34 Fla. L. Weekly D2434 (Fla. 2nd DCA 2009): *not reported in So.2d*

Trial court's giving of jury instruction at aggravated child abuse trial that defined "maliciously" as "wrongly, intentionally and without legal justification or excuse," and that applied a reasonable person standard to the definition, was fundamental error, and thus appellate counsel was ineffective in failing to argue on direct appeal that the instruction was fundamental error; instruction was not equivalent to requiring a finding of ill will, hatred, spite, or evil intent, and the element of malice was disputed at trial.

Cox v. State, 1 So.3d 1220 (2d DCA 2009):

Defendant engaged in a tirade against his ex-wife over the telephone during a visitation with his young sons. "At some point during this tirade, Cox rubbed the blunt edge of a pocket knife on B.C.'s leg, then stabbed a mattress several times stating, "[T]his is what I'll do to Patrick and your mom."B.C. testified that this frightened him, though he did not scream or cry. His brother, C.C., suffered from mental and physical health issues and was screeching loudly during the incident, as he often did when agitated. Neither of the boys sustained any physical injury, nor did the State present evidence of resulting mental injury."

The appellate court ruled that the conduct of the father was not aggravated child abuse as a matter of law. Although reprehensible, there was no evidence that the children suffered physical or mental injury. The court provides good citations for previously decided cases.

Gryphon v. State, 847 So.2d 589 (Fla. 5th DCA 2003):

Where issue of malice was disputed at trial, trial court committed fundamental error in instructing jury using then existing standard jury instructions, which define malice, or maliciously, as "wrongfully, intentionally, without legal justification or excuse," instead of using definition of malice provided by Florida Supreme Court in *State v. Gaylord*, defining malice as "ill will, hatred, spite, an evil intent."

Discussion: This opinion will be irrelevant for offenses committed after June 10, 2003, because the legislature decided to clear up the dispute once and for all by including a definition of malicious in F.S. 827.03(4), which states:

> *(4) For purposes of this section, "maliciously means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.*

Jackson v. State, 838 So.2d 594 (Fla. 5th DCA 2003):

Claim that trial court erred in failing to give jury instruction on child abuse as lesser included offense of aggravated child abuse because offense was committed after amendments to statute providing that parent or one acting as such could be convicted of the lesser offense of felony child abuse not properly the subject of coram nobis proceeding.

Because change in law occurred in 1988, issue was untimely raised.

Claim that trial court erroneously instructed jury on meaning of "maliciously" in light of recently revised jury instructions is untimely.

Florida Supreme Court decision holding that failure to use correct definition of malice in standard jury instruction was fundamental error in cases where essential element of malice was disputed at trial does not apply retroactively to defendant's case.

Discussion: The defendant was convicted for killing a child in 1988. This case will not likely have much relevance in your cases, so I will refrain from trying to analyze it.

Reed v. State, 837 So.2d 366 (Fla. 2002):

It is fundamental error to give standard jury instruction for aggravated child abuse when instruction inaccurately defines disputed element of malice.

It is fundamental error if inaccurately defined malice element is disputed and inaccurate definition is pertinent or material to what jury must consider in order to convict.

Because inaccurate definition of malice reduced state's burden of proof on essential element of offense charged, inaccurate definition is material to what jury had to consider to convict defendant.

"We hold that this decision shall be retroactively applied to cases pending on direct review or not yet final."

Discussion: This case is basically saying that incorrect jury instructions have been applied to aggravated child abuse cases for the last 20 years. The standard jury instruction, which says, '[m]aliciously' means wrongfully, intentionally, without legal justification or excuse," does not conform with the standard set forth in *State v. Gaylord*, 356 So. 2d 313, 314 (Fla. 1978), which held "[m]alice means ill will, hatred, spite, an evil intent."

Raford v. State, 828 So.2d 1012 (Fla. 2002):

Under the Florida statutory scheme there is no parental privilege barring prosecution for felony child abuse under F.S. 827.03(1) (1997).

A parent can be charged with simple child abuse for excessive corporal punishment that falls between the level of abuse required to establish the offense in F.S. 827.04 (1995) and that required to prove a violation of F.S. 827.03(2) (1997).

After 1998, a parent who spanks a child with such force or repetition as to cause significant bruises or welts could be considered to have abused the child under chapter 39 of the Florida Statutes. Even if the Florida Department of Children and Families does not initiate a dependency proceeding, the State could charge

the parent with contributing to the dependency of a minor for such conduct.

If a parent can be charged with the misdemeanor offense under F.S. 827.04 (1995) when a spanking results in significant welts, the Florida Legislature intended more serious beatings that do not result in permanent disability or permanent disfigurement to be treated as simple child abuse under F.S. 827.03(1) (1997). This reserves aggravated child abuse to cases involving parental discipline that results in great bodily harm or permanent disabilities and disfigurements or that demonstrates actual malice on the part of the parent and not merely a momentary anger or frustration.

Discussion: The Florida Supreme Court addressed the conflict between the Raford and Wilson opinions. The Raford opinion prevailed in this controversial area. This opinion examines the cases that precede it and attempts to clarify the issue. All cases in this section should now be read with this case in mind.

Adams v. State, 799 So.2d 1084 (Fla. 5th DCA 2001):

Standard jury instruction given by trial court defining "maliciously" as meaning "wrongfully, intentionally, without legal justification or excuse," rather than as "ill will, hatred, spite and evil intent" was inadequate.

Discussion: The case involved the brutal murder of Kayla McKean. The conviction was affirmed on other grounds, but the court noted that the court should have read the jury instruction including the language "ill will, hatred, spite and evil intent.

Brown v. State, 802 So.2d 434 (Fla. 4th DCA 2001): *on rehearing*

Trial court did not err when it failed to instruct jury on simple battery as a lesser included offense of child abuse.

Revised schedule of lesser included offenses provides that simple battery instruction is available for present charge only when case does not involve the discipline of child by a parent or other person in authority over the child.

No abuse of discretion in denying mother's motion for judgment of acquittal on ground that conduct was privileged.

Even if evidence in trial established a "typical spanking," parental privilege to administer corporal punishment is an affirmative defense which was waived by defendant's failure to present it at trial.

Motion for certification of conflict granted.

State v. Figarola, 788 So.2d 1109 (Fla. 3d DCA 2001):

Defendant's action in striking his son twice and splitting his lip when the son refused to eat dinner, and forcing son to eat dinner, causing him to choke, constituted reasonable parental discipline, and did not form basis for conviction of child abuse under section 827.03(1).

Trial court properly dismissed child abuse charge where there was no allegation that defendant inflicted significant bruises or welts, no allegation that child needed medical treatment, and defendant did not intend to inflict injury upon his son and did so accidentally.

Discussion: This case was brought forth on a sworn motion to dismiss. The court reviewed chapter 39 definition of child abuse, felony child abuse and determined that the defendant's conduct did not violate either statute. The court indicated in a footnote that their only available facts were from the defendant's sworn motion to dismiss. If you encounter such a motion, make sure the facts are completely detailed in the motion.

State v. McDonald, 785 So.2d 640 (Fla. 2d DCA 2001):

Error to dismiss child abuse charges against father, whose spanking of child resulted in dark bruising covering both buttocks and requiring medical attention at a hospital, on ground that common law parental privilege to use corporal punishment of a child prohibited a charge of "simple" or third-degree felony child abuse.

After amendments to statutes, a father's privilege to reasonably discipline his child does not bar prosecution for simple child abuse when a beating results in bruising severe enough to require child's treatment at a hospital, and fact that injuries are not permanent is not a bar to prosecution.

Pursuant to current statutory scheme, parent can be charged with simple child abuse for excessive corporal punishment that falls between level of abuse required to establish misdemeanor offense described in section 827.04 and that required to prove aggravated child abuse under section 827.03(2).

Question of whether father's corporal punishment of child was excessive such that it became the crime of child abuse is a question of fact.

Discussion: This is perhaps the most comprehensive opinion on this issue yet. The Wilson case has been exposed once again for its poor reasoning. The interesting thing about this case is that it established a three tier approach for filing child abuse cases. The court noted, "We conclude that if a parent can be charged with the misdemeanor offense under section 827.04 (contributing to dependency of a minor) when a spanking results in significant welts, the legislature intended more serious beatings that do not result in permanent disability or permanent disfigurement to be treated as simple child abuse under section 827.03(1). This reserves aggravated child abuse to cases involving parental discipline that results in great bodily harm or permanent disabilities and disfigurements or that demonstrates actual malice on the part of the parent and not merely a momentary anger or frustration."

Corsen v. State, 784 So.2d 535 (Fla. 5th DCA 2001):

Defendant precluded from raising on appeal claim that a parent, or one in parental authority, is exempt from prosecution under the felony child abuse statute if the alleged abuse arises when disciplining a child, where defendant failed to present that argument in the trial court.

Child abuse by a parent or one acting in parental authority is an existent crime.

Parental privilege to administer corporal punishment is an affirmative defense to charge of child abuse, and is waived if not asserted as defense at trial.

Discussion: Mom's boyfriend struck the 9-year-old child on the buttocks 15 times with a belt for lying and getting in trouble at school. The defendant did not raise the affirmative defense of parental privilege at trial, but only argued that he did not intend to

cause the serious bruising. The court note, "it is difficult to clearly delineate the boundary between reasonable and unreasonable punishment or discipline. However, because that issue was not presented to the jury in this case, we need not address it.

Nixon v. State, 773 So.2d 1213 (Fla. 1st DCA 2000):

Where defendant requested jury instruction on simple child abuse as lesser included offense of aggravated child abuse, he waived right to assert privilege against prosecution for battery upon child by parent or one in parental authority.

By requesting instruction on lesser included offense, defendant waives right to contest conviction for that offense unless the evidence is insufficient to convict defendant on the greater charge.

Testimony of victim and doctor sufficient to support conviction for aggravated child abuse, the offense with which defendant was charged.

Simple child abuse, as applied to parent is not a non-existent crime.

Discussion: The 5th grade child received serious welts on his lower back, buttock, and right thigh. The counselor and physician who saw the child were both allowed to testify that the wounds were the worst they had seen. This case is basically interpreting the Wilson decision concerning child abuse. The court held that a defendant must assert parental authority as an affirmative defense in a child abuse or battery prosecution. If the defendant does not raise that defense, the jury will not be instructed on it. This gives us a little room to maneuver in our cases since the court did not rule that battery and simple child abuse are non-existent crimes when resulting from parental discipline. It should also be noted that the 4th DCA has ruled contrary to the Wilson opinion in Raford v. State, so we do not have to be concerned with this issue unless the Florida Supreme Court rules otherwise.

Raford v. State, 792 So.2d 476 (Fla. 4th DCA 2001):

Third degree felony child abuse is a lesser included offense of aggravated child abuse by malicious punishment as long as the proper elements are included in the charging document.

Parental privilege recognized by Kama has been eliminated for all statutes except simple battery, e.g., a typical spanking. *conflict certified*

Child Abuse qualifies as "any forcible felony" under the violent career criminal sentencing statute.

Discussion: The suspect struck the 8-year-old son of his live-in girlfriend with a belt at least three times for defecating in his pants. Photographs introduced in trial showed textured bruises on the boy's buttocks, leg, and back, approximately two inches wide, which were consistent with being struck three times with a belt. It was agreed that the suspect stood in loco parentis to the child. The 4th DCA disagreed with Wilson v. State, 744 So.2d 1237 (Fla. 1st DCA 1999), which held that parental privilege precluded convicting a parent of third degree felony child abuse. The 4th DCA based its ruling on the fact that the child abuse statutes were changed shortly after the Kama opinion and therefore, the rationale of Kama is no longer applicable to any charge but simple misdemeanor battery. The conflict was certified to the Supreme Court. The 4th DCA also characterized the parental privilege as an affirmative defense.

Slocum v. State, 757 So.2d 1246 (Fla. 4th DCA 2000):

Strapping two year old victim who was terrified of water into car seat and kicking car seat into pool constituted malicious punishment.

Discussion: We will not likely encounter many cases which have similar fact scenarios, but there are observations by the court that may prove to be helpful in many of the fact scenarios that we do see. The Fourth DCA cites language from several other cases in its analysis of malicious punishment. Specifically, the Fourth DCA quotes the Florida Supreme Court in State v. Gaylord, 356 So. 2d 313 (Fla 1978), Kama v. State, 507 So.2d 154 (Fla. 1st DCA 1987), and Freeze v. State, 553 So.2d 750 (Fla. 2d DCA 1989). The Gaylord court noted that "The element of malice requires evidence that the defendant acted with 'ill will, hatred, spite, or an evil intent.'" The Kama court noted that "the determination that a parent, or one standing in a position of a parent, has overstepped the bounds of permissible conduct in the discipline of a child presupposes either that the punishment was motivated by malice, and not by an educational purpose; that it was inflicted upon frivolous pretenses; that it was excessive, cruel or merciless; or

that it has resulted in great bodily harm, permanent disability or permanent disfigurement." The Fourth DCA's adoption of this language appears to reflect that this court is not in complete agreement with the decision of Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000), which ruled that it was error not to instruct the jury that malice meant "ill will, hatred, spite, and evil intent." On the other hand, it should be noted that the ***Young*** decision also relied on ***State v. Gaylord***, to formulate its opinion as to the appropriate definition of malice. The distinction here seems to be that aggravated child abuse does not simply have to rely upon the definition, but can also be the result of: "that it was inflicted upon frivolous pretenses; that it was excessive, cruel or merciless; or that it has resulted in great bodily harm, permanent disability or permanent disfigurement." This issue may become a matter of semantics that needs to be resolved in front of the Fourth District Court of Appeal and/or the Florida Supreme Court. If this issue should arise in one of your cases, it would be incumbent upon you to read this case as well as State v. Gaylord and Young v. State and Kama v. State.

Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000):

Error to give standard jury instruction which includes prejudicial erroneous definition of word "malicious" as "wrongfully, intentionally, without legal justification or excuse" rather than requested instruction which would have defined "malice" as "ill will, hatred, spite, and evil intent".

Trial court was mistaken in belief that it was obliged to give instruction as written Florida Standard Jury Instructions In Criminal Cases.

Discussion: This is the final nail in the coffin in our child abuse cases. Not only has every option been eliminated except aggravated child abuse by malicious punishment when a parent strikes his or her child, but additionally, we have to show that the injuries were caused by hatred, ill will, or evil intent. Good Luck **!!**

The appellate court relies on the Florida Supreme Court case of State v. Gaylord, 356 So. 2d 313 (Fla. 1978), which concluded that "malice" means ill will, hatred, spite, and evil intent."

Wilson v. State, 744 So.2d 1237 (Fla. 1st DCA 1999): *overruled*

Where undisputed facts demonstrate that parent has employed corporal punishment to discipline his or her minor child, parent is exempt from prosecution under felony child abuse statute.

If line between permissible and excessive punishment is crossed, act is punishable as aggravated child abuse and state has responsibility to prove malice under aggravated child abuse statute.

Where state agrees that parent's act of slapping six year old son a single time across the face with her open hand did not rise to the level of aggravated child abuse, trial court correctly granted motion to dismiss that charge, but erred in denying motion to dismiss lesser charge of felony child abuse.

Discussion: This opinion has added yet another level of difficulty to our filing decisions. In essence, the Appellate Court is saying that if a parent exceeds appropriate parental discipline then the only option we have is to charge aggravated child abuse by malicious punishment. Since the charges of battery and contributing to the dependency of a minor have already been eliminated, we are now in a position where we must either charge a first degree felony or nothing at all. This opinion also calls into question our ability to file aggravated child abuse by "malicious punishment, unlawful caging, or willful torture." The language of this case seems to suggest we must strike the unlawful caging or willful torture sections in the statute when discipline is involved. It appears that since October 1, 1996, we have gone from the ability to charge a misdemeanor to the necessity of a first degree felony for basically the same conduct.

State v. Cabret, 730 So.2d 843 (Fla. 5th DCA 1999):

Question of whether defendant engaged in malicious punishment of child by hitting back of child's hand with hammer as punishment for pilfering was jury question, and thus, defendant was not entitled to dismissal of information charging aggravated child abuse in connection with incident.

State v. Coffman, 746 So.2d 471 (Fla. 2d DCA 1998):

Evidence that defendant was with six-month-old child most of the day before child was rushed to hospital where physicians concluded that child suffered from Shaken Baby Syndrome, and medical expert opinion that child's symptoms had to have been inflicted only a few hours before child was rushed to hospital, was

sufficient to support conviction for aggravated child abuse predicated on malicious punishment.

Abuse of discretion to order new trial on basis that verdict was against weight of evidence where medical evidence indicated that child suffered from shaken baby syndrome and that injuries were inflicted at time when child was in exclusive care of defendant.

Defendant charged with aggravated child abuse predicated on malicious punishment is not entitled to jury instruction on simple battery as lesser included offense.

Lowery v. State, 641 So.2d 489 (Fla. 5th DCA 1994):

Defendant was not entitled to judgment of acquittal in aggravated child abuse case, where evidence indicated that seven-year old boy struck by defendant suffered permanent disfigurement because of strikes, and that blood was probably drawn, crossing line between permissible discipline and impermissible punishment.

Snyder v. State, 564 So.2d 193 (Fla. 5th DCA 1990):

Aggravated child abuse statute is constitutional.

Evidence of beatings administered to 14 year old left in defendants' custody was sufficient to submit charges of aggravated child abuse to jury.

Freeze v. State, 553 So.2d 750 (Fla. 2d DCA 1989):

Aggravated child abuse conviction was sufficiently supported by expert medical testimony that bruises on 18 month old child's body were too numerous and severe to have resulted from normal childhood accidents, as claimed by defendant.

Specific intent element of first degree felony murder conviction was sufficiently supported by evidence that defendant, whose shaking of 18 month old child resulted in child's death from whiplash shaken infant syndrome, punished child out of spite, ill will, hatred or evil intent, and not for educational purposes.

Discussion: The defendant got mad at her child for biting, so she shook it to teach it a lesson. The child died as a result of the shaking. The autopsy revealed that the child had bruises over 75% to 85% of his body. The court ruled that the State proved

malicious punishment through its medical expert testimony for both the bruises and the shaking. This is a good case to read if you have a shaken infant case or a malicious punishment case where the victim is not verbal. The court notes that they are finding malicious intent in the shaking of the child because of the evidence of ongoing abuse. They noted that if this had been an isolated incident, a judgment of acquittal may have been appropriate in that there was no specific intent.

Moakley v. State, 547 So.2d 1246 (Fla. 5th DCA 1989):

Defendant's conviction for aggravated child abuse through malicious punishment was not sustained by evidence that he had struck his daughter on the buttocks and right hip with the leather portion of his belt, that he spanked his daughter on the buttocks and right hip with the leather portion of his belt, that he spanked his daughter with a leather belt because she had a behavior problem, that he lived the child, and that he wanted her taken from his home because of the behavior problem so that he would not hurt her.

Discussion: An HRS worker responded to a complaint at the defendant's home to find his eight year old daughter standing against the wall. She was crying and her pants were wet. The HRS worker found bruises on the child's buttocks and right hip. The defendant admitted to spanking her with a belt for disciplinary reasons. The 5th DCA indicated that this case presented an issue as to when the boundary between permissible punishment or discipline is crossed and the area of maliciousness is entered. The court reviews several other cases interpreting the word "malice" in the context of the child abuse statute. The cases relied upon are also discussed in this chapter. In short, the court is very concerned about the courts intruding into family matters, especially considering the subjective nature of the subject. In this case the court ruled that the act did not constitute malicious punishment. The tone of the opinion would also suggest that the court did not feel *any* crime had been committed, much less the felony version.

Herbert v. State, 526 So.2d 709 (Fla. 4th DCA 1988):

Issue of whether parent's use of belt to spank child constituted aggravated child abuse by malicious punishment was for jury where there was evidence that parent struck child severely a number of times and on various parts of his body other than the buttocks.

Admission of evidence as to prior **battery** inflicted on child by defendant charged with aggravated child abuse by malicious punishment was reversible error where facts of charged incident were undisputed at trial, with only question being whether defendant had gone "too far" in punishing child on occasion of charged offense; prejudicial effect of evidence of prior incident outweighed any probative value and evidence of defendant's guilt was not overwhelming.

Discussion: The defendant struck her child with a belt at least five times because her child had a discipline problem and stole money from her. She indicated that she intended to hit the child on the buttocks, but the child moved and she hit him across the back and arms. The CPT doctor testified that the skin was not broken and the bruises were not very deep and would probably heal without any scars. The court notes that "it is well established that a parent does not commit a crime by inflicting corporal punishment on her child if she remains within the legal limits of the exercise of that authority." The court then notes that there have been no cases which state unequivocally that the whipping of a child with a belt per se constitutes aggravated child abuse. Nor is there one which says that such punishment can never constitute aggravated child abuse. The court chose this case to make a statement about child abuse. (perhaps because it was reversed on Williams Rule grounds anyway) First, the court noted that "most cases in which aggravated child abuse convictions were upheld involved *far more* egregious behavior and injuries than were involved here." The court later states that "Cases like this should stand as a warning to those, parents and other alike, who quickly turn to corporal punishment as a solution to child discipline problems. It is apparent that there is a serious risk of 'going too far' every time physical punishment is administered. This case also provides a good discussion as to why the admission of a prior incident where the mother beat her child was not admissible as Williams Rule evidence.

Schraffa v. State, 508 So.2d 755 (Fla. 1st DCA 1991):

Victim injury was not essential element of offense of aggravated child abuse by maliciously punishing a child, and thus, victim injury points could not be assessed in sentencing defendant on conviction, even though indictment alleged that defendant caused massive bruises on child's buttocks and genital area.

Kama v. State, 507 So.2d 157 (Fla. 1st DCA 1987):

Parent, or one acting as parent, cannot be guilty of simple battery for disciplining child; accordingly, wherefore parent exceeds acceptable discipline, parent commits aggravated child abuse and not simple battery.

Neither simple battery, nor misdemeanor child abuse were lesser included offense of aggravated child abuse, where offender was child's stepfather and injury was inflicted upon child.

Discussion: The defendant was charged with aggravated child abuse by malicious punishment in that he "did maliciously punish said child by hitting child across back several times and hitting said child in face with his fist." The defense objected because the trial court would not give simple battery or misdemeanor child abuse as lessers. The appellate court first ruled that a parent cannot be convicted of battery for disciplining his own child. The court then ruled that aggravated child abuse is the only option for the parent who crosses the disciplinary line. The court ruled that misdemeanor child abuse was not appropriate because the language of the statute was worded "permit the infliction of bodily harm." The defendant actually inflicted the harm. It should be noted that the latter reasoning of the court is no longer valid in that the legislature amended 827.04(2) in 1988 to replace the term "permits" with "inflicts or permits the infliction of." Therefore, misdemeanor child abuse should now be a lesser of aggravated child abuse. Don't let defense counsel cite this case to throw you off track!

State v. Gaylord, 356 So.2d 313 (Fla. 1978):

Statute proscribing offense of aggravated child abuse was not unconstitutionally vague nor overbroad, notwithstanding assertion that term "maliciously" did not provide a definite standard of conduct understandable by a person of ordinary intelligence.

Discussion: The court cites other opinions for the same proposition. The court also states that the term "malice" means "ill will, hatred, spite, an evil intent."

Jordan v. State, 334 So.2d 589 (Fla. 1976):

The appellate court affirmed defendant’s conviction for maliciously punishing a child where the State's witnesses gave

testimony tending to prove that the boy was fine early in the evening on that date, but that when Ms. Schieler arrived home shortly after midnight, he was bruised in the face, back and buttocks. Both eyes were blackened, the left eye was almost closed, and both arms were battered. The defendant told police that, as discipline, he struck the victim's face approximately four times with his hand and spanked him approximately ten times with a belt.

Mental Injury:

Standard Jury Instructions:Standard Jury Instructions (and F.S. 39.01(43)

Mental injury means any injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in his ability to function within his normal range of performance and behavior, with due regard to his culture.

Burrows v. State, 2011 WL 2498113 (Fla. 3d DCA 2011)

State's alleged failure to present evidence that child suffered an actual mental injury as a result of watching defendant punch and stab child's mother did not preclude conviction for child abuse; defendant successfully had evidence of whether child had gone to counseling excluded from the trial, and child abuse statute required only an act that "could reasonably be expected to result" in a physical or mental injury, which requirement was satisfied by defendant's actions.

Burke v. State, 35 Fla. L. Weekly D2610 (Fla. 2d DCA 2010)

Defendant's acts of twisting his nine-year-old son's arm, pressing son against his knee, and holding son by the hair did not result in "physical injury" or "harm" to son, so as to support conviction for felony child abuse; more than mild or passing discomfort was required, son only claimed injury to his hair and did not explain what that injury was, and no witness testified that son's arm was even bruised.

Defendant's acts of twisting his nine-year-old son's arm, pressing son against his knee, and holding son by the hair did not result in "mental injury" to son, so as to support conviction for felony child abuse; although son was shaken up and frightened, there was no

evidence that the incident resulted in impairment of son's ability to function within the normal range of performance and behavior.

Dufresne v. State, 826 So.2d 272 (Fla. 2002):

Term "mental injury" in section 827.03, which makes it a felon to commit an intentional act which could reasonably be expected to result in mental injury to a child, is not unconstitutionally vague.

Child protective provisions located in chapter 39, and criminal provisions enumerated in section 827.03 are plainly interrelated and have same underlying purpose.

State v. McDeavitt, 776 So.2d 1086 (Fla. 4th DCA 2001):

Error to dismiss child abuse charges on ground that statute is unconstitutionally overbroad and vague.

Question certified: Is the term "mental injury" in section 837.03(1)(b), unconstitutional because it is vague?

Discussion: The defendant was employed as a teacher for physically and mentally disabled students. When a student failed to follow her instructions, she hit him three or four times with a stapler on the hand. On another occasion, she pulled his head back and struck him on the chest. On another occasion, she shoved a different child. The term "mental injury" is not unconstitutionally vague because it is defined in section 39.0015(4)(iv).

Multiplier for Domestic Violence:

Rolle v. State, 835 So.2d 1258 (Fla. 4th DCA 2003):

Error to impose multiplier for domestic violence committed in presence of child where children were in different room when victim was shot.

Munchausen Syndrome by Proxy:

State v. Butler, 1 So.3d 242 (Fla. 1st DCA 2008):

Defendant, who allegedly suffered from Munchausen syndrome by proxy which was disorder whereby defendant factitiously induced illness in child to draw attention to herself, did not have reasonable expectation of privacy when she was in her child's hospital room, and thus, the state action, namely court's broad delegation to hospital staff of the power to conduct video surveillance, together with court's authorization for the State to take immediate custody of child if surveillance showed he was in danger, did not amount to a search for Fourth Amendment purposes; even though defendant did not know about surveillance, she would have expected that efforts to interrupt child's breathing would have triggered medical response, and she could not have reasonably expected privacy in her actions affecting the health and well-being of a heavily monitored patient.

For Fourth Amendment purposes, patients admitted to private hospital rooms may reasonably expect that law enforcement will not search their belongings; the more private the treatment space, the more reasonable the patient's expectation of privacy with respect to official activity.

Bush v. State, 809 So.2d 107 (Fla. 4th DCA 2002):

This case did not involve any significant issues, but there is an extensive fact pattern outlining the enormous medical history of a Munchausen Syndrome by Proxy victim. Most legal issues involved improper comments and expert testimony.

Necessary:

State v. Joyce, 361 So.2d 406 (Fla. 1978):

Provision in child abuse statute prohibiting the willful or culpably negligent deprivation of "necessary food, clothing, shelter or medical treatment" is not constitutionally defective, despite contention that term "necessary" fails to provide guideline for determining what, less than total deprivation, constitutes a deprivation great enough to fall within its proscription.

Discussion: This case also discusses the constitutionality of the term "materially" which was subsequently deleted by the legislature in 1977.

Parental Privilege:

Case law holds that a parent or one acting in a parental capacity cannot be charged with misdemeanor battery for punishing his or her child. This point of law has caused great confusion in the appellate courts. The rationale behind this holding is that corporeal punishment is legal, therefore, someone authorized to administer corporeal punishment is allowed to commit battery on a child. If a parental exceeds the appropriate bounds of corporeal punishment, aggravated child abuse by malicious punishment is the appropriate charge. The application of this rule has resulted in numerous interpretations by the courts. Most of the cases discussing this topic are covered under the "Malicious Punishment" section of this chapter.

Hall v. State, 2018 WL 6624940, at *1 (Fla.App. 1 Dist., 2018)

The defendant got into an argument with child's mother in the car. As the suspect tried to punch the mother, the child grabbed the suspect's hand, preventing the assault. When they got home, the suspect beat the child with a belt for intervening in the fight.
The parental-discipline affirmative defense affords no protection to Appellant under these circumstances. The affirmative defense jury instruction states, "It is not a crime for a parent of a child to impose reasonable physical discipline on a child for misbehavior under the circumstances even though physical injury resulted from the discipline." Since the beating had no connection to reasonable discipline, the court did not air in failing to give the instruction.

Morris v. State, 2017 WL 4448687 (Fla.App. 1 Dist., 2017)

A teacher's aide escorted an unruly 4-year-old child from the classroom. The child was kicking at her, spitting at her and cursing her. The aid slapped the child and grabbed his leg, causing him to fall. He was not injured and returned to class. The jury acquitted the aide of child abuse and convicted her of the lesser of battery. In ruling that the defendant could not be convicted of battery, the court noted,

The legal privilege of teachers to chastise students under their care controls the outcome in this case. Here, even if Ms. Morris's actions in the hallway did not stem from defending herself against being struck with the student's spittle and kick, they were privileged acts. She had supervisory responsibility for the student's care and

> *discipline at the time of the incident and was acting in the place of the child's parent. In other words, she had "the right 'to moderately chastise for correction [the] child under ... her control and authority,' " which included touching him in the non-abusive manner that she did. Lanier, 979 So.2d at 369 (quoting Raford, 828 So.2d at 1015 n.5). Under these circumstances, Ms. Morris's motion for judgment of acquittal should have been granted.*[2]

Chisolm v. State, --- So.3d ----, 2011 WL 680347 (Fla. 1st DCA 2011):

> Defendant's act of repeatedly striking his child across his back and arms with a belt containing some type of metal object could not be likened to a typical spanking or other form of reasonable corporal punishment, and thus, defendant, who was charged with third-degree felony child abuse, failed to establish the affirmative defense of reasonable corporal punishment.

Czapla v. State, 957 So.2d 676 (Fla. 1st DCA 2007):

> Defendant charged with felony child abuse of his son failed to establish the affirmative defense of reasonable corporal punishment; defendant's act in kicking his son while the son was laying on the ground was an intentional act that could reasonably be expected to result in physical or mental injury to the son and was an act that was likely to result in physical injury.
>
> "Because, given the form of discipline used, intentionally kicking a child who is lying on ground, Czapla's conduct was, as a matter of law, not reasonable corporal discipline, it is not necessary for us to consider whether there was harm actually sustained by the child."

Julius v. State, 953 So.2d 33 (Fla. 2d DCA 2007):

> Defendant was convicted of felony child abuse for striking her daughter with a table leg with screw protruding from it and choking her. Defendant argued that the injuries constituted "significant bruises and welts" and therefore did not constitute felony child abuse. The appellate court said the conviction was proper because the abusive act was not the result of legitimate discipline. The mother was just mad at her children because she

was late for work and couldn't find her shoe. Under the circumstances, the court noted that aggravated child abuse by malicious punishment would have been justified.

Discussion: The court distinguishes the fact pattern of this case from the facts of King v. State and State v. Figueroa, both cases in which similar injuries resulted from legitimate disciplinary procedures. Had the court determined that the mode of punishment was a legitimate use of discipline, the bruising on the child would not have been sufficient to sustain a felony child abuse charge. The court does not discuss the validity of a contributing to the dependency of a minor charge, which should be the appropriate charge for significant bruising and welts in the disciplinary context. An interesting extension of this case may be that we can also charge a parent with battery for similar conduct, contrary to Kama v. State, because such an act of violence is not legitimate discipline.

Wright v. State, 835 So.2d 1264 (Fla. 2003):

Supreme court decision holding that there is no absolute immunity enjoyed by parent or one standing in *loco parentis* and that such a person may be convicted of felony child abuse applies to instant case, which was pending on direct appeal at time of decision.

Since record shows that trial court considered but rejected defense that spanking on which charge was based was permissible corporal punishment by parent, conviction must be affirmed.

Person Responsible For Child's Welfare:

State v. Christie, 939 So.2d 1078 (Fla. 3rd DCA 2005):

Under statute defining "caregiver," for purposes of statute criminalizing child neglect by a caregiver, as a parent, adult household member, or other person responsible for a child's welfare, public-school teacher was an "other person responsible for a child's welfare" and thus was a "caregiver" during school hours; teacher stood in loco parentis to child during school hours.

A public school owes a general duty of supervision to the students placed within its care.

Definition of "other person responsible for a child's welfare" in statutory chapter governing proceedings relating to children did not apply when determining whether criminal defendant, a public school teacher, was an "other person responsible for a child's welfare" for purposes of statutory definition of "caregiver" for statute criminalizing child neglect by a caregiver; a teacher fell within the plain meaning of "caregiver" under child-neglect statute, and adopting statutory definition in statutory chapter governing proceedings relating to children would have served to insulate from prosecution a group of adults who stand in loco parentis to students that they oversee during school hours.

D.A.O. v. Department Of Health And Rehabilitative Services, 561 So.2d 380 (Fla. 1st DCA 1990):

Thirteen year old boy who allegedly had intercourse with his five year old niece at home of boy's mother was not "person responsible for the child's welfare," within meaning of child abuse statute, where no evidence was presented that boy had any power to control niece.

Term "person responsible for child's welfare," as used in child abuse statute, has narrower meaning than person with "familial or custodial authority" over child, as used ins sexual battery statute.

Discussion: This case defines child abuse under Chapter 415.503.

Physical Injury:

Standard Jury Instructions:

Physical injury means death, permanent or temporary disfigurement or impairment of any bodily part.

Jones v. State, 2020 WL 1222935 (Fla. 2d DCA Mar. 13, 2020):

Defendant was watching his six-month-old child while the mother ran errands. At one point he called the mother and said something was wrong with the child. The mother noted the child was unconscious and suggested they call 911. The defendant asked her to wait for a few minutes to see if the child would revive on his own. Several minutes later, the child vomited milk and blood. The mother immediately called 911. The defendant was convicted of aggravated child abuse and child neglect with great injury. The

appellate court reversed the child neglect with injury count because the state's expert testified that delaying medical treatment could exacerbate the injury, but she never said that it actually did. The court also said the lesser included offense of child neglect was not appropriate because the facts presented did not establish culpable negligence.

Burke v. State, 35 Fla. L. Weekly D2610 (Fla. 2d DCA 2010)

Defendant's acts of twisting his nine-year-old son's arm, pressing son against his knee, and holding son by the hair did not result in "physical injury" or "harm" to son, so as to support conviction for felony child abuse; more than mild or passing discomfort was required, son only claimed injury to his hair and did not explain what that injury was, and no witness testified that son's arm was even bruised.

Defendant's acts of twisting his nine-year-old son's arm, pressing son against his knee, and holding son by the hair did not result in "mental injury" to son, so as to support conviction for felony child abuse; although son was shaken up and frightened, there was no evidence that the incident resulted in impairment of son's ability to function within the normal range of performance and behavior.

Garrett v. State, 978 So.2d 214 (Fla. 5th DCA 2008):

Evidence was sufficient to support child abuse conviction; evidence showed that defendant, who was employed by school board as a special education teacher assigned to provide vocational instruction to autistic children, placed her body weight upon child with enough force and for a long enough period of time until he turned blue from a lack of oxygen.

Trial court's supplemental instruction to jury in child abuse trial, which stated that physical injury meant asphyxiation, suffocation, or drowning, was proper; instruction was appropriately used by the courts to define excessive or abusive corporal discipline, and jury was instructed that corporal discipline that did not result in harm to the child did not constitute criminal child abuse, and therefore jury had to conclude that the child suffered asphyxiation and physical injury as a result of defendant's actions to reach their verdict.

In re O.C., 934 So.2d 623, 627–28 (Fla.App. 2 Dist.,2006)

*Case law has established, however, that a single incident of a serious bruise on the buttock of a child, perhaps caused by corporal punishment, will not support a finding of dependency. See T.G. v. Dep't of Children & Families, 927 So.2d 104 (Fla. 1st DCA 2006) (holding single instance of corporal discipline meted out by the mother to one of five children resulting in bruise that was not significant and did not require medical attention did not support finding of dependency); A.A. v. Dep't of Children & Families, 908 So.2d 585 (Fla. 5th DCA 2005) (holding dependency *628 was improper based on evidence that mother had her older son discipline her difficult younger child, and discipline resulted in punches that left bruises or welts on child's back and shoulder); J.C. v. Dep't of Children & Families, 773 So.2d 1220 (Fla. 4th DCA 2000) (finding stepfather's routine of spanking his oldest child with a belt, which on one occasion caused a bruise on the child's buttocks, did not qualify as excessive corporal discipline because the bruises were insignificant, did not constitute temporary disfigurement, and did not put the child at risk of imminent abuse or cause the child to suffer significant mental impairment); R.S.M. v. Dep't of Health & Rehabilitative Servs., 640 So.2d 1126 (Fla. 2d DCA 1994) (mere presence of bruises resulting from corporal punishment is not competent, substantial evidence of excessive corporal punishment or temporary disfigurement); In re S.W., 581 So.2d 234 (Fla. 4th DCA 1991) (holding that evidence was insufficient to support finding of abuse based upon a single incident in which mother repeatedly hit child with a belt and child was observed with recent bruises, including bruises to the face which may have been caused when child tried to run away, none of which required medical treatment); In re W.P., 534 So.2d 905 (Fla. 2d DCA 1988) (finding evidence that father slapped his child on the face and left a mark insufficient to support a finding of dependency because the mark did not require medical attention). Usually, some evidence of a pattern of excessive punishment or a single punishment resulting in a more serious injury is required. See, e.g., J.L. v. Dep't of Children & Families, 899 So.2d 1254 (Fla. 4th DCA 2005) (dependency was supported by finding that father hit naked child with a belt twice within same week as punishment, leaving bruising and welts, and intended to continue such punishments); O.S. v. Dep't of Children & Families, 821 So.2d 1145, 1148 (Fla. 4th DCA 2002) (finding mother's paddling of daughter excessive as it left bruises over majority of daughter's buttocks, legs, and neck; some of the bruises persisted for more than six weeks; the child testified that this was not even the most severe beating she had*

received; and there was evidence of daughter's self-mutilation reflecting a mental injury resulting from abuse).

Admittedly, the cited cases address children in the care of a parent who are disciplined by the parent. Nevertheless, if a single incident of bruising would not support a finding of dependency if it occurred in the mother's care, it is difficult to see how it could be characterized as the "abuse" necessary to support a finding of dependency when it occurs in the care of people entrusted by the mother to care for the child.

J.C. and S.C. v. DCF, 773 So.2d 1220 (4th DCA 2000):

Evidence did not support finding that stepfather's spanking of child with belt was excessive or abusive, despite bruising on child's buttocks, as there was no evidence that bruises were significant or that they constituted temporary disfigurement.

Discussion: This decision address the child abuse criteria of Chapter 39 and thus would be a relevant concern in our contributing to the dependency of a minor charge.

King v. State, 903 So.2d 954 (Fla. 2d DCA 2004):

Injuries inflicted by administrator of private school as result of paddling of student did not constitute felony child abuse as a matter of law where extent of injuries was not more than "significant bruises or welts," and there was no corresponding mental injury. Error to deny judgment of acquittal.

Discussion: The private school had a written policy allowing corporeal punishment. The child received some whacks with a paddle on the buttocks that left welts and bruises. The court ruled that the act constituted contributing to the dependency, but not felony child abuse.

Chesnoff v. State, 840 So.2d 423 (Fla. 5th DCA 2003):

No abuse of discretion in allowing physician to testify that he viewed victim's injuries as severe because of facial injuries and victim's loss of consciousness.

Discussion: This is not a child abuse case, but an aggravated battery case. This issue is relevant to our aggravated child abuse prosecutions. The defendant punched the victim, rendering him

unconscious. He then proceeded to kick the victim on the ground. At trial, the emergency room physician was allowed to testify that the victim's facial injuries and loss of consciousness were "severe." Defense counsel argued that the level of harm was a question for the jury and the physician should not have been allowed to comment on the ultimate issue. The appellate court ruled that the physician's testimony was proper expert testimony as to the extent of the victim's injuries.

J.C. v. Department of Children and Families, 773 So.2d 1220 (Fla. 4th DCA 2000)

Error to find that children were abused as result of excessive parental discipline where there was no competent substantial evidence that children had been harmed or were likely to be harmed.

Bruise on child's buttocks caused by father's spanking child with a belt was insufficient to prove father used excessive corporal discipline.

Discussion: This is a dependency case, but it gives us insight into the appellate court's interpretation of child abuse. Many of the terms, such as physical and mental injury, are discussed in this case and discarded as child abuse.

Donaldson v. State, 722 So.2d 177 (Fla. 1998):

Conviction for aggravated child abuse was supported by evidence that defendant and his cohorts forcefully interrogated and abused the minor victims for an hour and a half, one child was beaten in front of the other, and both children repeatedly asked if they were going to die, indicating some fear for their lives.

Bley v. State, 652 So.2d 1159 (Fla. 2d DCA 1995):

Language of statute making it a crime to knowingly or by culpable negligence permit "physical or mental injury" to a child not impermissibly vague for failure to define "physical injury." Overbreadth doctrine applies only if challenged legislation is directed at conduct protected by First Amendment and does not, therefore, apply to F.S. 827.04(2).

R.S.M. v. HRS, 640 So.2d 1126 (2d DCA 1994):

Mere presence of bruises resulting from corporal punishment was not competent, substantial evidence of excessive corporal punishment or temporary disfigurement within meaning of statute requiring reports of abused or neglected children be made to Department of Health and Rehabilitative Services

"We observe first that the so-called 24-hour rule (any bruises lasting over 24 hours creates a presumption of abuse) has been specifically disapproved by this court."

Rose v. State, 591 So.2d 195 (Fla. 4th DCA 1991):

Alleged failure of physician to diagnose and treat subdural hematoma which resulted from lethal injury to back of child's head was no defense to defendant's liability for aggravated child abuse and first degree murder where hematoma was mortal wound if left untreated.

Discussion: This case is primarily concerned with a homicide, but the analysis can also be used for cases involving serious personal injury.

State v. Gethers, 585 So.2d 1140 (Fla. 4th DCA 1991):

Child abuse statute did not reach unborn fetus and therefore defendant could not be prosecuted for aggravated child abuse for permitting her unborn child to be injured by her introduction of cocaine into her own body during gestation period of her unborn child.

Discussion: This Broward case was argued before Judge Carney. The State charged a mother with felony child abuse for permitting the injury of her unborn fetus by ingesting cocaine. The appellate court relied heavily on public policy and F.S. 415 to rule that the mother cannot be criminally punished.

Barber v. State, 592 So.2d 330 (Fla. 2d DCA 1992):

Foster care counselor's failure to inform juvenile court of child abuse report or contents of psychological evaluation of mother and stepfather was not reckless indifference to life of child who was killed by his stepfather during visitation, an, thus, counselor did not commit abuse; counselor had told juvenile judge that psychological evaluation was on file, alleged incident of child abuse had been investigated and was found unsubstantiated, and

nothing indicated that judge would have changed rulings or denied extended visitation if judge had been furnished with contents of evaluation or had been made aware of the child abuse report.

Probable Cause for Arrest:

Pickett v. State, 922 So.2d 987 (Fla. 3rd DCA 2005):

Probable cause existed to arrest defendant suspected of child abuse at the time defendant was taken into custody and placed in the police vehicle; defendant brought his two year-old daughter to the emergency room with severe injuries, defendant admitted that his daughter was in his custody when the injuries occurred, defendant's account of the accident was inconsistent with the level of injuries she sustained, the hospital staff indicated a possibility of child abuse, and officers viewed the defendant's stories as conflicting.

Specific Intent:

Posey v. State, 2020 WL 357140 (Fla.App. 1 Dist., 2020)

The defendant struck the victim child numerous times with a belt for disciplinary reasons. When the child tried to run away, the 320 lb. defendant caught her and sat on her to prevent her from moving. The compression of the large woman on the child caused the death of the child. The defendant argued that the State's evidence of the requisite willful intent to abuse the victim child was insufficient to prove aggravated child abuse so as to survive the motions for judgment of acquittal on the felony murder charge.

Appellant readily admitted, in her pre-trial interview with the investigator which was offered by the State and during her own testimony at trial, that she intended to sit on the child and use her considerable body weight to restrain the child. She further admitted that she remained upon the child's body even after the second time the child told Appellant she could not breathe. These actions were sufficient to show a prima facie case that Appellant willfully tortured or maliciously punished the child and thereby committed aggravated child abuse.

Freeze v. State, 553 So.2d 750 (Fla. 2d DCA 1989):

> "In order to establish aggravated child abuse, however, it is necessary for the state to prove specific intent. State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989); Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983). Thus, the state was required to present a prima facie case that Ms. Freeze had, with specific intent, "willfully tortured" or "maliciously punished" the child, or that the shaking constituted aggravated battery. § 827.03, Fla.Stat. (1985). Contrary to Ms. Freeze's argument, it was not essential for the state to establish that she specifically intended to kill her son. The state was obligated in this case merely to present sufficient evidence that Ms. Freeze specifically intended to maliciously punish Kenny."

Sufficiency of Evidence: Aggravated Child Abuse:

Lowery v. State, 2019 WL 2528787, (Fla.App. 1 Dist., 2019)

> Young child died from blunt trauma to the head and possible shaken baby syndrome while in daycare. Defense expert argued child had a vein abnormality that increased the chance of excessive bleeding with a minor head trauma. Defendant argued that State's circumstantial case did not rebut his reasonable hypothesis of innocence. Appellate court noted that the State's experts all disagreed with the defense expert on these points and the defendant made some comments that could be construed as consciousness of guilt. Court was correct in not granting a motion to dismiss.

Hicks v. State, 2018 WL 6803746, at *1 (Fla.App. 1 Dist., 2018)

> *Hicks was arrested after he left a child in his truck for an hour and a half with the windows up. It was the middle of September in the Florida Panhandle. By the time police discovered the child, he was already dehydrated, with an elevated heart rate and cracked, bloody lips. The child also had other serious injuries: he had an inch-long laceration on his forehead, bruising all over his body, and a severely swollen scrotum. There was no food or water in the truck, but there was a bag of loaded firearms.*
>
> Under these facts, the court ruled the suspect could be convicted of aggravated child abuse, neglect of a child causing great bodily

harm and leaving a child unattended in a car causing great bodily harm.

Double Jeopardy did not prevent convictions for both neglect of a child and leaving a child unattended in a car.

Wheeler v. State, 4D15-3693, 2016 WL 6611100 (Fla. 4th DCA Nov. 9, 2016)

Evidence did not show that minor victim was willfully tortured or maliciously punished so as to support defendant's conviction for aggravated child abuse; defendant arrived at house party where teenagers were drinking alcoholic beverages, and exercising poor judgment, defendant began a fight with the victim, defendant and the victim did not have the type of relationship contemplated by child abuse statute where punishment might be administered, the extent of the battery committed did not rise to the level of "maliciousness" required by aggravated child abuse statute, there was no medical testimony, victim did not testify, and battery that occurred in this case did not rise to such an extreme level that amounted to torture.

Aggravated child abuse committed through malicious punishment is reserved for cases involving parental discipline that results in great bodily harm or permanent disabilities and disfigurements or that demonstrates actual malice on the part of the parent and not merely a momentary anger or frustration.

Evidence did not show that battery committed by defendant caused great bodily harm, permanent disability, or permanent disfigurement to the minor victim so as to support defendant's conviction for aggravated child abuse; there was no medical testimony, victim did not testify, there was an absence of evidence that the victim suffered great bodily harm, and testimony that the victim was moaning and crying in the video were, at best, proof of moderate harm insufficient to support a conviction.

Bannister v. State, --- So.3d ----, 2014 WL 52659 (Fla.App. 4 Dist.):

Reasonableness of defendant's hypothesis of innocence on charges of second-degree murder, aggravated child abuse, and kidnapping

a person under 13 years of age, that four-year-old victim sustained fatal injuries by falling out of a mango tree, was both compromised and significantly challenged at trial, and thus trial court did not err in denying defendant's motion for judgment of acquittal on grounds that State failed to exclude defendant's reasonable hypothesis of innocence, where State presented evidence of defendant's prior inconsistent statement to police that victim fell out of cabbage palm tree and adduced expert testimony that victim's injuries were consistent with abuse and not with a fall from a tree.

Tate v. State, 2013 WL 5951702 (Fla.App. 2 Dist.)

Evidence was sufficient to show that defendant knowingly or willfully abused child victim, causing her great bodily harm, permanent disability, or permanent disfigurement, as required to support convictions for felony murder and aggravated child abuse; emergency room physician who treated victim testified that nature of victim's injuries showed that they had been inflicted intentionally, second treating physician testified that victim's injuries were not consistent with defendant's explanation that victim had fallen from couch, and pathologist who had performed autopsy had opinion that victim died at the hands of another person due to brain injuries.

Because direct evidence of intent is rare, and intent is usually proven through inference, a trial court should rarely, if ever, grant a motion for judgment of acquittal on the issue of intent.

Willfully:

Standard Jury Instructions:

Willfully means knowingly, intentionally and purposely.

Mutch v. State, 2020 WL 7380418 (Fla.App. 1 Dist., 2020)

The defendant was charged with aggravated manslaughter by culpable negligence of a child. His defense was that the child accidentally fell out of the car and hit his head. The medical examiner testified that the child died from repeated blows to the

head. *Appellant now argues the trial court committed reversible error by allowing the medical examiner to testify that the injuries resulted from "blows," because the State did not charge Appellant with intentionally causing the injuries.* The appellate court affirmed the conviction and stated, *[t]he trial court did not err by allowing the medical examiner's testimony that the fatal injuries were inconsistent with Appellant's exculpatory statements made before trial. The medical examiner's testimony was relevant to prove that the fatal injuries could not have been caused in an accident that did not involve criminal conduct, whether by intentional blows or some other type of force… The State's charging decision did not render the evidence at issue inadmissible.*

This is a good case to review when we have a child abuse/child neglect case where the child suffered serious injury and the defendant argues it was an accident.

Redding v. State, 958 So.2d 481 (Fla. 5th DCA 2007):

State presented competent evidence inconsistent with defendant's theory that his three month old daughter died from accidental head injuries, including expert evidence that child's injuries couldn't have resulted from accident inside apartment, that child would not have sustained the type of injuries observed during autopsy if she accidentally fell from defendant's arms and hit box spring and carpeted floor as claimed by defendant and that injuries suffered by infant could not have been caused accidentally unless child was accidentally dropped from second story building.

Pankow v. State, 895 So.2d 1149 (5th DCA 2005):

Defendant was not entitled to judgment of acquittal in trial for aggravated child abuse on ground that the state did not rebut his theory of defense that victim's injuries were caused when heated water splashed on her after dog knocked over water on stove, where two experts testified that due to nature of victim's injuries, which were circumferential injuries reaching slightly above victim's ankles, splashing water could not have caused injuries.

Probative value of evidence that victim would shake uncontrollably and scream "hot, hot, hot" when her aunt would

attempt to bathe her was not outweighed by danger of unfair prejudice in trial for aggravated child abuse.

Defendant opened door in trial for aggravated child abuse to expert's testimony that bruising shown in photographs of victim could relate to victim's struggle, where, during cross-examination of expert, defendant inferred that, if victim had been held in hot water for any extent of time, there should be fingerprint or ligature marks on victim and there was no evidence that such marks were present.

Sibold v. State, 889 So.2d 1000 (5th DCA 2004):

Circumstantial evidence was not inconsistent with defendant's hypothesis of innocence that he accidentally injured child's face with his hand when he sat down heavily on couch where child was sleeping and, thus, was insufficient to support conviction for child abuse; doctor testified that child's injury was absolutely consistent with injuries that could have resulted if a person dropped onto couch and slapped child in process, mother testified that defendant told her that he forgot child was on couch and sat down, mushing child's face with hand, and defendant stated to police that he sat down on couch and mushed child's face, catching child under eye with nail and leaving mark and scratch.

Discussion: The problem in this case was a matter of communication. "Dr. Matthew Seibel, M.D., the state's expert, testified that when he first examined the child, he was told that the injuries were caused by someone falling on the child with a body part other than a hand. This history was not consistent with the injuries, which showed marks from an open hand. Dr. Seibel stated that the day of trial was the first time that he had heard that the "sitting on" was done by someone's hand. He testified: [I]f the history that you're providing, someone falls down on the couch and the hand goes, bam, hits accidentally, is that consistent [with the marks], absolutely."

Lukehart v. State, 762 So.2d 482 (Fla. 2000):

Evidence sufficient to support aggravated child abuse conviction where defendant admitted to pushing baby to the ground and medical examiner testified the baby died of blunt trauma from five blows to her head which caused two fractures that were caused by force equivalent to dropping the child to the floor from four to five feet.

Washington v. State, 737 So.2d 1208 (Fla. 2d DCA 1999):

State made prima facie case to support either first-degree murder charge or felony-murder charge based upon underlying felony of aggravated child abuse, where defendant admitted that he was infant victim's sole custodian during playground visit and while infant's mother ran errands, physicians' testified that infant's injuries could have taken anywhere from ten seconds to 45 minutes to inflict, and evidence suggested that change in technique and in position of perpetrator's hands would have been required to inflict different types of injuries and that such changes would have required pauses which would have allowed perpetrator further time to reflect.

Discussion: This very lengthy opinion is quite interesting and helpful. A very detailed account of the facts of the case is included in the text, but in summary, it is a shaken baby case in which there were only two possible suspects. The 19 year old mother lived with her 16 year old boyfriend, the defendant. The victim's mother and the defendant were the only two people who had custody of the child during the relevant time period. The Suspect gave a statement indicating the 11 month old child fell off its sliding board, thus causing his injuries. He indicated he did not see the victim's mother do anything to harm the child. The victim's mother also indicated she did not see the Suspect doing anything to harm the child. The State presented a very exhaustive case outlining numerous circumstantial pieces of evidence which pointed towards the Suspect's guilt. Several medical experts gave detailed testimony regarding the opinion that this child died as a result of shaken baby syndrome and/or trauma. The Appellate Court ruled that the circumstantial case was sufficient to survive a motion for judgment of acquittal. A good review of the law regarding circumstantial evidence is contained in this opinion. On the other hand, this case points out the dangers of using one of the two possible suspects as a state witness. The trial court prohibited the defense from cross-examining the victim's mother on several points. The trial court also prohibited the defense introducing evidence about the mother's prior violent behavior towards the child. The Appellate Court basically ruled that since the victim's mother was a critical witness in the case and that she was one of the two possible suspects in the case, the defense should not have been restricted in its ability to impeach her credibility, bias, and motive. As a matter of fact, the proffered evidence from defense witnesses show that on numerous prior occasions witnesses had

seen the victim's mother pick up and violently shake the child because the child would not stop crying. Under the circumstantial nature of this case, that evidence should definitely not have been excluded. Since most of our shaken baby cases are circumstantial and involve a limited number of custodians of the child during the relevant time periods, this case should be quite helpful.

Ellis v. State, 714 So.2d 1160 (Fla. 2d DCA 1998):

Conviction of aggravated child abuse error where illegal conduct alleged was willfully failing to feed or seek medical treatment for child.

A conviction for an aggravated form of an offense is fundamentally erroneous where the body of the information describes only the simple offense, and no allegations were made, nor evidence submitted, to support the enhancement of the charge.

Worden v. State, 603 So.2d 581 (Fla. 2d DCA 1992):

Competent, substantial evidence supported jury verdict that defendant was guilty of first degree and aggravated child abuse for beating his nine month old son to death, where son died as result of rapid cerebral edema, fatal blow or blows were estimated to have occurred no more than two hours before death, and child died three hours after mother went to work, leaving defendant home alone with child.

Discussion: Defendant claimed that the child died accidentally. The case was proven solely through the use of circumstantial evidence. There is also a discussion to Williams Rule as it relates to absence of mistake. Other witnesses testified to the defendant's past violent behavior toward child.