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IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MARY NICHOLSON,

Petitioner,

vs. Case No. 78,045

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Mary Lee Nicholson, defendant/Appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to as either "Respondent" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. The opinion below is reported as Nicholson v. State, 579 So.2d 816 (Fla. 1st DCA 1991), attached hereto.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's statement of the facts. However, certain critical facts are either omitted or not presented in the light most favorable to the State. To assist this Court, the following additions and corrections are provided:

The Petitioner received money and services from the victim's mother, Darlene Jackson. Darlene spent "a lot of time" sewing and doing light housekeeping for Petitioner. (R 201, 318). Petitioner directed Darlene to close all her New York bank accounts and open an account at the Petitioner's bank. (R 328). Darlene purchased a bedroom set for Petitioner. (R 331). Darlene faithfully tithed to Petitioner (i.e., donated 10% of her earnings). (R 271, 278). Darlene sent additional funds as well. (R 279).

The Petitioner asked Darlene for money "through prophesy." (R 515). Darlene gave Petitioner close to $15,000.00. (R 517). Darlene was convinced by Petitioner that the child, Kimberly, was "oppressed" by evil spirits (R 309), and that in order to bring Kimberly out from under that oppression, Darlene would have to separate herself from Kimberly and let Petitioner take control of the child. (R 324). Petitioner prophesied to Darlene that she should remain with Petitioner and not return to New York. (R 325).

The paramedic who responded to the call at Petitioner's residence testified that Kimberly appeared to be severely dehydrated and very malnourished. She had the appearance of an Ethiopian child. (R 64).

Dr. David Nicholson, the forensic pathologist who examined Kimberly, testified that Kimberly died of starvation and had been beaten. The reason Kimberly's liver was so small is that her body had been feeding off of it. (R 718, 179). Kimberly had been malnourished and maltreated. (R 722). The child's starvation and beatings would have caused significant pain. (R 723).

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Petitioner's motion for judgment of acquittal where the State brought forth sufficient evidence to make out a *prima facie* case of aggravated child abuse. Petitioner's acts leading to the child's death constituted malicious punishment and willful torture which was wrongful, intentional, and without legal justification or excuse.

II. The trial court properly instructed the jury that "torture" may be accomplished by acts of omission or negligence where this is an accurate statement of law. Even so, this issue was not preserved for appellate review by objection at trial.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL (Restated)

Petitioner was convicted of first-degree felony murder and aggravated child abuse. (R 1026). The victim in this case was a four-year-old girl named Kimberly Jackson whom the Petitioner said was oppressed by evil spirits. (R 309). Petitioner styled herself "Evangelist Mary Nicholson" (R 108), and said that she was a member of the "Royal Priesthood." (R 274). Over a period of time Petitioner had corresponded with Kimberly Jackson's mother Darlene, who lived in New York with Kimberly. The correspondence was of a spiritual nature and included prophecies and dream interpretations. (R 220).

Darlene took Kimberly to Petitioner's house in Pace, Florida, in July of 1987. (R 278). Petitioner gave Darlene specific directions for Kimberly which were relayed to her through "prophesies from God." In her attempts to cleanse the child of demons, Petitioner instructed Darlene to make the child run and to hit her with a switch when she stopped running. (R 388). Darlene was later instructed to separate herself from her daughter and allow Petitioner to care for her on a daily basis. (R 324). This care included denying the child food and forcing her to drink

urine and bathwater. (R 345, 346). Petitioner would whip the child. (R 633, 634). The child would faint from lack of food. (R 635).

On the Friday before Kimberly's death, Petitioner struck her repeatedly with a belt. (R 426). Kimberly died in her sleep. (R 439-441). At the time of her death, Kimberly was 4 years old, 44 inches tall, and weighed 28½ pounds. (R 728). She had virtually no body fat, wasted muscles, and a small liver. (R 718). She had severe bruises on her back, legs, abdomen and arms. (R 718).

The evidence in this case shows that the Petitioner intentionally instructed Kimberly's mother to deprive the child of food and when the mother would not completely comply with the instructions, Petitioner took over and herself intentionally deprived the child of food as punishment and for purposes of correcting behavior. The Petitioner acted as she did because of the fact that she was receiving money and services from the victim's mother because of the mother's belief that the Petitioner was a woman of God who could help her in the treatment of her child. The Petitioner's actions were motivated in part because of the money and services that she received as well as the "ego trip" that she was on by having such control over another person. Petitioner had convinced the victim's mother that the child was

oppressed by demons and that only by following her guidance could the child be saved.

Petitioner argues that the State failed to present a *prima facie* case of aggravated child abuse in support of the charge of felony murder, and that the trial court should have granted her motion for judgment of acquittal. Petitioner first contends that because the withholding of food has been held to be an act of omission and not commission, that §827.03, F.S., the aggravated child abuse statute, does not apply. The State disagrees.

Section 827.03(1), F.S., provides:

> "Aggravated child abuse" is defined as one or more acts committed by a person who: (a) Commits aggravated battery on a child; (b) Willfully tortures a child; (c) Maliciously punishes a child; or (d) Willfully and unlawfully cages a child.

In this case, the conscious and systematic withholding of nourishment to achieve a specific result clearly constitutes willful torture and malicious punishment. Section 827.03, F.S., lists torture as an act comprising aggravated child abuse. Section 827.01, F.S., plainly defines torture as ". . . every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused."

Petitioner analogizes the instant situation to cases where the failure to timely seek medical attention for a child was held to be an act of omission and thus insufficient to support charges of aggravated child abuse. State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989); Jacubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983).

These cases are clearly distinguishable from the instant case as the situation at bar does not involve the failure to minister to an already existing medical crisis, but instead involves the knowing creation of an extremely painful and ultimately deadly situation. Further, the Third District Court of Appeal in Jacubczak, *supra*, reached a dubious conclusion when it held that ". . . the Legislature intended to punish under section 827.03 only acts of commission with specific intent." Jacubczak, *supra*, at 189. The court ignored and failed to address the Legislature's definition of torture which appears in §827.01, directly preceding §827.03, which encompasses acts of omission. A court must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980).

In State v. Harris, *supra*, the Second District Court of Appeal followed Jacubczak in holding that "torture" does not

encompass the failure to seek prompt medical attention, but only "acts of commission." Regarding the Jacubczak court's failure to acknowledge the statutory definition of torture as encompassing acts of omission, the court in Harris stated ". . . we note that there appears to be no way to fully, i.e., without any logical doubt square Jacubczak with section 827.01(3)." Harris, *supra*, at 1130. The court went on to state that the definition in §827.01(3) was "incongruous," but failed to adequately explain this position, choosing instead to blindly adhere to Jacubczak.

In affirming Petitioner's conviction, the appellate court stated:

> We have no difficulty in concluding "malicious punishment" or "willful torture" may consist of acts of commission or omission. Therefore, we affirm appellant's conviction.
>
> We are aware of *Jacubczak v. State*, 425 So.2d 187 (Fla. 3d DCA 1983), and *State v. Harris*, 537 So.2d 1128 (Fla. 2d DCA 1989), wherein those courts concluded that the Legislature intended to punish only acts of commission in Section 827.03, Florida Statutes, and that failure to take a child for medical treatment was not an act of "commission." However, Florida's child abuse statute, clearly defines "torture" as an act of ommission. Therefore, we decline to follow the rationale of *Jacubczak* and *Harris* and hold that Section 827.03 contemplates acts of commission or omission.
>
> We also hold that the willful, systematic deprivation of food over a

> period of four months, culminating in death from starvation, and the administration of severe beatings to the four-year-old child are acts of commission.

579 So.2d at 819.

Petitioner argues that:

> The failure to feed a child, the cause of death here, is as much an act of omission as is a failure to seek timely medical attention, held insufficient in Harris and Jacubczak to support a charge of aggravated child abuse.

Petitioner's brief at 16. Petitioner overlooks the fact that her actions constituted much more than mere negligent acts of omission by forgetting to feed the victim. The victim was the subject of a deliberate and planned regimen consisting of consciously withholding nutrition accompanied by repeated severe beatings. The Petitioner's actions deliberately caused the child's injuries and death, as opposed to the Harris and Jacubczak cases, where the failure to seek medical treatment for a preexisting injury was the criminal action charged.

There can be no doubt that the Petitioner's systematic starvation and beating of four-year-old Kimberly for the purpose of achieving the specific goal of "ridding the child of demons," and by so doing, ensuring Kimberly's mother's continued devotion

and financial support, constituted willful torture and malicious punishment, thereby supporting the charge of aggravated child abuse pursuant to §827.03, F.S.

In State v. Eagle Hawk, 411 N.W.2d 120 (S.D. 1987), the South Dakota Supreme Court, in reviewing convictions for abuse or cruelty to a minor, based in part on starvation, considered whether an act of "omission" could form the basis of a child abuse conviction. The court stated:

> It is obvious to us (and was to the jury) that (the) parents' treatment of these children was cruel, inhumane, conducive to injury, and recurrently painful. Parents' conduct was abusive under the standards developed by the trial court. Based upon the injuries resulting to these children, we agree with the State's point of view. What, pray tell, we ask, is the difference to the child be he afflicted by acts of commission or omission if, in the end, his body is racked with distress, agony, and torment? We perceive none.

Eagle Hawk, *supra*, at 124.

In Kama v. State, 507 So.2d 154 (Fla. 1st DCA 1987), the First District Court of Appeal held that where a parent crosses the line of acceptable discipline, he or she commits aggravated child abuse. The court stated:

> Although a person who spanks a child technically commits a battery, the parties do not dispute the well established principle that a parent, or one acting *in loco parentis*, does not commit a crime by inflicting corporal punishment on a child subject

> to his authority, if he remains within the legal limits of the exercise of that authority. The determination that a parent, or one standing in the 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." Otherwise, persons in positions of authority over children would have no way to judge the propriety of their conduct under the criminal standard.

Kama, *supra*, at 156. It is clear that the dietary regimen in the instant case which led to Kimberly's death overstepped the bounds of permissible conduct and was excessive, cruel, and merciless, and resulted in great bodily harm: i.e. death. It is also clear that the intentional deprivation of food is not merely an act of omission. Certainly nobody would suggest that Nazi starvation of holocaust victims was simply an omission.

The starvation in this case was the result of intentional deprivation of food. This was not a matter of someone neglecting to perform a legal duty. The Petitioner had no legal requirement to be involved with the care and treatment of the victim in this case. She intentionally inserted herself into the relationship between the victim and her mother and usurped the mother's authority and took control of the child's treatment. It was by her hand that the child was deprived of food. These are acts of commission, not omission.

Petitioner argues that her mistreatment of the child was motivated by her belief that the child was oppressed by demons and that mistreatment was necessary to drive the demons out. Even assuming that this was true, obviously this would be a mistake of fact because the child was not oppressed by demons. Nonetheless, the maltreatment was perpetrated upon the child. A mistake of fact does not alter the reality of the child's suffering and unnecessary pain and ultimate death. The child was the victim of the malicious punishment and torture, not demons.

Petitioner next contends that, for purposes of the motion for judgment of acquittal, the State had failed to show that she had a specific intent to abuse the child. It is well settled, however, that criminal intent may be inferred from circumstances surrounding the offense. State v. Norris, 384 So.2d 298 (Fla. 4th DCA 1980); K.P. v. State, 327 So.2d 820 (Fla. 1st DCA 1976), *aff'd*, State v. D.H., 340 So.2d 1163 (Fla. 1976); O'Brien v. State, 327 So.2d 237 (Fla. 1st DCA 1976). It is equally well settled that in moving for a judgment of acquittal, a defendant admits every conclusion favorable to the adverse party that a jury might reasonably infer from the evidence. Lynch v. State, 293 So.2d 44 (Fla. 1974).

In Freeze v. State, 533 So.2d 750 (Fla. 2d DCA 1989), the defendant's child died as a result of being violently shaken. In

examining the issue of intent in the context of aggravated child abuse, the court stated:

> There is clear evidence that the shaking was merely the culmination of an extended period of violent punishment. If this were a case in which there was no other evidence of child abuse and it appeared that the mother had simply shaken her child on one occasion without any conscious thought concerning the action, we would be inclined to agree that the required specific intent had not been proven. In this case, however, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that the punishment was not motivated by educational purposes but rather by spite, ill will, hatred, and an evil intent. The weight of the evidence on this disputed issue of intent was a matter for the jury to resolve. *Herbert v. State*, 526 So.2d 709 (Fla. 4th DCA), *review denied*, 531 So.2d 1355 (Fla. 1988); *Cochran v. State*, 547 So.2d 928 (Fla. 1989). We affirm the conviction for first-degree felony murder and the accompanying life sentence.

Freeze, *supra*, at 754.

The court below correctly found the requisite intent, saying:

> Appellant contends that the evidence does not establish that she had the requisite intent to act as a principal in the willful torture or malicious punishment of the child. On the contrary, the evidence reveals that appellant was in complete control over Kimberly's diet, that she also exercised controlling influence over the mother, and that she directed the mother's punishment of Kimberly. When Kimberly was offered food from third persons, appellant prohibited her from eating. This process of willfully starving the child occurred over a period of at least four months. There was evidence that appellant

> severely beat Kimberly on at least one occasion and directed Ms. Jackson to chastise her on several others. Evidence proved that the starvation and beatings were unusually long and intensely painful. There was evidence that appellant's conduct was excessive, cruel, and merciless. The weight of the evidence on the issue of intent was a matter for the jury to resolve. *Freeze v. State*, 553 So.2d 750 (Fla. 2d DCA 1989).

579 So.2d at 819.

It is clear that in this case there was sufficient evidence of Petitioner's continuing and systematic maltreatment of the child to compel the inference that Petitioner possessed the specific intent to abuse the child. The motion for judgment of acquittal was thus properly denied.

Petitioner next argues that because §827.04, F.S., the simple child abuse statute, specifically condemns the deprivation of necessary food, clothing, shelter, or medical treatment, that she should not have been prosecuted under §827.03, the aggravated child abuse statute. The court below held that:

> Deprivation of food is specifically addressed in Section 827.04, Florida Statutes. However, the case sub judice involved an aggravated form of food deprivation carried out systematically with intent to willfully torture and maliciously punish the child. Under these aggravated circumstances, the State was entitled to prosecute under Section 827.03, Florida Statutes.

579 So.2d at 819.

Black's Law Dictionary, 5th Ed. West 1979, defines "aggravation" as "[a]ny circumstance attending the commission of a crime or tort that increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." Here, the events leading to Kimberly's death, which consisted of repeated willful torture and malicious punishment, were more than a mere deprivation of food or shelter, and are the sort of actions for which the aggravated child abuse statute was designed to address. Deprivation of food was only one of the tools used to torture and punish Kimberly.

The trial court thus properly denied Petitioner's motion for judgment of acquittal and Petitioner's convictions must again be affirmed.

ISSUE II

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY THAT THE ELEMENT OF WILLFUL TORTURE IN AGGRAVATED CHILD ABUSE ENCOMPASSES ACTS OF NEGLIGENCE OR OMISSION

Petitioner claims as error the following portion of the instructions read to the jury:

> Before you can find the defendant Mary Nicholson guilty of aggravated child abuse the State must prove the following two elements beyond a reasonable doubt. One, that Mary Nicholson willfully tortured or maliciously punished Kimberly McZinc. And two, that Kimberly McZinc was under the age of 18 years.
>
> Torture means every act, omission, or negligent (sic) by which unnecessary or unjustifiable pain or suffering is caused. Willfully means knowingly, intentionally, and purposely.

(R 943, 944. Complained of portion in emphasis.)

Because the jury instruction was never objected to, the issue is not preserved for appellate review, as the appellate court properly concluded. Even so, there is no error as the complained-of instruction was taken verbatim from the Standard Jury Instructions.

Petitioner argues that although no objection was made, the giving of the instruction constituted fundamental error. It is well settled that an issue must be presented to the lower court

and the specific legal argument or ground to be argued on appeal must be a part of that presentation in order to be preserved for further review by a higher court. Tillman v. State, 471 So.2d 32 (Fla. 1985). An appellate court must confine itself to review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. State v. Barber, 301 So.2d 7 (Fla. 1974).

This Court has held that the doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Smith v. State, 521 So.2d 106 (Fla. 1988), *citing* Ray v. State, 403 So.2d 956 (Fla. 1981). Here, there is no jurisdictional error and there is no "compelling demand" as the jury instruction was proper and fairly presented a correct statement of law.

The Florida Standard Jury Instructions in Criminal Cases, Second Edition, sets forth the following instruction for aggravated child abuse by torture or malicious punishment:

> Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Defendant)
>   a. [willfully tortured]
>   b. [maliciously punished]
>   c. [willfully and unlawfully caged]

(victim).

2. (Victim) was under age of eighteen years.

"Torture" means every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused.

"Willfully" means knowingly, intentionally and purposely.

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

The definition of torture was taken directly from the statutory definitions set forth in §827.01(3), F.S. Consequently, there is no error as the jury was properly instructed as to the offense charged.

CONCLUSION

Based on the above cited legal authorities, Respondent prays that this Honorable Court affirm the judgment rendered in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

BRADLEY R. BISCHOFF
Assistant Attorney General
Florida Bar Number 0714224

DEPARTMENT OF LEGAL AFFAIRS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. GLEN P. GIFFORD**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of November, 1991.

Bradley R Bischoff

BRADLEY R. BISCHOFF

IN THE SUPREME COURT OF FLORIDA

MARY NICHOLSON,

Petitioner,

vs. Case No. 78,045

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Nicholson v. State, 579 So.2d 816 (Fla. 1st DCA 1991)

erage at the time of the subsequent accident. *Evans v. Florida Indus. Comm'n*, 196 So.2d 748 (Fla.1967).

In my opinion, the judge below and the majority have incorrectly focused solely upon medical evidence in concluding that the employee suffered only a recurrence of his earlier injury, whereas their inquiry should have been whether claimant remained disabled at the time of the subsequent injury. Because disability is defined as an "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of injury," Section 440.02(9), Florida Statutes, the judge should have taken into consideration other factors, including the claimant's capacity at the time of the later accident to engage in gainful employment. *Escambia County Council on Aging v. Goldsmith*, 500 So.2d 626, 635 (Fla. 1st DCA 1986).

Because the judge appears to have relied entirely on medical testimony in reaching his decision, I consider that critical evidence in the record was either overlooked or ignored. *Cf. Allied Parcel Delivery v. Dixon*, 466 So.2d 439 (Fla. 1st DCA 1985); *Poorman v. Muncy & Bartle Painting*, 433 So.2d 1371 (Fla. 1st DCA 1983). In my judgment the case should be remanded to the judge for him to determine, after considering claimant's employment history following his 1981 injury, whether appellant was capable of engaging in gainful employment at the time he suffered his 1986 injury.

If the judge concludes that claimant did have such capacity and was therefore *not* disabled, he should next consider whether claimant has as yet reached maximum medical improvement (MMI), and, if so, whether his condition is such as to entitle him to permanent compensation benefits. If claimant has not yet reached MMI, his entitlement to temporary compensation and medical benefits should then be established. The responsibility for payment of same under either circumstance should be placed solely on Liberty Mutual Insurance Company (carrier number two).

If, on the other hand, the judge determines from *all* of the evidence that claimant's disability from the prior injury continued at the time of his 1986 injury, he should then decide whether the two injuries combined to produce an overall greater disability than that preexisting the 1986 injury. Due to the washout agreement with carrier number one, such carrier would be absolved from any legal responsibility for additional compensation benefits. But its responsibility for the payment of future medical benefits may be affected by a proper allocation, if this issue can be resolved. Additionally, if claimant on remand is determined to have achieved MMI, with, as stated, a greater disability by reason of the second accident, carrier number two's responsibility for payment of compensation benefits, by applying the *Evans* principles of apportionment, should, if possible, be ascertained. It should be noted that section 440.42(3) authorizes a judge to allocate responsibility and order reimbursement between multiple carriers, and that allocation should be based on the extent to which each accident contributes to any resulting disability or need for medical care. *Atkins Constr. Co. v. Wilson*, 509 So.2d 1185 (Fla. 1st DCA 1987).

WEST KEY NUMBER SYSTEM

Mary NICHOLSON, Appellant,

v.

STATE of Florida, Appellee.

No. 90–01195.

District Court of Appeal of Florida, First District.

May 9, 1991.

Defendant was convicted in the Circuit Court, Santa Rosa County, George Lowrey, J., of first-degree felony-murder and aggravated child abuse, and defendant appealed.

The District Court of Ap
held that: (1) the terms "m
ment" and "willful torture"
omission, as well as comm
evidence established that
the requisite intent to act a
the willful torture or malici
of the child.

Affirmed.

1. Infants ⇐15

Terms "malicious pu
"willful torture," as used
scribing aggravated child a
sist of acts of commissio
West's F.S.A. §§ 827.03, 8

See publication Words
for other judicial const
definitions.

2. Homicide ⇐230

Infants ⇐20

In prosecution for firs
murder and aggravated ch
cient evidence established
had requisite intent to act
willful torture or malicious
child, who died of starva
was in complete control o
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mother, directed mother's
child, and prohibited chi
when she was offered food
sons. West's F.S.A. §§ 82
c).

3. Criminal Law ⇐29(5)

Where evidence sho
form of food deprivation
tematically with intent to
and maliciously punish chi
titled to prosecute under
abuse statute, even thoug
food is specifically addres
statute. West's F.S.A. §

Barbara M. Linthicum,
and Glen P. Gifford, Asst.
Tallahassee, for appellant

Robert A. Butterworth,
Bradley R. Bischoff, Asst
lahassee, for appellee.

The District Court of Appeal, Booth, J., held that: (1) the terms "malicious punishment" and "willful torture" include acts of omission, as well as commission, and (2) evidence established that defendant had the requisite intent to act as a principal in the willful torture or malicious punishment of the child.

Affirmed.

1. Infants ⇐15

Terms "malicious punishment" and "willful torture," as used in statute proscribing aggravated child abuse, may consist of acts of commission or omission. West's F.S.A. §§ 827.03, 827.03(1)(b, c).

See publication Words and Phrases for other judicial constructions and definitions.

2. Homicide ⇐230

Infants ⇐20

In prosecution for first-degree felony-murder and aggravated child abuse, sufficient evidence established that defendant had requisite intent to act as principal in willful torture or malicious punishment of child, who died of starvation; defendant was in complete control over child's diet, 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. West's F.S.A. §§ 827.03, 827.03(1)(b, c).

3. Criminal Law ⇐29(5)

Where evidence showed aggravated form of food deprivation carried out systematically with intent to willfully torture and maliciously punish child, State was entitled to prosecute under aggravated child abuse statute, even though deprivation of food is specifically addressed in different statute. West's F.S.A. §§ 827.03, 827.04.

Barbara M. Linthicum, Public Defender, and Glen P. Gifford, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

BOOTH, Judge.

This cause is before us on appeal from appellant's conviction of first-degree felony murder and aggravated child abuse. Appellant argues that: (1) the trial court erred in denying her motion for judgment of acquittal because the evidence failed to establish that the victim died from either malicious torture or willful punishment; and (2) the trial court committed fundamental error in instructing the jury that aggravated child abuse by willful torture under Section 827.03(1)(b), Florida Statutes, includes acts of negligence or omission. After careful consideration, we affirm as to each issue.

On February 8, 1988, four-year-old Kimberly McZinc died of starvation. Kimberly's mother, Darlene Jackson, was indicted for first-degree murder and aggravated child abuse. She subsequently pled nolo contendere to third-degree murder and simple child abuse.

Ms. Jackson, a native of Charleston, South Carolina, moved to New York City in 1979, where she met Kenneth McZinc, who fathered her child, Kimberly, born March 17, 1983. After Kimberly's birth, Ms. Jackson experienced a renewed interest in religion and became "born again."

In April 1986, Ms. Jackson met Hope Renwick. Ms. Renwick shared with Ms. Jackson her view that life on earth was a continuous struggle between the forces of God and Satan. In the summer of 1986, Ms. Jackson and Kimberly paid their first visit to Ms. Renwick's church. Ms. Jackson had been told that occasionally people became sick during the service and that such sickness was a sign of the cleansing of demons. Kimberly spit up in church, drawing the attention of other worshipers, who chanted "hallelujah." Afterwards, Ms. Jackson placed more credence in Ms. Renwick's accounts of spiritual warfare. Ms. Jackson began to dwell on concepts such as Satan and oppression by demons.

Ms. Renwick introduced Ms. Jackson to appellant. Appellant and Ms. Renwick began to interpret dreams which Ms. Jackson had been having. Appellant suggested

"malicious punishment" and "willful torture" have been held to connote acts of commission, not omission, and therefore the failure to feed a child is insufficient to support a conviction for aggravated child abuse. We have no difficulty in concluding "malicious punishment" or "willful torture" may consist of acts of commission or omission. Therefore, we affirm appellant's conviction.

We are aware of *Jakubczak v. State*, 425 So.2d 187 (Fla. 3d DCA 1983), and *State v. Harris*, 537 So.2d 1128 (Fla. 2d DCA 1989), wherein those courts concluded that the Legislature intended to punish only acts of commission in Section 827.03, Florida Statutes, and that failure to take a child for medical treatment was not an act of "commission." However, Florida's child abuse statute,[2] clearly defines "torture" as an act of omission. Therefore, we decline to follow the rationale of *Jakubczak* and *Harris* and hold that Section 827.03 contemplates acts of commission or omission.

We also hold that the willful, systematic deprivation of food over a period of four months, culminating in death from starvation, and the administration of severe beatings to the four-year-old child are each acts of commission.

[2] Appellant contends that the evidence does not establish that she had the requisite intent to act as a principal in the willful torture or malicious punishment of the child. On the contrary, the evidence reveals that appellant was in complete control over Kimberly's diet, that she also exercised controlling influence over the mother, and that she directed the mother's punishment of Kimberly. When Kimberly was offered food from third persons, appellant prohibited her from eating. This process of willfully starving the child occurred over a period of at least four months. There was evidence that appellant severely beat Kimberly on at least one occasion and directed Ms. Jackson to chastise her on several others. Evidence proved that the starvation and beatings were unusually long and intensely painful. There was evidence that appellant's conduct was excessive, cruel, and merciless. The weight of the evidence on the issue of intent was a matter for the jury to resolve. *Freeze v. State*, 553 So.2d 750 (Fla. 2d DCA 1989).

[3] Deprivation of food is specifically addressed in Section 827.04, Florida Statutes. However, the case sub judice involved an aggravated form of food deprivation carried out systematically with intent to willfully torture and maliciously punish the child. Under these aggravated circumstances, the State was entitled to prosecute under Section 827.03, Florida Statutes.

Appellant's second contention is without merit. The trial court gave the standard jury instructions on aggravated child abuse, as agreed by all parties at the charge conference. Appellant made no objection concerning the aggravated child abuse statute. The error was not fundamental, and the issue was not properly preserved for appeal. *Murray v. State*, 491 So.2d 1120 (Fla.1986).

Accordingly, we affirm the judgment of conviction and sentence imposed thereon.[3]

ZEHMER and WOLF, JJ., concur.

(2) A person who commits aggravated child abuse is guilty of a felony of the second degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. Section 827.01, Florida Statutes:
(1) "Child" means any person under the age of 18 years.
(2) "Placement" means the giving or transferring of possession or custody of a child by any person to another person for adoption or with the intent or purpose of surrendering the control of the child.
(3) "Torture" means every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused.

3. Appellant was sentenced to life on the felony murder charge, and 30 months on the aggravated child abuse charge, the sentences to run concurrently.

that Ms. Jackson's dreams signified that Kimberly was being pulled toward evil. Ms. Jackson began to speak with appellant more frequently.

In July of 1987, Ms. Jackson took Kimberly to appellant's home in Pace, Florida. Ms. Jackson kept a diary that chronicled her participation in religious activities with appellant. The diary reflected that appellant provided specific directions to Ms. Jackson for Kimberly's discipline, which were based upon appellant's "prophecies from God."

Appellant persuaded Ms. Jackson that the evil spirit of gluttony oppressed Kimberly. Appellant instructed Ms. Jackson to make Kimberly run and to strike her with a switch if she resisted, as a means of breaking the demonic hold over Kimberly. In September 1989, appellant instructed Ms. Jackson to separate herself from Kimberly and allow appellant to care for Kimberly on a daily basis. A September diary entry records that Kimberly was denied food for several days and suggests that Kimberly may have been forced to drink urine and bath water. Appellant assumed full control of Kimberly's diet, and Kimberly's weight began to drop.

In early October 1987, appellant's daughter, Tina Brown, noticed that Kimberly was losing weight and notified the Department of Health and Rehabilitative Services (HRS). After visiting appellant, HRS took no further action. Kimberly continued to lose weight. In December 1987, Ms. Brown again notified HRS. HRS again visited appellant's home but did not take further action.

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

In January of 1988, Ms. Jackson questioned appellant about Kimberly's weight loss. Appellant told Ms. Jackson that her questions angered God and strengthened the evil spirits. On the Friday before Kimberly's death, appellant whipped Kimberly for being disobedient. Ms. Jackson protested the severity of the beating. Afterwards, appellant told Ms. Jackson to pray in appellant's bedroom. During this prayer session, Ms. Jackson heard a voice that sounded like appellant's tell her to chastise Kimberly. Ms. Jackson reported the voice to appellant. Appellant told Ms. Jackson that the Lord's word comes in familiar voices and that she should follow His word and chastise Kimberly. Ms. Jackson whipped Kimberly.

On the day before Kimberly's death, Ms. Jackson noticed that Kimberly was sluggish; however, appellant persuaded Ms. Jackson that Kimberly was only faking. Appellant and Ms. Jackson stayed with Kimberly throughout the evening. They prayed and anointed Kimberly. At approximately 7:30 a.m., Ms. Jackson determined that something was wrong with Kimberly and called an ambulance. Kimberly, however, had been dead for several hours.

At the time of death, four-year-old Kimberly McZinc had virtually no body fat, had wasted muscles, and a small liver. An autopsy revealed that the child had severe bruises on her back, legs, abdomen, and arms, and that her liver had been partially consumed by her body. The medical examiner testified that Kimberly had died in extreme pain.

[1] Appellant was convicted of first-degree felony murder with the underlying felony being aggravated child abuse pursuant to Sections 827.03(1)(b) and (c), Florida Statutes.[1] Appellant argues that the terms

1. Section 827.03, Florida Statutes:
(1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
(a) Commits aggravated battery on a child;
(b) Willfully tortures a child;
(c) Maliciously punishes a child; or
(d) Willfully and unlawfully cages a child.