

attempted eluding, the person drives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property. s. 316.1935(3), F.S.

It is a second degree felony for a person, in the course of unlawfully leaving or attempting to leave the scene of a crash in violation of ss. 316.027 or 316.061, F.S., and having knowledge of an order to stop by a duly authorized law enforcement officer, to:

- Willfully refuse or fail to stop in compliance with such an order, or having stopped in knowing compliance with such order, willfully flee in an attempt to elude such officer; and
- As a result of such fleeing or eluding, cause injury to another person or cause damage to any property belonging to another person. s. 316.1935(3), F.S.

This offense is referred to as “aggravated fleeing or eluding.” It constitutes a separate offense for which a person may be charged, in addition to the offense of unlawfully leaving the scene of a crash which the person had been in the course of committing or attempting to commit when the order to stop was given. *Id.*

2. Aircraft Piracy

It is a first degree felony for a person, without lawful authority, to seize or exercise control, by force or violence and with wrongful intent, of any aircraft containing a nonconsenting person or persons within this state. s. 860.16, F.S.

3. Carjacking

“Carjacking” means the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear. s. 812.133(1), F.S.

If in the course of committing the carjacking the offender carried a firearm or other deadly weapon, then the carjacking is a first degree felony punishable by imprisonment for a term of years not exceeding life imprisonment. s. 812.133(2)(a), F.S. If the offender did not carry a firearm, deadly weapon, or other weapon, then the carjacking is a first degree felony. s. 812.133(2)(b), F.S.

An act is deemed “in the course of committing the carjacking” if it occurs in an attempt to commit carjacking or in flight after the attempt or commission. s. 812.133(3)(a), F.S. An act is deemed “in the course of the taking” if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events. s. 812.133(3)(b), F.S.

4. “Smash and Grab” Burglary and Theft

It is a first degree felony punishable by a term of years not exceeding life imprisonment for a person to commit burglary if, in the course of committing the burglary, the person enters an

occupied or unoccupied dwelling or structure and uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the burglary, and thereby damages such dwelling or structure. s. 810.02(2)(c)1., F.S. (This offense is popularly referred to as a “smash and grab” burglary.)

It is grand theft in the first degree, a first degree felony, for a person to commit grand theft if, in the course of committing the grand theft, the person uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the grand theft, and thereby damages the real property of another. s. 812.014(2)(a)3.a., F.S. (This offense is popularly referred to as a “smash and grab” theft.)

5. “Grand Theft Auto”

A person commits theft if the person knowingly obtains or uses, or endeavors to obtain or use, the property of another with the intent to either temporarily or permanently:

- Deprive the person of a right to the property or a benefit from the property; or
- Appropriate the property to the use of the person so appropriating or to the use of any person not entitled to the use of the property. s. 812.014(1)(a) and (b), F.S.

With a few exceptions, it is grand theft of the third degree, a third degree felony, if the property stolen is a motor vehicle. s. 812.014(2)(c)6., F.S. (This offense is popularly referred to as “grand theft auto.”) As previously noted, “smash and grab” theft is grand theft of the first degree, a first degree felony. If the value of the stolen motor vehicle exceeds \$100,000 or is cargo valued at \$50,000 or more that entered the stream of interstate or intrastate commerce from the shipper’s loading platform to the consignee’s receiving dock, it is grand theft of the first degree, a first degree felony. s. 812.014(2)(a)1. and 2., F.S. If the value of the stolen motor vehicle is \$20,000 or more, but less than \$100,000, or is cargo valued at less than \$50,000 that entered the stream of interstate or intrastate commerce from the shipper’s loading platform to the consignee’s receiving dock, it is grand theft of the second degree, a second degree felony. s. 812.014(2)(b)1. and 2., F.S.

6. Interfering with Railroad Trains, Cars, or Engines

It is a third degree felony for a person, other than an employee or authorized agent of the railroad company acting within the line of duty, to knowingly or willfully detach or uncouple any train; put on, apply, or tamper with any brake, bell cord, or emergency valve; or otherwise interfere with any train, engine, car, or part thereof. s. 860.05, F.S. However, if such violation results in the death of another person, the violator commits a homicide. s. 860.091, F.S.

7. Other Crimes Against Railroad Vehicles

It is unlawful for a person to shoot at, throw any object capable of causing death or great bodily harm at, or place any object capable of causing death or great bodily harm in the path of any railroad train, locomotive, car, caboose, or other railroad vehicle. s. 860.121(1), F.S. If the violation involves an unoccupied railroad vehicle, it is a third degree felony. s. 860.121(2)(a),

F.S. If the violation involves an occupied railroad vehicle or a railroad vehicle connected thereto, it is a second degree felony. s. 860.121(2)(b), F.S. If the violation results in great bodily harm, it is a first degree felony. s. 860.121(2)(c), F.S. If the violation results in death, it is a homicide. s. 860.121(2)(d), F.S.

8. Shooting into or Throwing Deadly Missiles into Vessels, Aircraft, Buses, Railroad Cars, Streetcars, or other Vehicles

It is a second degree felony for any person to, wantonly or maliciously, shoot at, within, or into, or throw any missile or hurl or project a stone or other hard substance which would produce death or great bodily harm, at, within, or in any occupied or unoccupied public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state. s. 790.19, F.S.

9. Arson Upon Transportation

It is arson in the first degree, a first degree felony, for a person to willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damage or cause to be damaged any structure, or contents thereof, where persons are normally present during normal hours of occupancy, or other similar structures, or any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being. s. 806.01(1)(b) and (c), F.S. A "structure" includes any vehicle, vessel, watercraft, or aircraft. s. 806.01(3), F.S.

If the arson involving a structure does not fall under any of the circumstances in subsection (1), it is arson in the second degree, a second degree felony.

B. Definitions of Terms

For purposes of Part II of chapter 163, F.S. (Regional Transportation Authorities), the term "public transportation" means "transportation of passengers by means, without limitation, of a street railway, elevated railway or guideway, subway, motor vehicle, motor bus, or any bus or other means of conveyance operating as a common carrier within the regional transportation area, including charter service therein." s. 163.566(8), F.S.

For purposes of Part II of chapter 343, F.S. (Central Florida Regional Transportation Authority), the term "public transportation" means "transportation of goods and passengers for hire, as a charter service, or without charge, by means, without limitation, of a street railway, elevated railway or fixed guideway, commuter railroad, subway, motor vehicle, motor bus, and any bus, truck, or other means of conveyance operating as a common carrier or otherwise." s. 343.62(5), F.S.

For purposes of s. 627.7285, F.S. (motor vehicle liability insurance), the term "public conveyance" means "any vehicle or train operated over fixed rails."

The terms “commercial transportation” and “commercial conveyance” are not defined in Florida law.

For purposes of s. 787.025, F.S. (luring or enticing a child) the term “conveyance” means “any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car.” s. 787.025(1)(c), F.S.

For purposes of chapter 810, F.S. (burglary and trespass), “conveyance” means “any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car. . . .,” but “. . . during the time of a state of emergency declared by executive order or proclamation of the Governor under chapter 252 and within the area covered by such executive order or proclamation and for purposes of ss. 810.02 and 810.08 only, the term ‘conveyance’ means a motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car or such portions thereof as exist.” s. 810.011(3), F.S.

“Commercial motor vehicle” is defined in s. 316.003(66), F.S., as “[a]ny self-propelled or towed vehicle used on the public highways in commerce to transport passengers or cargo, if such vehicle: (a) Has a gross vehicle weight rating of 10,000 pounds or more; (b) Is designed to transport more than 15 passengers, including the driver; or (c) Is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act, as amended (49 U.S.C. ss. 1801 et seq.).”

The courts employ a rule of statutory construction with regard to words and phrases that are not defined in law.

. . . The general rule is that where the legislature has not defined words or phrases used in a statute, they must be “construed in accordance with [their] common and ordinary meaning.” *Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146 (Fla. 2000). “[T]he plain and ordinary meaning of [a] word can be ascertained by reference to a dictionary.” *Green v. State*, 604 So.2d 471 (Fla. 1992). However, there are variations on the general rule of statutory interpretation regarding words being given their common and ordinary meaning. The supreme court has stated that “consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute’s enactment.” *Florida Birth-Related Neurological Injury Compensation Ass’n v. Division of Admin. Hearings*, 686 So.2d 1349, 1354 (Fla. 1997). The supreme court has also held that words in a statute “must be construed according to their plain and ordinary meaning, or according to the meaning assigned to the terms by the class of persons within the purview of the statute.” *Florida E. Coast Indus., Inc. v. Department of Community Affairs*, 677 So.2d 357, 362 (Fla. 1st DCA 1996). *Sneed v. State*, 736 So.2d 1274, 1276 (Fla. 4th DCA 1999) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989)), held that “[t]he meaning of terms on the statute books ought to be determined on the basis of which meaning is (1) most in accord with context and ordinary usage and (2) most compatible with the surrounding body of law into which the provision must be integrated.” (First ellipsis in original.) The Fourth District also held in *WFTV, Inc. v. Wilken*, 675 So.2d 674, 679 (Fla. 4th DCA 1996), that a “statutory phrase should also be viewed not only in its internal context within the section, but in harmony with interlocking statutes.”

Southwest Florida Water Management Dist. v. Charlotte County, 774 So.2d 903, 915-916 (Fla. 2d DCA 2001).

III. Effect of Proposed Changes:

CS/SB 622 provides that it is a third degree felony for a person to attempt to obtain, solicit to obtain, or obtain any means of public or commercial transportation or conveyance, including any vessel, aircraft, railroad train, or “commercial vehicle,” as defined in s. 316.033(66), F.S., with the intent to use such public or commercial transportation or conveyance to commit a felony or facilitate the commission of a felony.

It is uncertain how the courts will interpret key terms in application of the statute. No terms are specifically defined, except “commercial vehicles,” by reference and this term is incorrect (See “Technical Deficiencies” section of this analysis). Some key terms are not defined in Florida law, or, if defined, are not identical, and all terms defined in Florida law are applicable for purposes of a section, part of a chapter, or a chapter. (See “Present Situation” section of this analysis.) The scope of the law is much broader than the one defined term, “commercial vehicles.” If the new transportation offense does not involve a commercial vehicle, than the rule of lenity may come into play in the interpretation of whether the means of transportation is covered under the statute, particularly as to whether the means of transportation is “public transportation.” See *Register v. State*, 23 Fla. L. Weekly D946a (Fla. 1st DCA April 9, 1998) (“To the extent that penal statutory language is indefinite or ‘is susceptible of differing constructions,’ due process requires a strict construction of the language in the defendant’s favor under the rule of lenity.”) (citations omitted).

It appears that the new transportation offense requires an act in addition to and separate from the act of obtaining the transportation. The person obtains the transportation; and the person obtains the transportation with the intent to use the transportation to commit a felony or facilitate the commission of a felony.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Arguably, the new offense may raise some interpretation questions in the courts if someone is charged with this offense and certain other offenses. For example, the

elements of this new offense and the elements of aircraft piracy are different, but if a person is charged with this new offense and with aircraft piracy, that person is being charged with an offense in which the aircraft was obtained to commit the aircraft piracy and charged with aircraft piracy, which requires (among other elements) that the person unlawfully exercise control over the aircraft, which is arguably obtaining the aircraft. Another example is the charging of a person with this new offense and “smash and grab” burglary. Although the elements of the two offenses are different, the person is being charged with obtaining a motor vehicle to commit a burglary and charged with burglary where a motor vehicle was used to unlawfully enter a dwelling or structure and where such use damaged the dwelling or structure.

Under double jeopardy analysis, a court is required to examine each of a defendant’s convictions arising out of the same incident to determine whether each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. *Blockburger v. United States*, 284 U.S. 299 (1932). The test is referred to as the “Blockburger test” or “same-elements” test. One statutory exception to the “same-elements” test is when the offense is a lesser-included offense. s. 775.021, F.S. However, the “same-elements” test distinguishes between offenses that are necessarily lesser included offenses and offenses that are not. If two statutory offenses are found to be separate under the “same-elements” test than the lesser offense is not subsumed by the greater offense.

The Fifth District Court of Appeals has held that a defendant’s conviction for attempted robbery with a firearm and possession of a firearm during the commission of a felony (where that felony was robbery), violated the defendant’s double jeopardy rights.

Specifically, [the defendant] argues that the imposition of two convictions based upon one criminal act violates the prohibition against double jeopardy. We agree.

This issue was addressed in *State v. Stearns*, 645 So.2d 417, 418 (Fla. 1994). In *Stearns*, the defendant was convicted of armed burglary, grand theft, and carrying a concealed weapon while committing a felony, to wit: grand theft. The supreme court, responding to a certified question from this court, affirmed our ruling that the state cannot, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon. *Id.*

Also, in an earlier opinion, *Cleveland v. State*, 587 So.2d 1145, 1146 (Fla. 1991), our supreme court addressed a similar double jeopardy issue. Cleveland was convicted of attempted robbery with a firearm and use of a firearm while committing a felony. *Id.* As here, the convictions stemmed from a single criminal act committed by the defendant; namely, a robbery. *Id.* The supreme court determined that when a robbery conviction is enhanced because a firearm is used in the commission of the crime, the single act involving the use of the same firearm in the same robbery cannot form the basis of a separate sentence and conviction for use of a firearm while committing a felony. *Id.* In accordance with

this case law, we must reverse the defendant's judgment and sentence for possession of a firearm during the commission of a felony.

Carson v. State, 23 Fla. L. Weekly D601a (Fla. 5th DCA March 6, 1998) (italicized words inserted by analyst).

Staff notes that the double jeopardy issue is in regards to the conviction of the two offenses, not the facial constitutionality of the possession statute.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference estimates that CS/SB 622 will have an insignificant prison bed impact.

VI. Technical Deficiencies:

The bill refers to “‘commercial vehicles,’ as defined in s. 316.003(66), Florida Statutes....” “Commercial motor vehicles” is defined in s. 316.003(66), F.S., not “commercial vehicles.” Further, the term “Florida Statutes” where it appears should be deleted.

VII. Related Issues:

None.

VIII. Amendments:

None.