IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-43

JOHNNIE WILMER CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Citations in this brief to designate the one volume record references will be "R," followed by the relevant page number(s). The trial transcript will be referred to as “T.” Petitioner was the defendant below, the appellant in the lower tribunal, and will be referred to in this brief as petitioner.

Pursuant to Administrative Orders of this Court, counsel certifies that this brief is printed in 12 point Courier New Font, and that a disk containing the brief in WordPerfect 6.1 is submitted herewith.

Attached hereto as an appendix is the decision of the lower tribunal, which has been reported as Clark v. State, 25 Fla. L. Weekly D78 (Fla. 1st DCA Dec. 29, 1999).

STATEMENT OF THE CASE

By information filed December 4, 1997, petitioner was charged with aggravated battery on Cecil Lynn by striking him with a motor vehicle, aggravated battery with a motor vehicle on Keith Frost, unarmed robbery of Lynn and/or Frost, and criminal mischief by causing damage over $1,000 to a motor vehicle and/or vehicles (R 1-2). The cause proceeded to trial on May 12, 1998, and at the conclusion thereof petitioner was found guilty as charged of aggravated battery by striking Cecil Lynn with a motor vehicle, unarmed robbery of Lynn and/or Frost, and criminal mischief by causing damage over $1,000 to a motor vehicle and/or vehicles; he was found not guilty of aggravated battery with a motor vehicle on Keith Frost (R 6-9).

Petitioner was adjudicated guilty and sentenced to the following concurrent sentences: for the second degree felonies, 96 months in state prison; for the third degree felony, five years; credit for time served of 188 days was granted; and petitioner was ordered to pay $3,129.53 in restitution (R 14-20). The sentencing guidelines scoresheet called for a sentence between 57 and 96 months (R 10-12).

On May 14, 1998, a timely notice of appeal was filed (R 21). The Public Defender of the Second Judicial Circuit was

later designated to represent petitioner.

On appeal to the lower tribunal, petitioner argued that he should not have been convicted of aggravated battery, because the victim suffered no injury, the incident involved no touching or striking of the victim and the victim's truck could not be considered an extension of his person. Petitioner further argued that he should have been convicted of only misdemeanor criminal mischief, and was entitled to be resentenced if the court agreed with either argument.

The lower tribunal held that petitioner was properly convicted of aggravated battery and certified conflict with Williamson v. State, 510 So. 2d 335 (Fla. 4th DCA 1987), *disapproved on other grounds*, State v. Sanborn, 533 So. 2d 1169 (Fla. 1988). The lower tribunal agreed with petitioner's argument that he should have been convicted of only misdemeanor criminal mischief and remanded for resentencing on the aggravated battery because the sentencing guidelines scoresheet was affected by the reduction of the criminal mischief to a misdemeanor.

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of this Court, and this Court later entered an order postponing its decision on jurisdiction and directing briefing on the merits.

STATEMENT OF THE FACTS

At trial, Keith Frost, an employee of Northwestern, Inc., testified that on November 6, 1997, they were hanging pipe along side of a dock in Escambia County. He drove a blue Ford company truck to an area called the bull pen to get some T brackets, which hold the pipe to the dock. As he arrived petitioner was pulling out of the bull pen in black truck. He asked petitioner if the T brackets belonged to him. He asked petitioner to stay there while he called his supervisor Cecil Lynn (T 17-26).

When Cecil Lynn arrived, petitioner hit Cecil's truck and drove off. Keith Frost pursued and blocked the exit. Petitioner slid into Keith's truck and struck it. Cecil drove up and blocked petitioner in and took petitioner's car keys. The damage to Keith Frost's truck consisted of dents and scratches. The damage to Cecil Lynn's truck consisted of damage to the front and back bumpers and a dented hood (T 27-35).

Cecil Lynn testified that when petitioner hit his truck, he tore the bumper off. His truck also suffered damage to the radiator, grille, right quarter panel, and tailgate. He did not know how much the damages were (T 40-54).

Reggie Jernigan, deputy sheriff, arrived at the scene and testified that petitioner admitted taking the T brackets (T 60-

63). Mark Burke photographed the trucks (T 64-69).

The state rested (T 69). Petitioner moved for acquittal on the criminal mischief on the grounds that the state had failed to prove that petitioner's criminal mischief caused damage to the two company trucks in the amount over $1,000 (T 70). The prosecutor stated that she had a hard time finding an expert witness to prove value, and argued that the jury could determine the threshold amount by the testimony about the damage (T 70). Counsel argued that would be pure speculation (T 70). The court denied the motion and found that the jury had enough common experience to know if the damage was more than $1,000 (T 71).

Counsel also moved for acquittal on the charges of aggravated battery with a motor vehicle on the grounds that there was no injury to either employee, and that the employees had driven into petitioner's path. The court denied the motion (T 71-73), but ruled that the bodily injury element would not go to the jury, and the prosecutor agreed with that determination:

> THE COURT: ... Now, insofar as the requirements under counts 1 and 2 of intentionally causing bodily harm, I don't think that has application.
>
> MS. PARSONS: I don't either.
>
> THE COURT: So to that extent the court will eliminate that averment from the charges to be read -- or elements of

> the offense to be read to the jury. (T 76; emphasis added).[1]

Petitioner rested without presenting any testimony (T 78). Counsel renewed his motion for acquittal on the aggravated battery charges on the grounds that there was no touching or striking of the victims, and cited Williamson v. State, supra, for the proposition that the trucks were not an extension of the victims' persons (T 84-87). The court denied the motion (T 87).

The jury returned the verdicts noted above (T 141-42). Counsel renewed his motion for acquittal on the remaining aggravated battery count, which was denied (T 143-45). Petitioner was sentenced as noted above (T 149-50).

1Accordingly, the jury was instructed (T 121) and reinstructed (T 140) only on aggravated battery with a deadly weapon.

SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the lower tribunal erred in affirming the conviction for aggravated battery where petitioner struck the victim's truck but caused no injury to the victim himself. The lower tribunal held that the victim's truck was an extension of his person. The Fourth District has expressed the contrary and more correct view.

The out-of-state cases relied on by the lower tribunal are distinguishable and actually support petitioner's position, because the victims in those cases all suffered some bodily injury, albeit slight. Here, the victim Cecil Lynn never testified that he suffered any injury. The lower tribunal erroneously assumed that he did. Moreover, the jury was never instructed on the bodily injury element of aggravated battery.

More importantly, the lower tribunal improperly relied on tort law to define the crime of aggravated battery with a motor vehicle. It is a bad idea to use tort law in defining criminal battery, because of the different goals of the criminal and tort systems. Tort law compensates individuals for individual wrongs. Criminal law punishes individuals for crimes against society. A tort costs the defendant money, but a defendant may lose his liberty for committing a crime. Tort law is common law; criminal

law is largely codified. The state has to prove culpability beyond a reasonable doubt to obtain a criminal conviction, a higher burden than the plaintiff in a tort case. Grafting principles of one onto the other does violence to these distinctions.

If there be any ambiguity in the aggravated battery statute, we should look first to the rule of lenity, not to a different system such as the body of civil tort law. Moreover, a due process violation occurs where men of common intelligence must refer to tort law to determine what conduct constitutes aggravated battery with a motor vehicle.

The proper remedy is to vacate the aggravated battery conviction and remand for resentencing on the unarmed robbery after preparation of a proper sentencing guidelines scoresheet for that crime.

ARGUMENT

THE LOWER TRIBUNAL ERRED IN HOLDING THAT AGGRAVATED BATTERY WITH A MOTOR VEHICLE OCCURRED WHEN PETITIONER STRUCK THE VICTIM'S TRUCK AND SPUN IT AROUND, BUT CAUSED NO BODILY HARM TO THE VICTIM.

Petitioner was convicted of aggravated battery with a deadly weapon by striking Cecil Lynn's truck with a motor vehicle, causing the victim's truck to spin around. There are two methods of committing an aggravated battery on a person who is not pregnant: either causing great bodily harm or using a deadly weapon:

> (1)(a) A person commits aggravated battery who, in committing battery:
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> 2. Uses a deadly weapon.

§784.045(1)(a), Fla. Stat. (1997).

Petitioner was not charged with causing bodily harm to the victim, and the judge properly ruled that the jury would not be instructed on that alternative (T 76).

The lower tribunal borrowed from tort law and erroneously held that the victim's truck was an extension of his person, so that petitioner could be convicted of aggravated battery for striking the victim's truck. In doing so, the lower tribunal

disagreed with Williamson v. State, *supra*.[2]

In Williamson, the defendant stole a car and kidnaped a hitchhiker and drove to Florida. He was chased by state troopers on the turnpike, during which he rammed his car into a trooper's car with the trooper inside of it. He was convicted of aggravated battery on a law enforcement officer, but the court reversed, because the trooper's car was not an extension of his person:

> Appellant also contends that, with regard to the aggravated battery conviction, **the requirement of a touching or striking of the person has not been met, since appellant struck only the vehicle in which the trooper was riding and not the trooper's person.** *See* Sec. 784.03 and 784.045, Fla. Stat. (1985). **Although a battery may be found as a result of the touching or striking of something other than the actual body of the person, that object must have such an intimate connection with the person as to be regarded as a part or extension of the person, such as clothing or an object held by the victim.** *See Malczewski v. State*, 444 So.2d 1096 (Fla. 2d DCA 1984), *appeal dismissed,* 453 So.2d 44 (Fla. 1984).
>
> The touching or striking in the

2Petitioner presented *Williamson* to the trial judge during his motion for acquittal. It is distressing that trial judges do not realize that they are bound by controlling authority from another district court, when there is no contrary authority from this Court or the judge's district court. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992).

> present case was to the outer body of an automobile which Trooper Thomas was driving, with no direct impact upon or even injury to the trooper. In fact, the evidence shows that the trooper was not even jostled about in the car as a result of the impact. **We conclude that as a matter of law the automobile in this case did not have such an intimate connection with the person of the trooper so as to conclude that a battery had occurred.**

510 So. 2d at 338; emphasis added.[3]

In Malczewski v. State, 444 So. 2d 1096 (Fla. 2nd DCA), *appeal dismissed,* 453 So. 2d 44 (Fla. 1984), the case cited by Williamson, the court held that a money bag being clutched by a person was an extension of the person, so that a defendant who stabbed the money bag with a knife had committed an aggravated battery on the person. Not so when a person in sitting inside of a vehicle.

The lower tribunal relied on State v. Townsend, 865 P.2d 972, 124 Idaho 881 (1993), in holding that the victim's truck was an extension of his person. That case is distinguishable. There the defendant drove his truck into his wife's car, "jostling her around inside the car, and forcing her off the road." 865 P.2d

---

3That portion of *Williamson* relating to whether false imprisonment was a lesser offense of kidnaping was overruled in *State v. Sanborn*, 533 So. 2d 1169 (Fla. 1988), but the portion regarding the aggravated battery was not.

at 976, 124 Idaho at 885.

But here the judge expressly directed a verdict against the state on the question of bodily harm, and there was no evidence that Cecil Lynn was "jostled around" inside of his truck. The lower tribunal improperly found that "Although not injured, there is no doubt that Lynn was more than 'jostled' ... ." Appendix. Lynn never testified about what happened to his body when petitioner struck his truck. The lower tribunal erroneously assumed that he had suffered some invasion of his body.

Moreover, the Idaho battery statute is not the same as ours. It defines one type of battery as: "Willful and unlawful use of force or violence upon the person of another." IDAHO CODE §18-903(a). Our battery statute, §784.03(1)(a), Fla. Stat. (1997), requires some type of unlawful touching or bodily injury:

> (1)(a) The offense of battery occurs when a person:
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.

Thus, the Idaho statute is much broader than ours.

In Huffman v. State, 292 S.W.2d 738, 200 Tenn. 487 (1956), a case cited with approval by the Townsend court, determined as a matter of law that ramming a vehicle into someone who is seated

in a car and injuring them constitutes a battery, as defined by 6 C.J.S. Assault and Battery, §70: "A touching of the person ... or touching something intimately associated with, or attached to, his person ... ." 292 S.W.2d at 742, 200 Tenn. at 497. The victim in Huffman suffered some sort of bodily injury, albeit minor. This is demonstrated by the Tennessee court's later opinion in Reese v. State, 457 S.W.2d 877, 3 Tenn. Crim. App. 97 (1970). There the defendant shot a gun into the right front fender of the victim's Volkswagen. The victim was not hit by the shot, and suffered no injury whatsoever. The appellate court found insufficient evidence of a battery and distinguished Huffman on the basis that the victim in Reese suffered no injury.

Thus, Townsend's reliance on Huffman is too broad. Even if it is not, with all due respect to the States of Idaho and Tennessee, the better view was expressed by our enlightened Florida judges in Williamson v. State, *supra*.

In Boyd v. State, 263 P.2d 202, 97 Okla. Crim. 331 (1953), the defendant was drunk and drove his 1939 Ford into a Pontiac which was being driven by the victim. The defendant was convicted of assault and battery. The victim in Boyd suffered "serious bodily injury." 263 P.2d at 204, 97 Okla. Crim. at 332. Likewise, in Fleming v. State, 987 S.W.2d 912 (Tex. Ct. App.

1999), the intoxicated defendant drove his car into the car occupied by the victim, who suffered a torn knee cartilage which later required surgery and a jammed hand, which did not. The court affirmed a conviction for the crime of intoxication assault because the victim had suffered bodily injury, albeit not life-threatening.

Thus, the law in Oklahoma, Tennessee, Texas and Idaho is consistent to the extent that a person seated in an auto who suffers some physical injury has been the victim of a battery. This view is also consistent with the view of the court in Williamson. Therefore, these out-of-state cases are not controlling.

The civil case, Espinosa v. Thomas, 472 N.W.2d 16, 189 Mich. App. 110 (1991), relied on by the lower tribunal, being a legal malpractice case, is even less on point. There the plaintiff drove into his place of employment, and auto plant, and his car was attacked by some union strikers. They struck Espinosa's car and he suffered no physical injury, but rather an aggravation of a pre-existing bipolar mental disorder. He retained counsel, who failed to file suit within the statute of limitations against General Motors and the strikers. Espinosa then sued them and settled his claim against them through mediation. Espinosa then

sued his former attorneys for malpractice. The appellate court held that the mediation settlement did not bar the suit and that Espinosa had a cause of action in tort against General Motors and the strikers because he had suffered emotional injury as a result of their actions.

Espinosa is easily distinguishable from the instant case. While Espinosa suffered no physical injury from the incident, the strikers did aggravate his pre-existing bipolar disorder when they beat on his car. In the instant case, Cecil Lynn suffered no physical or mental harm by having his truck spun around.

More importantly, the lower tribunal improperly relied on the RESTATEMENT (2D) OF TORTS to define the crime of aggravated battery with a motor vehicle. It is a bad idea to use tort law in defining criminal battery, because of the different goals of the criminal and tort systems. Tort law compensates individuals for individual wrongs. Criminal law punishes individuals for crimes against society. A tort costs the defendant money, but a defendant may lose his liberty for committing a crime. Tort law is largely common law; criminal law is largely codified. The state has to prove culpability beyond a reasonable doubt to obtain a criminal conviction, a higher burden than the plaintiff in a tort case. Grafting principles of one onto the other does

violence to these distinctions.

If there be any ambiguity in the aggravated battery statute, we should look first to the rule of lenity, not to a different system such as the body of civil tort law. Our rule of lenity provides:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§775.021(1), Fla. Stat. (1997). *See also* Perkins v. State, 576 So. 2d 1310 (Fla. 1991), in which this Court held that criminal statutes must be strictly construed in favor of the defendant.

Thus, if the crime of aggravated battery with a motor vehicle is "susceptible of differing constructions," the most favorable construction must benefit the defendant. Here, the most favorable construction of the aggravated battery statute is that adopted by the Fourth District in Williamson, not the tortious construction adopted by the lower tribunal in the instant case.

Moreover, crimes must be specifically defined by statute so that a defendant is placed on notice as to what conduct is prohibited. Warren v. State, 572 So. 2d 1376 (Fla. 1991). A due process violation occurs when men of common intelligence must

refer to outside sources, such as tort law, to determine what conduct constitutes aggravated battery with a motor vehicle. *See, e.g.*, Brown v. State, 629 So. 2d 841 (Fla. 1994) (statute outlawing sale of contraband within 200 feet of a "public housing facility" unconstitutionally vague).

This Court must approve Williamson and hold as a matter of law that a vehicle is not an extension of a person's body, and no aggravated battery can be charged unless the victim suffers some physical injury. The proper remedy is to reverse the judgment and sentence for aggravated battery.

CONCLUSION

Petitioner, based on all of the foregoing, respectfully urges the Court to disapprove the decision of the First District, approve the position of the Fourth District, vacate the aggravated battery conviction, and remand the case for resentencing on the unarmed robbery with a proper scoresheet.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
P. DOUGLAS BRINKMEYER
Florida Bar No. 197890
Assistant Public Defender
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to Sherri Tolar Robinson, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to petitioner, #314632, Walton Work Camp, 301 World War II Veterans Lane, DeFuniak Springs, Florida 32433, by U.S. Mail, on this ____ day of January, 2000.

_____
P. DOUGLAS BRINKMEYER

THE SUPREME COURT OF FLORIDA

CASE NO. SC00-43

JOHNNIE WILMER CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

APPENDIX

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Florida Bar No. 197890

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

COUNSEL FOR PETITIONER

Criminal law -- Aggravated battery and felony criminal mischief convictions arising out of defendant's intentional crashing of his vehicle into two occupied vehicles -- Trial court properly submitted aggravated battery charges to jury although there was no evidence of bodily harm, injury, disability or disfigurement of either of the occupants of the rammed vehicles -- Motor vehicle can have sufficiently close connection with its occupant that intentionally striking the vehicle may constitute a battery on the person of the occupant -- Whether an object is sufficiently closely connected to person such that touching or striking the object would be a battery on the person will depend upon the circumstances of each case and is generally a question of fact for the jury -- Evidence that defendant twice drove his truck into one vehicle, spinning it around and causing damage to the front and back end of the vehicle, was sufficient to permit jury to find that occupant suffered an ``unpermitted and intentional invasion of the inviolability of his person'' -- Conflict certified -- Felony criminal mischief conviction cannot stand where state failed to present evidence that damage to vehicles exceeded $1000 -- Cost of motor vehicle body repair is not so self-evident that jury could simply use its life experience or common sense to determine whether $1000 threshold had been met -- Absent evidence of amount of damages, defendant could only be found to have committed the offense of criminal mischief, involving damage of $200 or less, a second-degree misdemeanor -- Sentencing -- Resentencing required after correction of scoresheet

JOHNNIE WILMER CLARK, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 98-1960. Opinion filed December 29, 1999. An appeal from the Circuit Court for Escambia County. Nickolas Geeker, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Sherri Tolar Rollison, Assistant Attorney General, Tallahassee, for Appellee.

(VAN NORTWICK, J.)

In this direct criminal appeal, Johnnie Wilmer Clark challenges his convictions for aggravated battery on Cecil Lynn and felony criminal mischief with a motor vehicle which arose out of an incident in which Clark intentionally crashed his vehicle into vehicles occupied by Keith Frost and Cecil Lynn. Appellant argues that the lower court erred in denying his motion for

acquittal on each charge because (i) with respect to the aggravated battery charge, ramming the vehicle of Lynn without causing Lynn injury cannot constitute aggravated battery as a matter of law; and (ii) with respect to the criminal mischief charge, the state failed to prove that appellant caused damage to the trucks involved in an amount in excess of $1,000. We affirm the conviction of aggravated battery, because there was sufficient evidence to present a question of fact for the jury. We agree with appellant, however, that, because the state produced no evidence as to the monetary amount of damage to the trucks, the conviction for felony criminal mischief must be reversed. Accordingly, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

Factual and Procedural Background

Keith Frost, an employee of Northwestern, Inc., a utility contractor, discovered appellant removing construction materials in his truck from a Northwestern storage site. Frost telephoned his supervisor, Cecil Lynn, for direction. Lynn instructed Frost to have appellant wait so that Lynn could drive to the site and talk with appellant. Lynn then instructed his office to contact the police. Frost was driving a company-owned pickup truck and Lynn was driving his own pickup truck. Frost and Lynn then used their trucks in an attempt to block appellant's exit from the company facility. Lynn testified concerning the events that then transpired:

> A. . . . I had pulled in and started to get out of the truck, and . . . was going to go approach [appellant] -- as the truck was coming toward us, I was going to approach him and talk to him and see what was going on, but to my surprise they started speeding up, coming at me. So I got back in the truck for protection.
>
> * * *
>
> Q. What happened once you got back into your truck?
>
> A. Well, when I got back in the truck, I looked and he was coming at us probably 25 to 30 miles an hour and wasn't letting up. And I said oh, Lord, here we go. He hit the right rear of the truck on a pretty fair angle and spun me.
>
> Q. The right rear of your truck?

A. Yes, tore the bumper off. Keith Frost started chasing him to get him to pull over. At that point I turned around and got into the chase and called the office a second time. And by then I was pretty well upset and kind of scared.

As Lynn and Frost continued to maneuver to block appellant's exit, appellant crashed his truck into the side of Frost's truck and then backed his truck into the front of Lynn's vehicle, damaging its grille, radiator, and bumper. Neither Lynn nor Frost sustained injury. At trial, no evidence was introduced concerning the cost to repair the damage to the trucks, although Frost and Lynn testified about the damage caused to their trucks and photographs of the damage were introduced into evidence. Appellant's motions for acquittal on the aggravated battery and felony criminal mischief charges were denied. As relevant here, the jury found appellant guilty of aggravated battery on Lynn, not guilty of aggravated battery on Frost, and guilty of felony criminal mischief.

Aggravated Battery

Appellant contends that the trial court erred in denying his motion for acquittal on the aggravated battery charge, arguing that the incident involved no touching or striking of the person of either Lynn or Frost and that, under *Williamson v. State*, 510 So. 2d 335 (Fla. 4th DCA 1987), *disapproved on other grounds*, *State v. Sanborn*, 533 So. 2d 1169 (Fla. 1988), the victim's truck could not be considered an extension of their persons. We do not agree.

"Aggravated battery" occurs when a person commits battery either causing great bodily harm, permanent disability or permanent disfigurement or using a deadly weapon. *See* §784.045(1)(a), Fla. Stat. (1997). "Battery" occurs when a person either "actually and intentionally touches or strikes" another person against that person's will or intentionally causes bodily harm or injury to another person. *See* §784.03(1)(a), Fla. Stat. (1997). As the trial court recognized below, in the instant case there is no evidence of bodily harm, injury, disability, or disfigurement of either Lynn or Frost. In addition, there is no dispute that the appellant's truck can constitute a "deadly weapon." *See Williamson v. State*, 92 Fla. 980, 111 So. 124 (1926). Thus, the issue is whether the instant case involved a touching of the victim's person under section 784.03(1)(a) so as to constitute a battery.

As this court has held, under the battery statute the degree of injury caused by an intentional touching is not relevant and "any intentional touching of another person against such person's will is technically a criminal battery." *D.C. v. State*, 436 So. 2d 203, 206 (Fla. 1st DCA 1983). Further, under section 784.03(1)(a) "there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body." *Malczewski v. State*, 444 So. 2d 1096, 1099 (Fla. 2d DCA 1984) (stabbing money bag held by victim sufficient to constitute battery). Thus, "the word 'person' in our state's battery statute . . . means person or anything intimately connected with the person." *Id*.

In *Williamson*, 510 So. 2d 335 (Fla. 4th DCA 1987), cited as authority by appellant, the defendant had crashed his car into the side of a car occupied by a state trooper. *Williamson*, 510 So. 2d at 336. The *Williamson* court held that as a matter of law the striking of the trooper's car could not constitute the touching or striking of an object intimately connected with the victim's person so as to result in a battery. As the court explained:

> The touching or striking in the present case was to the outer body of an automobile which Trooper Thomas was driving, with no direct impact upon or even injury to the trooper. In fact, the evidence shows that the trooper was not even jostled about in the car as a result of the impact. We conclude that as a matter of law the automobile in this case did not have such an intimate connection with the person of the trooper so as to conclude that a battery had occurred.

Id. at 338.

We do not agree with the *Williamson* court that, as a matter of law, a motor vehicle cannot have such a sufficiently close connection with its occupant that intentionally striking the vehicle may never constitute a battery on the person of the occupant. The Restatement of Torts explains the nature of the considerations in determining whether an object should be regarded as part of the person for battery purposes, as follows:

> Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person

> and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person. On the other hand, there may be things which are attached to one's body with a connection so slight that they are not so regarded. The line of distinction is very difficult to draw. It is a thing which is felt rather than one to be defined, since it depends upon an emotional reaction. Thus, the ordinary man might well regard a horse upon which he is riding as part of his personality but, a passenger in a public omnibus or other conveyance would clearly not be entitled so to regard the vehicle merely because he was seated in it.

Restatement (2d) of Torts, §18, cmt. c. (1965).

Thus, just as the question of whether an object can be considered a "deadly weapon," *see Morris v. State*, 722 So. 2d 849, 850 (Fla. 1st DCA 1998), whether an object is sufficiently closely connected to a person such that touching or striking the object would be a battery on that person will depend upon the circumstances of each case. As a result, generally it is a question of fact for the jury.

In the instant case, appellant twice drove his truck into Lynn's vehicle, once spinning Lynn around and causing damage to the front and back end of Lynn's truck. Although not injured, there is no doubt that Lynn was more than "jostled," or that a reasonable jury could find, in the language of the Restatement, that he suffered an "unpermitted and intentional invasion of the inviolability of his person." We find persuasive the reasoning of the Supreme Court of Idaho which stated, when considering this same issue, that

> [i]ndeed, we have little difficulty in concluding that intentionally striking a car with a pickup truck, when both vehicles are being operated at 35 miles per hour, would generate whatever physical disturbance may be implicitly required by the statute.

State v. Townsend, 124 Idaho 881, 886, 865 P.2d 972, 977 (1993); *see also Espinoza v. Thomas*, 472 N.W.2d 16, 21 (Mich. App. 1990) (attack on plaintiff's car by striking workers could establish claim for assault and battery). We conclude, therefore, that the trial court correctly submitted the aggravated battery charges to the jury. Pursuant to Article V, section 3(b)(4) of the Florida Constitution, we certify conflict with *Williamson*.

Criminal Mischief

The offense of criminal mischief is established by the proof of willful or malicious damage to the property of another. See §806.13(1)(a), Fla. Stat. (1997). If the damage to the property is $1,000 or greater, the offense is a third degree felony, see section 806.13(1)(b)3, Florida Statutes (1997). "[T]he value of the property damage is relevant only to the severity of the crime." *Valdes v. State*, 510 So. 2d 631, 632 (Fla. 3d DCA 1987).

In the instant case, although the state did produce evidence as to the extent of physical damage to Lynn's vehicle and the repair required, no evidence of the monetary value of the damage or cost of repair was introduced. We recognize that in theft cases, where the value of an item is so self-evident as to defy contradiction, specific evidence of value need not be introduced. *See Jackson v. State*, 413 So. 2d 112, 114 (Fla. 2d DCA 1982). Here, however, we cannot agree that the cost of motor vehicle body repair is so self-evident that a jury could simply use its life experience or common sense to determine whether the $1,000 damage threshold was met. Because no evidence was introduced of the cost of repair or amount of damages for which appellant was responsible, appellant could only be found to have committed what would be the offense of criminal mischief involving damage of $200 or less, second-degree misdemeanor criminal mischief. *See J.O.S. v. State*, 668 So. 2d 1082, 1083 (Fla. 1st DCA 1996), *approved*, 689 So. 2d 1061 (Fla. 1997).

Finally, because this court has reduced the felony criminal mischief conviction to second-degree misdemeanor criminal mischief, appellant's guidelines scoresheet must be corrected. Since appellant received a sentence at the top end of the guidelines under the prior scoresheet, appellant must be resentenced under a corrected scoresheet. *See Warren v. State,* 673 So. 2d 987 (Fla. 1st DCA 1996).

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion; conflict certified.

(ALLEN AND WEBSTER, JJ., CONCUR.)

* * *

IN THE SUPREME COURT OF FLORIDA

NO. SC00-43

JOHNNIE WILMER CLARK

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Florida Bar No. 197890

Leon County Courthouse
301 South Monroe Street,
Suite 401
Tallahassee, Florida 32301
(850) 488-2458

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS